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Judicial Review of Administrative Action in India

Dr. Rajan Varghese*

INTRODUCTION

Exercise of discretion is inevitable in modern administration. The administrative authorities are conferred with wide discretionary powers by the Legislature. However, in exercising these powers there are possibilities of misnse and this would lead to abuse of powers. Dicey[1] was of the view that wide discretionary powers were incompatible with the rule of law. However, subsequently Dicey realized the needs of the administration and modified this stand. Now in spite of the inherent defects like the possibility of abuse or misuse, one cannot say that discretion is undesirable in administration.

Discretion is a process of choosing from amongst alternatives without reference to any predetermined criteria. In this regard, understanding discretion is essential for further examination of the issue of judicial review. A definition of the term, which most appropriately explains the characteristics of discretion is given by Freund. According to him, it is a process with which an administrative authority reaches a conclusion or decision "in part at least, upon the basis of consideration not entirely susceptible of proof or disproof". [2]Hence, it may be seen that here the decision is reached by the authority concerned not only on the basis of the evidence, but also in accordance with other considerations of the administration such as policy, expediency, logic and the like. According to Judge Smith, this discretion may be divided into two categories - 'decision of will' and 'decision of logic', highlighting the basic characteristics of administrative action[3]. The doctrine, 'decision of will' carries at least a mild implication that when an agency has to make a choice from among a wide range of alternative options, it ought to be free to ignore 'legalistic' or 'judicial' modes of thought. However, he mentions of an 'inevitable overlap' between the realms of 'will' and 'logic'. Hence, it is doubtful, to what extent these classifications are

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1. A. V. Dicey, *Law of the Constitution*, Mac Millan and Co, London, 1885.
2. Ernst Freund, *Administrative Powers Over Persons and Property*, The University of Chicago Press, 1928, P. 71.
3. These two alternatives were suggested by Judge Loren A. Smith, *"Judicialization: The Twilight of Administrative Law"*, 1985 *Duke L.J.* 427.
4. d. at p. 430

watertight? By a Statute, discretion may be conferred on the administration. But, which of the above is being conferred? What is the extent of subjectivity involved in this process of exercising the power? In this connection, the observation by the US Supreme Court may be worth mentioning. In *Small* v. *Moss*[5] , the Court observed that, the Courts may not enter into the field of administrative discretion, emphasizing the limitations under judicial review. In fact in this case, the Court emphasized on the need for statutory guidelines for such exercise[6]. However, when the exercise of powers including discretion by the administrative authorities affects the life and liberty of the citizens, the judiciary may be forced to examine the propriety of such exercise. It is pertinent to examine the scope of judicial review of administrative discretion.

JUDICIAL REVIEW AND THE WEDNESBURY TEST

Wednesbury test in exercising judicial review, which was developed by the English Courts in the case of *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[7] , would apply to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided, could have arrived at it. Proportionality, on the other hand, as a legal test is capable of being more precise than a reasonableness test, besides requiring a more intrusive review of a decision made by a public authority by which the courts are to 'assess the balance or equation' struck by the decision maker.

The jurisdiction of the Constitutional Courts to control excess or abuse of power by the executive is fundamental to the very judicial process and vital to the rule of law. Two of the principles which are relied upon by the Judiciary since a long time are the 'Wednesbury unreasonableness'[8] and later the doctrine of 'Proportionality'[9] . Jurists even doubted whether the doctrine of 'Proportionality'

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5. (1938) 279 NY 288.
6. Ibid. The Court observed: "such field of discretion must be defined by the Legislature. The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field."
7. [1947] *1 KB* 223. In this case, a Cinema Company, Associated Provincial Picture Houses, was granted a licence by the Wednesbury Corporation, to operate a Cinema Theatre on condition that "No children under the age of fifteen years shall be admitted to any entertainment, whether accompanied by an adult or not." This condition was imposed under Section1, sub section 1 of the Sunday Entertainments Act of 1932. The Picture Houses sought a declaration that such a condition was unacceptable and outside the power of the Corporation.
8. Introduced for the first time in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation, [1947] *1 KB* 223 by Lord Greene, M.R.
9. The doctrine was first developed in the High State Administrative Courts in Germany and the European Union law brought it into their legal system. In *Council of Civil Service Unions* v. *Minister for the Civil Service*, [1985] AC 374, the doctrine was applied by the Court of Appeal.

would over-throw the 'Wednesbury test'[10]. However, the judicial approach appears to have remained steady and is towards retaining both the tests though with different fields of application.

A judicial scrutiny of the two concepts in the English legal system would reveal the hesitation of the Courts to reject *Wednesbury* and accept *proportionality* as a final test. However, what is the approach of the Indian judiciary in this regard? An attempt is being made in this paper to examine the judicial approach in India in this regard.

JUDICIAL REVIEW AND THE PROPORTIONALITY TEST

'Proportionality' is a principle where the Courts are concerned with the examination of the process, method or manner in which the decision-maker has ordered his priorities, and how the authority has reached a conclusion or decision. The very essence of administrative decision-making consists of the attribution of relative importance to the factors and considerations made by the authority concerned in a given case. The doctrine of proportionality focuses at the true nature of exercise of the elaboration of a rule of permissible priorities. According to Prof. de Smith, 'proportionality' involves a 'balancing test' and a 'necessity test'. The former permits scrutiny of excessive and onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations. The latter, viz., the 'necessity test' requires infringement of human rights to the least restrictive alternative[11].

ADMINISTRATIVE ACTION AND JUDICIAL REVIEW IN INDIA

In India, judicial review of administrative discretion has been a subject of much discussion. In the initial days of exercise of judicial review, the focal point was abuse of discretion, including arbitrariness. The Supreme Court of India has unequivocally laid down the judicial policy regarding administrative discretion in the following words:

> *"The absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon*

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10. HWR Wade and CF Forsyth, *Administrative Law*, (9th Edition) (2004), pp. 371- 372 with the caption 'Goodbye to Wednesbury' wrote:
    The Wednesbury doctrine is now in terminal decline but the coup de grace has not yet fallen, despite calls for it from very high authorities and opined that in some jurisdictions the doctrine of unreasonableness is giving way to doctrine of proportionality.
11. The general approach is that in cases of violations of human rights the test that is considered appropriate is 'Proportionality' and in other cases, 'Wednesbury unreasonableness'.
    See, S. A. de Smith, *Judicial Review of Administrative Action*, Sweet & Maxwell, London, 1995, pp. 601-605.

executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable..."[12]

With the rapid growth of Administrative Law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain definite principles had to be evolved by Courts. If an action taken by any authority is contrary to law, improper, unreasonable, irrational or otherwise unreasonable, a Court of Law could interfere with such an action by exercising the power of judicial review. As mentioned earlier, one such mode of exercising the power of judicial review is by using the 'doctrine of proportionality'.

The main concern of administrative law is that the exercise of powers conferred upon the authorities must be made properly, fairly and in accordance with and within the boundaries of the law from which it derives the power. If, on the contrary, administrative authorities exercise power in an unreasonable manner or capriciously or at pleasure, without an adequate determining principle, not founded on reason and is depending on the will alone, it is considered as an arbitrary exercise.[13] In other words, a decision is said to be arbitrary when it is based on the mere whims or caprice or on the purely subjective likes or dislikes of the decision maker.[14] An action is arbitrary when no 'reasonable person' could have acted in that manner.[15] The extent of damage by the arbitrary action of the administration was highlighted by the Supreme Court in *E. P. Royappa v. State of Tamil Nadu*[16] when it observed that "from a positivistic point of view, equality is antithetic to arbitrariness".

In scrutinizing the exercise of administrative discretion in India, the yardstick used to be *Wednesbury* though subsequently *proportionality* began to show its presence. Even though the *Wednesbury* rule primarily governed judicial review in India, in certain specific areas the judiciary used the measure of

12. *Vineet Narain v. Union of India (1996) 2 SCC 199.*
13. *M/S Sharma Transport Represented by Shri D.P. Sharma v. Government of A.P. & others, AIR* 2002 SC 322.
14. *In Som Raj v. State of Haryana, AIR* 1990 *SC* 1176, the Supreme Court of India observed that, "If the discretion is exercised without any principle or without any rule, it is a situation amounting to the antithesis of Rule of Law. Discretion means sound discretion guided by law or governed by known principles of rules, not by whim or fancy or caprice of the authority."
15. The Court in *Short v. Poole Corporation*, [1926] Ch. 66, pp.90-91, as cited in *Wednesbury case, ibid.*, which gave the example of the dismissal of a red-haired teacher, who was dismissed because she had red hair, would illustrate this position.
16. (1974) 4 *SCC* 3; 1974 *SCR* (2) 348 at p. 386.

proportionality. The sum and substance and the essence of judicial review is that Courts cannot interfere as appellate authorities, overriding the decisions of such authorities. It can only look into the decision as a reviewing judicial authority, concerned with an examination of whether the order of an administrative authority under review has contravened the law or acted in excess of its powers. In this regard, it is pertinent to note the observation of the Supreme Court in *Bhagat Ram v. State of Himachal Pradesh*[17]

> *"Let us make it abundantly clear that we are not sitting in appeal over the findings of the Inquiry Officer. In a petition under Article 226, the High Court does not function as a court of appeal over the findings of disciplinary authority. But where the finding is utterly perverse, the court can always interfere with the same."*

Further, Lord Greene, who spoke for the Court in *Wednesbury case*,[18] enunciated the "principles of reasonableness" in case of judicial review. The Courts in India have been following this 'principle of reasonableness' in various decisions. Subsequent to the *Wednesbury case* the English Courts have brought in the principle of 'proportionality' in judicial review. However, much before the English Courts have applied the principle of proportionality in the CCSU case,[19] the Indian Courts applied the doctrine in scrutinizing administrative actions. The principle of proportionality comes in when an authority takes a decision which may not have an appropriate nexus to the object for which the action was initiated. For instance, in *Hind Construction and Engineering Co. Ltd. v. Their Workmen*,[20] Chief Justice Gajendragadkar and Justice Hidayatullah opined that, "the punishment imposed was one which no reasonable employer would have imposed in like circumstances unless it served some other purpose".[21] Subsequently, the term 'reasonableness' was explained by the Supreme Court in *Ganahyutham*[22] thus:

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17. *AIR* 1983 SC 454, para 10.
18. [1947] 1 KB 223.
19. 1985 AC 374.
20. *AIR* 1965 SC 917, 1965 *SCR* (2) 85. In this case, according to the practice of the appellant company 14 days in each year (including the 1st of January) were holidays and whenever a holiday fell on a Sunday the following day was made a holiday. The first day of January 1961, being a Sunday, the 11 permanent workmen did not attend work on the 2nd January 'treating it as holiday', although they had been told that owing to pressure of work 2nd January was to be a working day and a holiday in lieu would be given on another day. The workmen who abstained on January 2 were dismissed from service by the employer. The Industrial Tribunal set aside the action.
21. *Id.*, p. 89 (SCR).
22. *Union of India v. G. Ganahyutham*, *AIR* 1997 SC 3387, para 11, *per* Justice M. Jagannadha Rao.

... to arrive at a decision on 'reasonableness' the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bonafide one.

PROPORTIONALITY AND EMPLOYMENT LAW

As mentioned above, with respect to managerial actions against the employees in disciplinary cases the question of disproportionate punishments came up before the Courts in India years before the *CCSU case*[23] came up before the British Courts. The application of the doctrine of proportionality may be said to have been frequent in the country in the field of service and industrial laws and in cases of discrimination under the Constitution of India. Another interesting case in this regard was that of *Indian Chamber of Commerce v. Workmen*[24]. In this case the allegation against the employee of the Federation was that he issued legal notices to the Federation and to the International Chamber of Commerce which brought discredit to the Federation and the employer. A domestic inquiry was conducted against the employee and his services were terminated. The punishment was held to be disproportionate to the misconduct alleged and established at the inquiry. The Supreme Court opined that the Federation had made a mountain out of a mole hill and made a trivial matter into one involving loss of its prestige and reputation. It is important to remember that Proportionality as the word indicates has reference to variables or comparison; it enables a Court to apply the principle with various degrees of intensity and offers a potentially deeper inquiry into the reasons projected by the decision maker.

So also the Supreme Court in *Divisional Controller N.E.K.R.T.C v. H. Amaresh*[25] *and UPSRTC v. Vinod Kumar*[26] held that the punishment should always be proportionate to the gravity of the misconduct and the High Court under Article 226 gets jurisdiction to interfere with the punishment only when it finds that the punishment imposed is shockingly disproportionate to the charges proved.

A lot of disproportionate decisions taken by employers against erring employees and subsequent legal actions in those cases preceded the amendment of the Industrial Disputes Act, 1947 which introduced Section 11A by Act 45 of 1971 to the I. D. Act[27] empowering the adjudicatory authorities to give 'appropriate

23. *Council of Civil Services Union v. Minister of Civil Services*, 1985 AC 374. See also *infra* n. 39.
24. *AIR* 1972 SC 763.
25. *AIR* 2006 SC 2730.
26. (2008) 1 *SCC* 115.
27. The Industrial Disputes Act, 1947, Section 11A. Powers of Labour Courts, Tribunals and

relief to the aggrieved workmen in case of disproportionate punishments. This amendment was in the light of the International Labour Organization's recommendation[28] concerning termination of employment at the initiative of the employer, which recommended that a worker aggrieved by the termination of his employment should be entitled to appeal against the termination to a neutral body[29] and that the neutral body concerned should be empowered to examine the reasons given in the termination of employment and the other circumstances relating to the case and to render a decision on the justification of the termination. The ILO further recommended that the neutral body should be empowered, if it finds that the termination of employment was unjustified, to order that the worker concerned, unless reinstated with unpaid wages, should be paid adequate compensation or afforded some other relief. However, it may be remembered that this power to award an alternate punishment by the adjudicating authority is limited to disputes in employment law.

In the matter of judicial review of administrative action, the Courts are not authorized to step into the shoes of the administrative authority and rewrite the decision. It is undisputed that the decision of the administrative authority could be one of many choices open to it. It is for that authority to decide upon the choice and not for the Court to substitute its view in this regard.[30]

So also, there were a number of decisions where disciplinary actions taken by College or University authorities were questioned or brought before the Courts in India. The view adopted by the Courts in this regard that the relationship of the Head of an educational Institution and the student is that of a parent and child, and a punishment imposed on the student should not be retributive in nature or should not be meant to give vent to a feeling of wrath[31]. In *Akshay Choudhary v. University of Delhi*[32] the Delhi High Court considered the matter of disciplinary

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National Tribunals to give *appropriate relief in case of discharge or dismissal of workmen.*- Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require: Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.

28. Recommendation No. 119, adopted in June 1963.
29. Such as an arbitrator, a court, an arbitration committee or a similar body.
30. The special provision under Section 11A provided under the Industrial Disputes Act, 1947 empowers the adjudicators to provide an appropriate relief to the aggrieved person, indicating thereby the chances of disproportionate actions initiated by the employer against the employed.
31. *B.C. Chaturvedi v. UOI*, AIR 1996 SC 484; *T.T. Chakravarthy Yuvraj v. Principal, Dr. B.R. Ambedkar Medical College*, AIR 1997 Kant. 261 are illustrative of the point.
32. 2010 (174) *DLT* 645.

action taken against senior students in a case of ragging from the angle of proportionality of punishment.

In cases of punishmeut by authorities, whether administrative or otherwise, it is ideal to leave the power with the Courts not only to examine whether there was a balance between the gravity of the misconduct and punishment awarded but also to award an appropriate punishment. In this regard, the observation of the Supreme Court is noteworthy, that if the Court in exercising the power of judicial review, finds that the decision of the authority shocks the conscience of the Court, then the reviewing Court is empowered to appropriately mould the relief, either by itself imposing another penalty with a view to shorten the litigation or refer the matter back to the disciplinary authority.[33]

PROPORTIONALITY UNDER THE CONSTITUTIONAL LAW

The Constitution of India by Article 19 clauses 2 to 6 permits the legislature to impose reasonable restrictions on the freedoms guaranteed in clause 1 of Article 19. So also, Article 14 deals with equality. The Courts in the country have examined several cases on the basis of the doctrines of 'intelligible differentia' and 'reasonable nexus' to ascertain the validity of 'classification'. Any penalty imposed by an authority, disproportionate to the gravity of the misconduct, would be violative of Art. 14. If 'reasonability' of the classificatiun could not be sustained in judicial scrutiny, the actions or rules, permitting unfair or unreasonable classification, have been struck down by the Courts.[34] These cases could be considered as instances of applying the proportionality principle by the judiciary.

It is pertinent to note that in India due to the Fundamental Rights laid down in Part III of the Constitution, the Indian Courts did not suffer from a disability similar to the one experienced by English Courts in declaring as unconstitutional, a legislation, on the principle of proportionality or reading them in a manner consistent with the Charter of Rights. Ever since 1950, the principle of 'proportionality' has indeed been applied to legislative and administrative actions in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India the Supreme Court had occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation.

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33. *B.C. Chaturvedi* v. *UOI*, AIR 1996 SC 484, para 14. So also, *S.K. Giri v. Home Secretary, Ministry of Home Affairs & ors.*, 1995 Supp. (3) SCC 519; *Union of India. v. Giriraj Sharma, AIR* 1994 SC 215; *Bishan Singh & ors. v. State of Punjab*, (1996) 10 SCC 461, etc., highlight this approach. The Court in these cases opined that that if the punishment awarded was disproportionate to the gravity of the misconduct, it would be arbitrary and thus would violate the mandate of Article 14 of the Constitution.
34. *Chintaman Rao v. State of U.P. 1950 SCR 759; Air India v. Nargesh Meerza*, 2000 (7) *SCALE* 524; etc., are illustrative of this aspect.

Reasonable restrictions' under Clauses (2) to (6) of Article 19 could be imposed on these freedoms only by legislation and Courts had occasion to consider the proportionality of the restrictions.[35] So also, the Court had occasion to examine the validity of laws vis-à-vis Articles 14 and 21 and again in these cases the Court adopted an interpretation based on the principle of proportionality.[36] Hence

it could be concluded that in India there was never any difficulty in testing the validity of legislation on the basis of restrictions on Fundamental Rights to see whether the restriction was proportional. However, it is significant that the Indian Courts have not used the specific expression 'proportionality' in these cases.

Ranjit Thakur's case and the formal development of Proportionality in India

As discussed above, the proportionality principle was used by various Courts in India in cases where the quantum of punishment was in issue. An elaborate discussion on proportionality with respect to punishment could be seen in the dissenting opinion of Justice Bhagwati in *Bachan Singh's case*.[37] However, the said principle was applied in a technical sense in *Ranjit Thakur's case*.[38] The appellant in this case, a Signal Man in a Signal Regiment of the Armed Services, while serving out a sentence of 28 days' rigorous imprisonment imposed on him by the Commanding Officer of the Regiment, for violating norms for presenting representations to higher officers, was alleged to have committed another offence by refusing to eat his food when ordered to do so. He was charged under section 41(2) of the Army Act, 1950 for 'disobeying a lawful command given by

35. For instance in *Chintaman Rao* v. *State of U.P.*, [1950] *SCR 759*, Justice Mahajan observed that 'reasonable restrictions' which the State could impose on the fundamental rights 'should not be arbitrary or of an excessive nature, beyond what is required for achieving the objects of the legislation. Similarly, Chief Justice Patanjali Sastri in *State of Madras* v. *V.G. Row*, [1952] *SCR 597*, observed that the Court must keep in mind the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions of the time. This principle of proportionality vis-a-vis legislation was referred to by Justice Jeevan Reddy in *State of A.P. v. M C Dowell & Co.*, [1996] 3 SCC 709. This level of scrutiny has been a common feature in the High Court and the Supreme Court in India for over six decades.

36. For instance, *Air India v. Nargesh Meerza and Ors*, [1981] 4 *SCC* 335, *Bachan Singh* v. *State of Punjab*, [1980] 2 *SCC* 684 and the dissenting judgment of Justice Bhagwati [1982] 3 *SCC* 24. So far as Article 14 is concerned, the Courts have examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the Court considered the question whether the classification was based on intelligible differentia, the Courts were examining the validity of the differences and the adequacy of the differences and this is nothing but an application of the principle of 'proportionality'.

37. *Bachan Singh v. State of Punjab and others*, *AIR* 1982 SC 1325; 1983 *SCR* (1) 145. The observation was in the light of imposing death sentence. See *id.* Pp 299 - 303 *(SCR)*.

38. *Ranjit Thakur v. Union of India*, *AIR* 1987 SC 2387.

his superior officer'. A sentence of rigorous imprisonment for one year was imposed by a Summary Court Martial. He was removed to the civil prison where he served out the sentence. The appellant's representation to the confirming authority was rejected by the General Officer Commanding. The appellant's writ petition challenging proceedings of the Summary Court-Martial was dismissed in *limine* by the High Court.

In the appeal by special leave, it was contended on behalf of the appellant that the proceedings of the Court Martial were vitiated by (i) non-affording of an opportunity to challenge the constitution of the Summary Court Martial under section 130(1); (ii) bias on the part of respondent No. 4 who participated in and dominated the proceedings; (iii) awarding a punishment so disproportionate to the offence as to amount in itself to conclusive evidence of bias and vindictiveness; and (iv) ignoring that as the appellant was then serving out an earlier sentence he could not be in active service so as to be amenable to the disciplinary jurisdiction and that the appellant's refusal, while already serving a sentence, to accept food did not amount to disobedience of any lawful command of a Superior officer under Section 41.

In the course of the arguments the appellant raised a contention that, "At all events, the punishment handed down is so disproportionate to the offence as to amount, in itself to conclusive evidence of bias and vindictiveness."[39] In response to this the Supreme Court observed:

> *"Judicial review generally speaking, is not directed agalnst a decision, but is directed against the 'decision making process'. The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court- Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review." (Emphasis added)*

The Court agreed with Lord Deplock in *Council of Civil Service Unions v. Minister for the Civil Service*,[41] wherein it was observed that,

39. *Id.* para 4.
40. *Id.* para 9.
41. [1984] 3 WLRs 1174 (HL).

> *"... Judicial Review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community."*

The Supreme Court also made a reference to its earlier decision in *Bhagat Ram v. State of Himachal Pradesh*,[42] wherein it was held that,

> *"It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution."*[43] (Emphasis added)

The Court further pointed out and emphasized that 'all powers have legal limits' and held that "the punishment was so strikingly disproportionate as to call for and justify interference. It cannot be allowed to remain uncorrected in judicial review".[44]

Again, the Supreme Court in *Coimbatore District Central Cooperative Bank* v. *Coimbatore District Central Cooperative Bank Employees Assn. and Another*[45], considered the doctrine of proportionality. The Court clarified the circumstances under which a reviewing Court could interfere with the decision of the disciplinary authority. Here the Court observed that when disciplinary proceedings have been initiated and a finding of fact has been recorded in such inquiry, it cannot be interfered with, unless such finding is based on 'no evidence' or is perverse, or is such that no reasonable man in the circumstances of the case

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42. *AIR* 1983 SC 454. In this case an enquiry conducted by the disciplinary authority against a Forest Guard was fond to be bad as being utterly perverse. On the question of punishment, the Supreme Court observed that where the coquiry was found to be bad and the order of penalty was quashed, it was open to the Court to give any direction, which would not permit a fresh enquiry to be held. Pointing out that the purpose of holding a fresh enquiry was to impose some penalty, in this case, the Supreme Court held that it, in such circumstances, without prolonging the matter, might itself impose an appropriato penalty.
43. *Id.* Para 15.
44. *AIR* 1987 SC 2387, para 9.
45. 2007(3) L.L.N.128. Despite the advice by the Labour Officer, the employees of the Appellant Bank commenced a strike which was totally illegal and unlawful. A notice was

would have reached such finding. In the instant case, four charges were leveled against the workmen. An inquiry was instituted and findings recorded that all the four charges were proved. The Labour Court considered the grievances of the workmen, rejected all the contentions raised by them, held the inquiry to be in consonance with principles of natural justice and findings supported by evidence. Keeping in view the charges and the award of the Labour Court, the Supreme Court observed that the Labour Court rightly held that the punishment imposed on the workmen could not be said to be harsh so as to interfere with it. So far as the doctrine of proportionality is concerned, the Court observed that the doctrine has not only arrived in our legal system but has come to stay. With the rapid growth of administrative law and the need and necessity to control the possible abuse of discretionary powers by various administrative authorities time and again, certain principles have been evolved by Courts.[46]

THE DILEMMA

It is a reality that the two principles - Wednesbury and Proportionality - are resorted to by the Courts in reviewing administrative actions. When a choice is to be made between the two principles, there may be a dilemma as to the appropriate principle that would be applicable. The English Courts have adopted a stand that cases involving human rights would be scrutinized under the proportionality principle and in other cases, the Wednesbury test. So also in

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issued to the Union stating that the workmen should join duties by a designated date by tendering an unconditional apology. The employees accepted it. A settlement was arrived at between the Management and the Union and 134 employees gave up the 'strike call' and resumed work. 53 employees, however, refused to join duty and continued their illegal strike and acts of misconduct. The illegal acts of employees affected the work of the Bank very badly. It was alleged that not only the workmen did not join duty and continued the illegal and unlawful strike, but also prevented other employees from resuming duty and threatened them with dire consequences if they returned for duty. Disciplinary proceedings were initiated against the 53 workmen. The employees were intimated of the charges leveled against them, which they denied. However, the workmen did not participate in disciplinary proceedings and the Management proceeded with the disciplinary inquiry ex parte. The workmen were held guilty of the charges and an order of punishment was passed. The two punishments were (i) stoppage of increment for 1 to 4 years with cumulative effect; and (ii) non-payment of salary during the period of suspension. According to the Bank, the case was an appropriate one to impose the extreme penalty of dismissal from service, but taking a liberal view, the extreme punishment was not imposed on the employees and they were retained in employment by the Bank. The workmen joined duty. The workmen, however, preferred an appeal which was dismissed by the Executive Committee. The employees raised an industrial dispute
and the same was awarded against the workmen. In a Writ Petition filed by the employees the learned Single Judge held that stoppage of 1 to 4 annual increments with cumulative effect was 'harsh'. The Division Bench in appeal rightly noted that it is settled law that the question of choice and quantum of punishment are within the discretion of the Management. However, it observed that "the sentence has to suit the offence and the offender" and was unduly harsh or vindictive, disproportionate or shocks the conscience of the Court, it could be interfered with by the Court.

46. *Id.* at pp. 134 and 135.

judicial review, the process of decision making is examined by the reviewing Court and that will to be the same whichever principle is applied by the Court. In such a situation, a certain amount of confusion is bound to arise in the decision-making due to the overlapping character of the two principles. Another important issue was whether proportionality would over-throw *Wednesbury* or co-exist amidst the dilemma? According to juristic opinion in England it was doubtful whether there could be an imminent demise of the Wednesburry test in the light of the rise of the proportionality test. For instance, in *Huang's case*[47] and *Daly's case*[48], the English Courts have considered both the Common Law and Article 8[49] of the Human Rights Act, 1998. Both the cases were concerned with the violation of human rights and demonstrated a deviation from the traditional *Wednesbury* test of unreasonableness and showed leniency towards proportionality. Wade and Forsyth also observed that the "Wednesbury doctrine is now in terminal decline but the coup de grace has not yet fallen, despite calls for it from very high authorities" and opined that in some jurisdictions the doctrine of unreasonableness was giving way to the doctrine of proportionality.[50]

The administrative authorities are entrusted with power by the Legislation concerned. When the Legislation imposes restrictions 'disproportionate' to the aims of the Legislation, a judicial review of the legislation is called for. Normally principles such as, 'natural justice', 'rational' and 'nexus' between the law and the act proposed, etc., come into operation. In case of an administrative action, usually authorized by a law, it may be examined whether the action was arbitrary. In *Om Kumar and others v. Union of India*[51] , the Supreme Court highlighted the duty of the Court to ensure that the legislature and the executive authorities maintain a proper balance between the adverse effects the legislation or the administrative order may have on the rights and liberties of individuals, in the light of the purpose which they were intended to serve. Explaining the meaning of proportionality, the Court opined that these authorities are given a large amount of choices by way of discretion, but whether the choice was proper or not is for the Court to examine. The Wednesbury or proportionality principle is resorted to by the Courts in this process, but as to which of the principles is to be applied remained unclear for some time even in India.

In Chairman, All India Railway Recruitment Board v. *K. Shyam Kumar and Others*[52] , the Supreme Court of India expressed the view that the Courts have to

47. *Huang v. Secretary of State for the Home Department*, (2007) 4 *All ER* 15 (HL).
48. *R (Daly) v. Secretary of State for the Home Department*, (2001) 2 AC 532.
49 Article 8 (1) reads: "In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate."
50. HWR Wade and CF Forsyth, *Administrative Law*, (9th Edition), Oxford University Press, UK, 2004, pp 371-372.
51 *AIR* 2000 SC 3689.
52 Civil Appeal Nos. 5675-5677 of 2007, para 33, per Justice Aftab Alam and Justice K. S.

develop an 'indefeasible and principled approach to proportionality' and until that is done there will always be an overlapping between the traditional grounds of review and the principle of proportionality and "the cases would continue to be decided in the same manner whichever principle is adopted". In this case, the Court was examining the decision of the Railway Board to cancel a recruitment test due to various allegations of malpractice and leakage of the question paper and decided to go for a new test. According to the Supreme Court, the Railway Board had three alternatives viz., (1) to cancel the entire written test, and to conduct a fresh one inviting applications afresh; (2) to conduct a re-test for those candidates who had obtained minimum qualifying marks in the first written test; and (3) to go ahead with the first written test (as suggested by the High Court). The High Court applying the Wednesbury principle accepted the third alternative by rejecting the decision of the Railway Board to conduct a re-test. The Supreme Court was of the view that the High Court has wrongly applied the Wednesbury principle and misdirected itself in directing the Board to accept the third alternative. The Court held that the Board's decision was fair, reasonable, well balanced and harmonious. The Supreme Court while taking a final view applied the test of Wednesbury unreasonableness as well as the proportionality test, on the decision taken by the Railway Board to choose the second option in the facts and circumstances of the case. Hence, to say that Wednesbury test has met with its 'natural death' appears to be an unrealistic statement.

This decision highlights the fact that 'proportionality' requires the Court to judge whether the action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed by the administration. 'Proportionality' therefore, is more concerned with the aim and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. Courts entrusted with the task of judicial review have to examine whether the decision taken by the authority is proportionate, i.e., well balanced and harmonious and to this extent the Court may indulge in a review on merits and if the Court finds that the decision is proportionate, it seldom interferes with the decision which is taken. On the contrary, if it finds that the decision is disproportionate, i.e., if it is not well balanced or harmonious and does not stand to reason it may tend to interfere with the administrative decision.

In India both proportionality and Wednesbury have been applied from time to time. If in the English Courts, the Human Rights angle provided the distinctive element to proportionality; in India it was the Fundamental Rights that was the focal point of distinction between the proportionality and Wednesbury tests. The view adopted by the Courts in this country is that the question of the quantum of

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Radhakrishnan, (on May 6, 2010) available at<*https://docs.google.com/file/d/0B6 hXZk fsIpLQNDQ1NGQ3YWYtOGFhYi00NzYzLWJlZmYtNjNjZmRlZjIwZjVj/ed?pli=1*> (visited on August 12, 2012).

punishment in disciplinary matters is primarily for the disciplinary authority and the jurisdiction of the High Courts under Article 226 of the Constitution or of the Administrative Tribunal is limited and is confined. The Supreme Court had occasion to lay down the narrow scope of its jurisdiction to interfere with administrative decisions on disciplinary matters in several cases. The applicability of the principle of 'proportionality' in Administrative law was considered exhaustively in *Union of India* v. *Ganayutham*[53], where the primary role of the administrator and the secondary role of the Courts in matters not involving fundamental freedoms was examined. The Courts have been following the principle laid down in the *Wednesbury* case that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would be limited.

THE DEVELOPMENT OF PRIMARY AND SECONDARY REVIEW IN INDIA

Article 14 of the Constitution of India brings in two possibilities with regard to judicial review. One, if the administrative action is 'discriminatory' and the other, 'arbitrary'. It may be seen that the Courts in India have adopted an approach based on primary and secondary review. Under Article 14 of the Constitution of India, an administrative action would be struck down as discriminatory where the proportionality principle would be applied and is referred to as the primary review. If the action is held arbitrary, it is Wednesbury principle would be applicable and is referred to as the *secondary review*.

Where an administrative action is challenged under Article 14 as being discriminatory, the Constitutional Courts as primary reviewing Courts have to consider the correctness of the level of discrimination and whether it was excessive and whether it had a nexus with the objective intended to be achieved by the administrator. Hence, the Court would examine the merits of the balancing action of the administrator and, in effect, would apply the 'proportionality' test and would be acting as a primary reviewing authority. But where, an administrative action is challenged as 'arbitrary' under Article 14 the question will be whether the administrative order is 'rational' or 'reasonable' and the appropriate test then is the Wednesbury test[54]. The Courts would then be confined only to a secondary role and will only have to see whether the administrator has acted properly in his primary role, i.e., whether the authority has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether the view of the authority is one which no reasonable person could have taken. If the authority's action does

53. [1997] 7 *SCC* 463.
54. For instance, in *E.P. Royappa* v. *State of Tamil Nadu*, 1974 (4) *SCC* 31, where punishments in disciplinary cases were challenged, Justice Bhagwati laid down another test for the purposes of Article 14. It was that if the administrative action was 'arbitrary', it could be struck down under Article 14. This principle is now being followed in all Courts more rigorously.

not satisfy these rules, it is to be treated as arbitrary. Justice Venkatachaliah, pointed out that 'reasonableness' of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of Wednesbury rules[55].

In the hght of the approach of the judiciary it may be seen that when the administrative action is attacked as discriminatory under Article 14, the principle of primary review is what the Courts exercise by applying the principle of proportionality. On the other hand, where the administrative action is questioned as 'arbitrary' under Article 14, the principle of secondary review, based on the Wednesbury principle is applied. The positiou was clarified by the Supreme Court in *Om Kumar* v. *Union of India*[56], in the following words:

> *"... where an administrative decision relating to punishment in disciplinary cases is questioned as 'arbitrary' under Article 14, the Court is confined to Wednesbury principles as a secondary reviewing authority. The Court will not apply proportionality as a primary reviewing Court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context."*

The English Courts have tried to keep the Wednesbury test and Proportionality test alive to be applied in different circumstances. Hence, Wednesbury and 'proportionality' coutinuc to co-exist and the proportionality test is applied, when there is violation of human rights and fundamental freedom and the Wednesbury finds its presence more in domestic Laws when there are violations of citizens' ordinary rights. So also in India, the judicial approach in the matter of judicial review is clearly distinct based on 'discrimination' and 'arbitrariness'. It is significant to note that there has been an overlapping of these tests in its content and structure and it is difficult to compartmentalize or lay down a straight jacket formula. However, in cases of discrimination the proper approach seems to be proportionality, whereas in cases of arbitrariness, the right test would be Wednesbury. One could bardly find any judicial move to ring the death knell of the Wednesbury test.

55. In *G.B. Mahajan v. Jalgaon Municipal Council, AIR* 1991 SC 1153.
56. 2000(7) *SCALE* 524.

International Peace and Security: An Appraisal of the Role of UN Security Council

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ABSTRACT

The UN Charter vested the Council with the primary responsibility of maintenance of international peace and security. A separate body just for this purpose was created so that swift and effective action could be taken. The Council since the establishment of the UN has played a vital role in many international situations and has represented the interests and consensus of the international community. The Council has used both methods to settle disputes for instance the Corfu Channel case where the Council referred U.K. and Albania to the ICJ to settle their disputes and an example of an enforcement action of the Council can be considered as the Korean Crisis of 1950 where the council took action against North Korea for its aggression towards South Korea. The Council has also imposed diplomatic and economic sanctions against many states In order to maintain international peace and security. A prime example is Rhodesia where actions were imposed against the white minority under Article 41 of the UN Charter. The Council has not been entirely successful in the maintenance of international peace and security but to say that the Council has failed in its mandate would be wrong as there have been many occasions when the Council has restores peace without even firing a single bullet.

INTRODUCTION

The UN was formed with the aim of maintaining international peace and security which the erstwhile League could not provide for due to the breakout of World War II. After the two World Wars that the world had witnessed, in which there was great loss of life and destruction, the founders of the UN understood the importance of maintaining peace in the world and thus desired for an International organization which could provide for the same unlike what The League had achieved. Representatives of 50 nations came together in 1945 at San Francisco to create the United Nations Charter (UN Charter) at the United Nations Conference on International Organization and the UN officially came into existence on 24 October 1945. During the entire period of negotiations at the conference there was special emphasis laid on the formation of a particular body

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which would perform the main function of maintaining international peace and security and thus the Security Council (Council)was tasked with this important role. It must be remembered that throughout these negotiations it was the Council which was intended to embody the principal aim of the United Nations, namely the maintenance of international peace and through a system of collective security.[1]

Even though the UN was formed with the aim of achieving the ideology of collective security and to maintain balance of power, this was not entirely to be attained because, for the Super Powers, collective security was subservient to their own national interests and to protect their interests they had the option of using the special power of veto. The struggle for supremacy, in the form of the Cold War between U.S.A. and U.S.S.R. left the Council paralyzed in the first 45 years of its existence and it only became properly active after the end of the Cold War.

SECURITY COUNCIL AND MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY

As stated earlier the primary role of the UN is the maintenance of international peace and security which has been elaborated in Article 1 of the UN Charter. To achieve this goal various organs have been formed within the UN. The main principal organs of the UN are: General Assembly, Security Council, Economic and Social Council, Trusteeship Council.

The Council acts as an executive organ of the UN as it has been given the responsibility of maintenance of international peace and security.[2] Unlike the General Assembly, which is a deliberative body, the Council is decision making body. The decisions of the Council are binding on the members of the UN, who as per the UN Charter agree to accept and carry out the decisions of the Council. The Council discharges its primary function of maintenance of international peace and security by two methods: firstly, Pacific settlement of international disputes and secondly, by taking preventive or enforcement action which presupposes the failure or incapability of the first. The Council is the UN's body which has been created to take action on behalf of the UN. It has the power to take collective enforcement action in order to maintain peace and security. Chapters VI, VII and VIII of the UN Charter, keeping in view the purpose and principles of the UN, has provided the Council with the necessary authority required to take enforcement actions. It is these chapters on which the role of the

1. K.P. Sarkensa, *The United Nations and Collective Security*, D.K. Publishing, New Delhi, 1974, p. 4.
2. Article 24(1) of the UN Charter provides: In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security and agree that in carrying out its duties under this responsibility, the Security Council acts on their behalf.

Council depends upon so as to maintain peace in the world. There was not much enforcement activity by the Security Council up to 1990. It was focusing on aspects of decolonization and did not affect any of the great powers or their allies. Occasional attempts by the General Assembly to revitalize collective measures remained fruitless.[3]

KOREAN CRISIS AND RESTORING INTERNATIONAL PEACE AND SECURITY

In June of 1950 North Korean armed forces launched an attack on South Korea and with began the greatest crisis at the international level since the initial years of the UN. The United States requested for an immediate meeting of the Council. Before the meeting was convened the Council received a report from the UN commission in Korea which confirmed the attack.

The council met and without referring to any provisions of the UN Charter, it considered that attack as a breach of the peace and called for an immediate stoppage of the hostilities and withdrawal of the North Korean armed forces and called member states to provide assistance in carrying out this resolution which was passed on 25th June 1950. The Council further requested that members should refrain from assisting North Korea.

The Council recommended to its members to provide assistance to South Korea as may he necessary to repel the North Korean armed forces and to restore peace and security in the area. To coordinate the aid, the Council approved a third resolution in order to setup a "Unified Command" under the UN flag and again requested the member states to provide military assistance to South Korea. A total of sixteen states contributed to the UN force in Korea. Thus the UN action in Korea was initially under the authority of the Council.

This action was taken by the Council due to uniqne combinations of circumstances which started from the Soviet Union boycotting the Council from January, 1950 because the Council had voted against its proposal to exclude the representative of Nationalist China because of alleged misrepresentation of China in the UN. It is on this basis that USSR opposed the validity of the resolution passed by the Council in its absence and added that a resolution could only he legal if the five permanent members participated and agreed at the same time. However, to avoid the risk the USSR sent its representatives back to tbe Council. Secondly, American occupation forces were in Japan and forces from other bases were readily available.

The Korean crisis was the first case where the Council gave its members the authority to use force in order to maintain or restore peace and security.

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3. M. Koskenniemi, *"The Place of Law in Collective Security", Michigan Journal of International Law*, vol. 17 1996 p. 457.

SECURITY COUNCIL IN RHODESIAN CASE

On 11th December 1965 White settlers in the British Colony of Rhodesia unilaterally declared Rhodesia's independence which was against the wishes of the UK and majority African population that constituted 94% of the total population of Rhodesia. The purpose behind this unilateral declaration was to preserve the political and economic dominance of the white settlers over the majority African population. There was obviously a risk that sooner or later the Rhodesian African would react violently against this state of affairs, and a risk that fighting between the Rhodesian African and the white minority regime might spill over into territory of neighboring states; indeed both these risks became realities in the 1970's.[4]

After this unilateral declaration was made, the Council passed a total of three resolutions. First resolution was passed in November 1965 and it imposed so-called 'voluntary' sanctions of enforcement action. The next resolution was passed in April of 1966, this resolution was more specific and allowed the UK to use force if necessary to prevent ships taking oil to ports from which the oil could be supplied to Rhodesia. The third resolution was passed in December 1966 and this involved imposing mandatory sanctions under Article 41 of the UN Charter. This was the first time that a mandatory enforcement action was taken by the Council.

These steps taken against Rhodesia created a precedent for the present as well as the future of the Council in taking collective enforcement actions. It was in 1979 that Rhodesian government agreed to take back the unilateral declaration of independence and accepted the principles of the majority African rules, that the mandatory sanctions of the Council were terminated and the members of the UN were asked to respect the free and fair choice of the people of Zimbabwe. Zimbabwe became a member of the UN in 1980.

The Council played an essential role by helping the people in their struggle to achieve their right of self-determination.

GULF CRISIS AND RESTORING INTERNATIONAL PEACE AND SECURITY

Iraq and Kuwait are neighboring states and on 2nd August, 1990 Saddam Hussein, the then president of Iraq, invaded Kuwait and declared it as Iraq's seventeenth province. Kuwait made an urgent request to the Council for a meeting and at that meeting Iraq's invasion was condemned by several members of the Council. An immediate resolution was adopted and Iraq's actions were considered as a "breach of peace and of international security". The Council demanded an

4. Michael Akehurst, *Modern Introduction to International Law*, 4th ed, Routledge, London and New York, 1982, pp.181-182.

immediate withdrawal of troops from Iraq. The Council on 9th August, 1990 passed another resolution that Iraq's annexation of Kuwait had no legal validity and was considered as null and void. This resolution also called upon all states and international organizations not to recognize this annexation and no action shall be taken that would be considered as an indirect recognition of the annexation.

The Council considered the matter under Article 39 of the UN Charter and a number of measures were taken involving non use of force under Article 41. The Council imposed mandatory economic sanctions against Iraq which put obligations on states to refrain from importing commodities and products which were exported by Iraq and Kuwait and to refrain from selling or supplying to Iraq and Kuwait any commodity or products including weapons. There was an exception for supplies for medical and food purposes.

After all the measures taken under Article 41 of the UN Charter to restore the independence of Kuwait failed, the Council on 28th November, 1990 adopted a resolution, acting under Chapter VII specifically under Article 42 of the UN Charter, authorized the member states to implement and uphold the resolution of the Council till the time Iraq withdraws from Kuwait on or before 15th January, 1991. The resolution demanded the member states to keep the Council regularly informed.

Iraq did not withdraw its forces from Kuwait on the expiry on of the deadline set by the UN resolution. The consequence of this was multinational forces which consisted of 28 states led by the United States started a war against Iraq on 17th January, 1991. This multinational force was successful in forcing Iraq to withdraw its forces. This action of the Council clearly comes under Chapter VII of the UN Charter. This has easily been the most successful collective action of the UN under Chapter VII to restore and maintain international peace.

The end of the Cold War and the invasion by Iraq in Kuwait was a turning point for the future of the Council and it had revived the Council's role of collective security. The Council has increased the adoption of authorization resolutions and such resolutions have been adopted to allow the use of force for various purposes like securing humanitarian aid for starving people in Somalia, restoring of legitimate authority in Haiti and many such resolutions to resolve the Yugoslavian crisis.

ISRAEL'S ACTIONS IN EAST JERUSALEM

The General Assembly held an emergency special session on 24th and 25th April, 1997. In this special session the Assembly considered Israel's illegal actions in the occupied East Jerusalem. What lead to this special session was when Israel occupied and built a settlement to the south of occupied East Jerusalem on 26th

February 1997. Portugal, France, Sweden, U.K. brought a draft resolution in the Council which was vetoed by U.S.A. but the same draft was adopted in an urgent meeting of the General Assembly on 13th March 1997. Israel of course voted against it along with U.S.A. Israel defied this and started construction of the new settlement on 18th March. Another attempt was made by the Council on 21st March to pass a resolution stating that Israel should stop the construction but it was gain shot down by a negative vote cast by the United States. At the same time Israel continued with the construction of the settlement and this threatening world peace and security. The Arab group was beginning to make preparations to convene an emergency meeting and thus a request was made to the Secretary General by the Chairman of the Arab group for an emergency special session. The secretary General informed all the member states of the request on 1st April, which was made by the Arab group. The Secretary General wanted the opinions of the member states on this request. As it was expected U.S. and Israel were opposed to the request and the EU did not reply at all. By 22nd April the majority of affirmative responses were determined.

An agreement between Palestine and Arab groups with the EU was reached and on its basis a resolution was drafted. The draft resolution contained provisions which called for stopping all forms of support for the illegal activities of Israel in the occupied parts of Palestine which included Jerusalem. Another provision of the resolution stated that states should ensure that Israel should respect the fourth Geneva Convention as being the occupying country. The resolution tasked the Secretary General with the responsibility of monitoring the situation and the Secretary General was to submit a report about the implementation of the resolution, within 2 months of the adoption of the same.

The emergency session continued on 15th July 1997 and by this time Israel and refused to comply with the resolution. On the continuation of the session the General Secretary also submitted its report. In this special session another resolution was adopted which determined the actions to be taken by the member states in preventing any further settlement activity to take place.[5]

It is only because of these resolution which were adopted that peace and security could be maintained in Palestine. This wasn't easy due to U.S. casting its veto and thus it was all left to the General Assembly to restore peace. Most of the members were concerned about the peace processes in the Middle-East and thus wanted to undo the illegal actions of Israel.

AMERICAN WAR IN IRAQ

The United States was the only super left in the world after the Soviet Union collapsed and thus the balance of power tilted towards the U.S. It was the U.S.

5 United Nations General Assembly Res (ES-10/2).

that led the Gulf War in 1991, which was authorized by the UN. This was not the first time that the U.S. was involved in an attack which threatened the territorial integrity and political independence of a state. By being a part of many such attacks the U.S. has always flouted the well-established rule of the UN i.e. prohibition of use of force. For instance in 1962 America enforced a blockade against Cuba on the grounds of self-preservation which was not accepted by the UN. Another example is when the U.S. attacked Grenada in 1983 to protect its own citizens and a new government was also put in place by the U.S.[6] other examples are Vietnam, Cambodia, Nicaragua, Panama, Libya etc.[7] The United States repeated its activities in 2003 by invading Iraq.

The United States invasion of Iraq in 2003, also called the "2nd Gulf War"[8] . This war has gone down in the history books as a defining moment in the initial years of this century. The relation between Iraq and U.S. had remained rocky since the end of the Gulf War in 1991. The U.S. government hoped that Saddam Hussein's government would one day be thrown out of power and there was always a fear that Saddam was procuring or developing Weapons of Mass Destruction (WMD) which was in violation of UN resolutions. U.S. and U.K enforced economic sanctions on Iraq after there was no consensus in the Council on the matter related to Iraq not complying with the terms of the cease fire in 1991 Gulf War. The U.S. in 1998 passed the Iraq Liberation Act which stated that the United States should support efforts to remove Saddam Hussein's regime.

The Bush administration felt that it had a lot of public support in United States for more operations against Iraq in light of the September 11 attacks. The unfriendly relations between the two countries aggravated the situation. The U.S. administration made it clear that one of its goals was to overthrow the Hussein regime in Iraq.

In 1999 the Council created the United Nations Monitoring Verification and Inspection Commission which was to make sure that Iraq get rid of its WMD's and to devise a system of regular monitoring to keep a check on Iraq that it does not procure the weapons again. Another resolution was adopted by the Council which demanded that Iraq should cooperate with UN inspectors and the International Atomic Energy Agency (IAEA). This was done with the aim that Iraq would fulfill its obligations with respect to disarmament.

On 7th March the U.S. introduced a draft resolution in the Council as per which Iraq had failed in its obligation of disarmament. 17th March was the deadline given to Iraq under the draft resolution. The resolution was not adopted as the

6. *Supra* n.5 p.1033.
7. S.K. Kapoor, *International Law and Human Rights*, 5th ed. Central Law Agency, Allahabad, 2004 p. 196.
8. Purusottam Bhattacharya, *"The war in Iraq: Implications for International relations"*, *IJIL*, vol. 43, 2003 p.9.

Council was undivided. On 18th March a forty-eight hour ultimatum was given to Hussein and his two sons to leave Iraq which was rejected by Hussein. After the deadline expired, the U.S., U.K. and it allies of about 40 countries attacked Iraq. The U.S. military took control of Iraq on 4th April 2003.

The U.S. and the U.K. have maintained that their actions in Iraq were in accordance with the UN Charter and these actions were done in order to maintain international peace and security. The justification provided by the U.S. and the U.K. for their actions in Iraq do not satisfy some very important prerequisites of the UN Charter like the authorization of the UN. The U.S. however, stated that it aimed to disarm Iraq, change its regime and establish democracy and to achieve these goals the U.S. used the provision of self-defense in the form of pre-emptive military action against Iraq. The important question that comes up here is whether pre-emptive use of military can be legally justified. The justification given was that Iraq violated the Council's resolutions, there was gross violation of human rights, seek change in Iraq's internal regime and the right to exercise pre-emotiveself-defense.

The United States in justifying its unilateral action against Iraq raised two violations of the Council's resolutions by Iraq. The objective of both the resolutions was to restore Kuwait's liberty and to maintain international peace and security. These resolutions clearly only provide for the maintenance of international peace and security and do not state for any action against Iraq.

The Secondly the U.S. claimed that that's its actions were legitimate on the ground of enforcement of international sanctions for non-compliance of disarmament obligations by Iraq. The Council had decided that IAEA and UN inspectors would be sent back to Iraq in search for WMD's. Iraq accepted the inspectors to check for WMD's. The UN Inspectors did not find any evidence of WMD's. In spite of this the U.S. still felt that Iraq did not comply with the Councils resolution which called for disarmament. Even if Iraq violated the resolution of the Council it did not justify the U.S. unilateral action to attack Iraq. No state can justify the use of force unilaterally against a state on the pretext of enforcing an international sanction.

There are, of course, instances of humanitarian disaster in which intervention, even by the use of force, on behalf of the international organization like United Nations has been permissible for the purpose of remedying serious human rights violations.[9] But the unilateral action by a state for a cause like human rights is questionable.

9. A.E. Roberts, *"Traditional and Modern Approaches to Customary International Law: A Reconciliation", AJIL*, vol. 95, 2001, p. 786.

The ICJ in the *Nicaragua Case*[10] stated that an armed attack is a pre-condition for invoking the right of self-defense. The ICJ stressed that this right is subject to the concerned state being a victim of an armed attack. The U.S. based its right to individual self-defense on three grounds. The first being the assassination attempt on George W. Bush Senior, second the alleged links of Iraq with Al-Qaida the terrorist group responsible for the September 11 attacks and third justification was termed as the right of pre-emptive self-defense.

The right of pre-emptive defense was introduced the National Security Strategy (NSS) which came in force in 2002. The NSS is based on two assertions. The first was that the United Sates could not let its enemies attack first and the second assertion was anticipatory self-defense (pre-emptive self-defense).

It is a well-established rule in international law that, the jurisdiction of a state in its territory is absolute but the state does not have jurisdiction in the territory of another state. The Permanent Court of International Justice (PCIJ) in the *S.S. Lotus Caseclearly* stated "the first and foremost restriction imposed by international law upon a state is that failing the existence of a permissible rule to contrary... it may not exercise its power in any form in the territory of another state".[11]

However U.S. attacked Iraq without any express authorization of the Council and justifted its actions as an act of self-defense under Article 51 of the UN Charter. This provision contemplates certain conditions governing the lawful exercise of the right of self-defense which are as follows:

1. Necessity of taking an unilateral action
2. The action of self-defense must be proportional to the original injury
3. An armed attack must take place against the state claiming self defense
4. For a pre-emptive strike the threat against the state taking the action must be imminent

In view of the above mentioned requirements the unilateral action of Ameriea eannot be justified as act of self-defense under Article 51 of the UN Charter.On the basis of the above mentioned arguments it can be said that the Gulf War II was an illegal war in terms of the UN Charter. The U.S. violated the principle of non use of violence as per the UN Charter.

U.S. INVASION OF AFGHANISTAN

Since the bomb explosion on the American embassy in Kenya and Tanzania the relations between the U.S. and the Taliban government in Afghanistan became

10. ICJ, 1986, 14.
11. *France v Turkey*, PCIJ Series A, (1927) p. 10

strained. The person behind these attacks was Osama Bin Laden and U.S. claimed that the Taliban government was protecting him. A draft resolution was submitted before the Council by the U.S. as per which the Taliban government was to give up Osama Bin Laden and if the Taliban government failed in doing so then the UN would impose an air embargo coupled with financial sanctions. This resolution was unanimously passed by the Council on 15th October 1999. As per this resolution the Taliban was to surrender Bin Laden to the U.S. by 14th November 1999 and on the failure of the same the UN would impose sanctions. The Taliban refused to surrender Bin Laden.

In November 1999 the Taliban threatened to take action if the UN imposed sanctions on it. The Taliban failed to surrender Bin Laden and the UN thus imposed the sanctions. On 13th December, 1999 U.S. gave another warning to Taliban that if there were any terrorist attacks against them done by the Bin Laden's organization then the U.S. would also hold the Taliban responsible. In spite of this the Taliban refused to surrender Bin Laden.

The situation took a turn for the worst when Bin Laden attacked the U.S. on 11th September, 2001. Bin Laden's men attacked the World Trade Towers in New York and the Pentagon in Washington. The U.S. considered this as an act of war against itself. The preparations for a military strike had started with the target being Osama Bin Laden.

Finally the U.S. attacked Afghanistan with the assistance of U.K., Australia, and Northern alliance. The U.S. justified its attack as retaliation to the September 11 attacks and that the Taliban failed to meet the demands of the U.S.

The attacks were not authorized by the Council but the U.S. still considered it fit to attack Afghanistan on the grounds of the 9/11 attacks. The Charter of the UN does not provide individual states to determine when the use of force is necessary. Necessity is entirely a matter for the Security Council with only one exception: the strictly limited right of self-defense.[12]

The Council did pass a resolution in 1999 stating that Afghanistan should surrender Bin Laden and even set an ultimatum for the same. The Council in its resolution also provided for imposing sanctions against Afghanistan in case Bin Laden was not surrendered before the expiry of the ultimatum. By not surrendering Bin Laden Afghanistan violated the Council's resolutions and thus the sanctions came into force. In accordance to the legal provisions, Afghanistan was under an obligation to comply with the resolution passed by the Council. By not complying with the sanctions the Taliban government directly violated international law and in doing so it also defied the international community. But

12. Jordan J. Paust, *"Use of Armed Force against Terrorists in Afghanistan, Iraq and beyond", Cornell International Journal*, (2002) p. 542.

it is import to note here that the Council never authorized the use of force against the Taliban government for not complying with the Council's resolutions.

The attacks by Al-Qaida were condemned by the Council and a resolution was passed which stated that such attacks constitute a threat to international peace and security[13] and all efforts must be made within the means of the Charter to prevent terrorist attacks.[14] The resolution also condemned the actions of Taliban which allowed Afghanistan to be used as base for exporting terrorism and for providing shelter to Osama Bin Laden. These resolutions did not expressly provide for any authorization to take a unilateral action by the U.S. against Afghanistan. Thus there is no doubt that the U.S. invasion was done without the authorization of the Council.

CONCLUSION

It is safe to say that the Council was left a little ineffective during the Cold War days and it found it difficult in performing its primary task. This can be attributed to the rivalries between the superpowers because of which the Council's hands were tied to take any action against the permanent members and their allies. The culprit for this is the power of veto with the five permanent members. This veto right has been used many times by the permanent members achieve their own interests and to override the powers of the other members. The permanent members have on many occasions obstructed the functioning of the Council but the permanent members have also used the threat of veto to make impartial decisions. The Gulf War (1991) is one example where a decision was not opposed by any permanent member. The permanent members manipulated the majority in making this decision.

The collective will of the members of the UN has not been represented in certain cases due to the use of the veto by a permanent member. The failure of the UN in maintenance of international peace and security in certain conflicts is the fault of the attitudes of the permanent members and not the fault of any defect in the text of the Charter. The power of the Council has been undermined due to the present political atmosphere as permanent members have started to take military actions unilaterally. This is done by the permanent members when they feel that their resolution might be vetoed.

It is true that the Council has been paralyzed on many occasions due to the special right of the veto of the big five. The big five have also interpreted the Articles of the UN Charter to justify their unilateral actions involving use of force without any express authorization of the Council thereby undermining the sanctity of the Council. This was evident in the way the United States interpreted Article 51 of the UN Charter to attack Iraq (2003) and Afghanistan (2001).

13. United Nations Security Council (UNSC) Res. 1368.
14. UNSC Res. 1373.

This however, cannot take away from the fact that the Council has also done exemplary work in maintaining and restoring international peace and security all over the world. The actions of the UN in Indonesia (1945); Korean crisis of 1950; Suez Canal Crisis of 1956 Rhodesian crisis (1966); Gulf War I (1991) and many others have led to the restoration of peace. The Council has also resolved many disputes without the use of force and thus bringing an end to hostilities like in the Palestine case in 1948 where the Council gave directions with aim of bringing an end to hostilities and the Corfu Channel case in which the Council referred the disputing parties (U.K. and Albania) to the ICJ.

War Against Terrorism: Effectiveness and Applicability of International Humanitarian Law

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INTRODUCTION

International Humanitarian Law (IHL) does not provide any clear definition of the terms 'terrorism' and 'war against terrorism'. Presently, the term 'war against terrorism' is used by conflict parties and others as a political weapon, to serve a certain agenda, but does not have any objective legal basis. Terrorist actions committed in the context of armed conflict are violations of IHL and the International Criminal Court is competent to hear such cases. IHL does not also constitute an obstacle to the fight against terrorism. War against terrorism seems to have a different dynamics as a government is fighting against a transnational group that does not mostly have any links with a state. The Geneva Conventions, 1977 states that terrorism as a concept is necessarily limited to non-state groups. It gives opportunity to the regular armed forces to carry out acts of terror. The global 'war against terrorism' has pitted United States of America (USA) and its allies against Al-Qaeda, and other non-state groups adopting irregular warfare strategies. After captured, suspected members are wearing no uniform and represent no sovereign state, posing problems for those holding them. This controversial treatment of terror suspects has been repeatedly highlighted by international media organizations and human rights groups. The example of Guantanamo Bay is undoubtedly reflective of the way that terrorists are treated in other, less visible parts of the world. The constraints of the Geneva Conventions are increasingly losing their effect on the use of force. The main challenge of IHL is determination of the legal status of an individual as to whether he is a terrorist or a combatant especially in non-international armed conflicts (NIAC) and in situations of self-determination. NIAC lies at the centre of the delicate balance that needs to be struck between IHL and anti-terrorism measures. 'Terrorism' is a phenomenon. Both practically and legally, war cannot be waged against a phenomenon, but only against an identifiable party to an armed conflict. For these reasons, it would be more appropriate to speak of a multifaceted 'fight against terrorism' rather than a 'war on terrorism'. Since the

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laws of war were last updated in 1977, there have been significant changes in the nature of armed conflict. Most recently, there has been the US campaign against global terrorism, which has overturned many of the assumptions on which IHL has traditionally rested. To be effective, certain limitations tied to the use of IHL must be overcome, relating notably to its scope of application. As the primary purpose of IHL is the limitation of chaos and human suffering, it should have the potentiality to address the anarchy and anguish caused by the war against terrorism. This study focuses on the adequacy of IHL in dealing with war against terrorism and terrorists.

TERRORISM AND WAR AGAINST TERRORISM

Generally, 'terrorism' is any act that aims to target innocents, causing terror and chaos. The Conventiou for the Prevention and Punishment to Terrorism, 1937 has defined *'acts of terrorism' as 'criminal acts directed against a state or intended to create a state of terror in the mind of particular persons, or a group of persons or the general public'*. The concept of terrorism may be controversial as it is often used by state authorities to delegitimize political or other opponents, and potentially legitimize the state's own use of armed force against opponents (such use of force may be described as 'terror' by opponents of the state).[1] At the same time, the reverse may aiso take place when states perpetrate or are accused of perpetrating state terrorism. The most controversial definition is the United Nation's (UN) definition that states that terrorism is *attempting to bring about political and/or social change by deliberately attacking civilians*. This definition has made it difficult especially in trying to differentiate resistance movements that oppose forms of occupation and a terrorist organization that both often use violence to obtain a political change. In some cases, the same group may he described as 'freedom fighters' by its supporters and considered to be terrorists by its opponents. Therefore, terrorism has been described variously as both a tactic and a strategy; a crime and a holy duty; a justified reaction to oppression and an inexcusable abomination.[3] Although at the international level, a comprehensive definition of 'terrorism' does not exist, various legal systems and government agencies use different definitions of terrorism in their national

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1. For example, the American definition of terrorism is; 'premeditated, politically motivated violence perpetrated against non combatant targets by sub national groups or clandestine agents while a terrorist group is defined as any group, or which has significant subgroups which practice international terrorism (international terrorism being terrorism involving citizens or the territory of more than one country'. See U.S. Code Title 22, Ch.38, Para. 2656f (d); Gertrude C. Chelimo, "Defining Armed Conflict in International Humanitarian Law", available at <*www.studentpulse.com*>, (viewed on 25 August 2014); Mutasem Awad, 'International Humanitarian Law and the War on "Terrorism", available at <*http://www.palestinercs.org/en/adetails.php?aid=15*>, (viewed on 25 August 2014).
2. Gertrude C. Chelimo, *'Defining Armed Conflict in International Humanitarian Law'*, available at <*www.studentpulse.com*>, (viewed on 25 August 2014).
3. See < *http://www.terrorism-research.com/*>, (viewed on 30 August 2014).

legislation.[4] Moreover, international community has been slow to formulate a universally agreed, legally binding definition of this crime. These difficulties arise from the fact that the term 'terrorism' is politically and emotionally charged.[5] IHL applicable in the armed conflict, whether international or non-international does not provide a definition of terrorism, but prohibits most acts committed in armed conflict that would commonly be considered 'terrorist' if they were committed in peacetime.

The 'War against Terrorism (WAT)' also known as the 'Global War on Terrorism (GWOT)' is a term which has been applied to an international military campaign that started after the 11 September 2001 terrorist attacks on the USA.[6] USA called on other states to join in the WAT asserting that "either you are with us, or you are with the terrorists." This resulted in an international military campaign to eliminate *al-Qaeda* and other militant organizations. The USA and many other North Atlantic Treaty Organisation (NATO) and non-NATO nations participated in the conflict.[7] The term 'WAT' is used today as a political weapon, to serve a certain agenda. The term itself is a fabrication to serve political goals outside the law. It is primarily used to shirk legal obligations, as there is no difference between those who perpetrate a 'terrorist act' and those parties that support such an act, as all are regarded as targets for 'anti terrorism' activities. The notion of a WAT has proven highly contentious, with critics charging that it has been

4. The United States Department of Defense defines terrorism as *"the calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological."* Within this definition, there are three key elements-violence, fear, and intimidation-and each element produce terror in its victims. The FBI uses this definition: "Terrorism is the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives." The US Department of State defines terrorism to be "premeditated politically-motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents, usually intended to influence an audience". Outside the United States Government, there are greater variations in what features of terrorism are emphasized in definitions. The United Nations produced the following definition of terrorism in 1992; "An anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby - in contrast to assassination - the direct targets of violence are not the main targets." Less specific and considerably less verbose, the British Government definition of terrorism from 1974 is "...the use of violence for political ends, and includes any use of violence for the purpose of putting the public, or any section of the public, in fear.".
5. Bruce Hoffman, *Inside Terrorism*, Columbia University Press. New York, 1998, p.32, available at <*http://www.nytimes.com/books/first/h/hoffman-terrorism.html*>. (viewed on 30 August 2014).
6. Marc Sassoli, *"Transnational armed groups and international humanitarian law"*, Program on Humanitarian Policy and Conflict Research, Harvard University, *Occasional Paper Series*, 2006, 6:1-50, p.5, available at *http://www.hpcrresearch.org/sites/default/files /publications/OccasionalPaper6.pdf*>.
7. ETA "Presidential Address to the Nation" (Press release). The White House. 11 September

exploited by participating governments to pursue long-standing policy for military objectives,[8] reduce civil liberties,[9] and infringe upon human rights. Among the most important elements of any international or non international armed conflict is the existence of specific parties who equally comply with the principles and rules of the IHL.

PROVISIONS RELATING TO TERRORISM UNDER IHL

In the interest of clarity, IHL still is expedient to divide the prohibitions laid down in humanitarian conventions into two categories: (i) rules which restrict methods and means of warfare and (ii) rules for the protection of persons in the power of the adversary against arbitrary acts and violence.[10] According to the Fourth Geneva Convention, collective penalties and likewise all measures of intimidation or of terrorism are prohibited[11], while Additional Protocol II prohibits 'acts of terrorism' against persons not or no longer taking part in hostilities. The main aim is to emphasize that neither individuals, nor the civilian population may be subjected to collective punishments, which, among other things, obviously induce a state of terror. Both Additional Protocols to the Geneva Conventions also prohibit acts aimed at spreading terror among the civilian population.[12] The subjective factor of intent to spread terror among the civilian population is always an indispensable element. The fact is that any

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2001; The phrase "War against Terrorism" was first used by US President George W. Bush on 20 September 2001. The Bush administration and the western media have since used the term to argue a global military, political, lawful, and conceptual struggle against both organizations designated as terrorist in nature and regimes accused of supporting them. It was originally used with a particular focus on Muslim countries associated with Islamic terrorism organizations, like al-Qaeda or like-minded organizations. The consequences of this war, however, went far beyond toppling the Taliban regime and hunting down Al Qaeda terrorists. One obvious consequence of the US-led attack on "terrorists" has been the effective green light given to other governments and regimes engaged in their own domestic "counter-terrorist" actions, particularly where these actions relate to Muslim minorities. The political logic of the war against terrorism seems to imply that because the terrorists do not, by definition, respect international conventions; anti-terrorist operations may therefore have a freer hand. See for more details: Morten Rostrup, War On Terror Ignores International Humanitarian Law , available at
< *http://www.digitalnpq.org/global_services/nobel%20laureates/10-18-02.html* >,(viewed on 20 August 2014).

8. George Monbiot, "A Wilful Blindness" ("Those who support the coming war with Iraq refuse to see that it has anything to do with US global domination"), available at <*monbiot.com*>, reposted from The Guardian, 11 March 2003,(viewed on 28 May 2007).
9. Ryan Singel, "FBI Tried to Cover Patriot Act Abuses With Flawed, Retroactive Subpoenas, Audit Finds", available at <*Wired.com*> (viewed on 13 February 2012).
10. Hans-Peter Gasser, 'Prohibition of Terrorist Act in International Humanitarian Law', in M.K Balachandran and Rose Vergese (ed.), *Introduction to International Humanitarian Law*, ICRC, NewDelhi, 1999, p.231.
11. Article 33 and Article 4, The Fourth Geneva Convention.
12. 'The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited' (API, Article 51 and Article 13 (2) and APII, (2)).

military operation or indeed any threat of military measures is bound to have a terrorizing effect on unprotected civilian. It follows that in international armed conflict, any recourse whatsoever to terrorist methods of warfare is absolutely inadmissible. Additional Protocol I also states that terrorist attacks against civilians causing serious injury to death are grave breaches and are to be regarded as war crimes.[13] The rules of IHL apply equally to all parties to an armed conflict. It does not matter whether the party concerned is the aggressor or is acting in self-defence. Also, it does not matter if the party in question is a state or a rebel group. Accordingly, each party to an armed conflict[14] may attack military objectives but is prohibited from direct attacks against civilians. Although IHL limits parties in their operations against military and civilian targets during armed conflicts, which bans the most effective means at their disposal - terrorization of the general public and attacks directed at civilians. This provision is meant to significantly reduce the advantages terrorist organizations enjoy in asymmetric wars. Similarly, Additional Protocol I prohibits excessive incidental damage to civilian targets in relation to the concrete and direct military advantage anticipated,[15] indiscriminate attacks,[16] and perfidy.[17] It also bans the disguise of terrorists as civilians, the use of protected bodies or regular armies' symbols and most of the strategies of attack employed by terrorists.[18] The provisions of Common Article 3 and the Additional Protocol II bind parties to non-international armed conflict. Under international law, non-state actors are also bound by customary IHL norms when they become a party to an armed conflict.[19] The Appeals Chamber of the Special Court for Sierra Leone held as follows:

'--- it is well settled that all parties to an armed conflict, whether

13. Article 85 of Additional Protocol I.
14. Article 51(2) of Additional Protocol I to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) reads as follows - "*The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.*"
15. Article 51(5) of Additional Protocol I.
16. Article 51(4) of Additional Protocol I.
17. Article 37 and 38 of Additional Protocol I.
18. Other examples of the reducing of this asymmetry are the prohibitions on attacks on civilian objects (article 52(1) of Protocol I), attacks on non-defended localities (article 59(1) of Protocol I) and attacks on objects indispensable to the survival of the civilian population prohibition (article 54 of Protocol I).
19. While wars were traditionally fought between states, most armed conflicts after 1945 were internal (such as civil wars) and involved non-state armed groups. Against this background, rules that bind parties to non-international armed conflicts, including non-state actors, were codified in Article 3 common to the Geneva Conventions of 1949 (Common Article 3) and in the Second Additional Protocol of 1977. Some of these rules have become customary IHL norms, such as those contained in Common Article 3. Moreover, additional customary IHL norms applicable to non-international armed conflicts developed over the years.

states or non state actors, are bound by international humanitarian law, even though only states may become parties to international treaties."[20]

A comprehensive study published in 2005 by the International Committee of the Red Cross (ICRC) identifies all existing customary IHL norms, and specifies in which type of armed conflict they apply.[21] Interestingly, a large number of the customary norms identified in the study are applicable in both international and non-international armed conflicts.[22] According to the Additional Protocol I, members of the armed forces of each party to an international armed conflict have 'the right to participate directly in hostilities.'[23] By contrast, the provisions of the Additional Protocol II do not explicitly grant fighters of a non-state armed group the right to take up arms against the state.[24]

SCOPE AND APPLICATION OF IHL ON WAR AGAINST TERRORISM

Terrorist acts committed only during the situation of armed conflict[25] fall within the scope of application of IHL. IHL have been designed to regulate mainly wars

20. *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, para. 22.
21. The study was published in two volumes in *Customary International Humanitarian Law*, eds., Jean-Marie Henckaerts and Louise Doswald-Beck (ICRC and Cambridge University Press, 2005) (ICRC Study on Customary IHL). Conveniently, a list of the norms identified in the study is included in Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law - Annex: List of Customary Rules of International Humanitarian Law," 87 *Int'l Rev. Red Cross* (2005), 198 (Annex to ICRC Study on Customary IHL). The ICRC, an organization based in Geneva, is considered the "guardian" of IHL. The four 1949 Geneva Conventions and their two 1977 Additional Protocols grant the ICRC the right to carry out activities such as bringing relief to wounded, sick or shipwrecked military personnel, visiting prisoners of war, re-establishing contact between members of families separated by conflict, aiding civilians, and ensuring that those protected by humanitarian law are treated accordingly. The ICRC was responsible for the initial drafting of the four 1949 Geneva Conventions and their two 1977 Additional Protocols.
22. It is also noted that the Rome Statute illustrates that most of the important IHL norms applicable to international armed conflicts are also applicable to non-international armed conflicts. The Rome Statute distinguishes between war crimes (serious IHL violations) committed during international armed conflicts and those committed during non-international armed conflicts. A comparison between these sets of crimes shows few substantial differences.
23. Article 43 (2) of Additional Protocol I.
24. Still, it can be argued that consistent with the principle of distinction, customary IHL norms do not prohibit the targeting of state forces by members of a non-state actor which is engaged in an armed conflict with the state. See: Ben Saul, 'Terrorism and International Humanitarian Law', Legal Studies Research Paper, No. 14/16, February 2014, available at *http://ssrn.com/abstract=2394300*, accessed on 7 September 2014; Ben Saul, 'Terrorism and International Humanitarian Law' in Ben Saul (ed), *Research Handbook on International Law and Terrorism*, Edward Elgar, Cheltenham, 2014, chapter 13.
25. The term 'armed conflict' as defined in international Law covers any conflict, between states or within a state, which is characterised by open violence and action by armed forces.

between states, and their relevancy to the war on international terror is restricted to acts committed in the context of national or international armed conflicts. International or internal situations which do not bear the essential characteristics of armed conflicts, although marked by collective violence, consequently do not come within the scope of IHL, such as situations of internal strife, riots and violent repression etc. It is a basic principle of IHL that persons fighting in armed conflict must, at all times, distinguish between civilians and combatants and between civilian objects and military objectives. The 'principle of distinction', as this rule is known, is the cornerstone of IHL. War against terrorism is sometimes conducted between governments and elements that act within their territories in ways that do not always amount to international armed conflicts,[26] thus rendering a substantial portion of the humanitarian law inapplicable. Acts of terror are not always governed even by the limited corpus of laws that refers to non-international armed conflicts. Sometimes armies have difficulties observing the principle of discrimination between military and civilian objectives, since terrorist organizations consist of a few distinct military targets.[27] Sometimes, terrorist organizations are difficult to deter. The possibility of terrorist groups being defeated solely by military action is reduced because it is difficult to assess their magnitude. This is true because of several factors: these groups usually do not operate within geographically defined areas, do not defend industrial installations, are not committed to the warfare of a civilian population, operate largely within 'gray zones,'[28] are well camouflaged within their environment and are embodied in an ideology rather than in any particular institution.[29] Since a state can not make a credible threat of retaliation to a terror attack that exceeds its 'zone of tolerance,' the war on terror renders the logic of

26. Regarding the argument that most acts committed by states in the context of the war on international terror do not amount to international armed conflicts as defined by international law, see G. Rona, Interesting Times for International Humanitarian Law: Challenges from the "War on Terror", 27 *The Fletcher Forum of World Affairs* 55 (2003); *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*. Report prepared by the International Committee of the Red Cross, Geneva (September 2003).

27. For an elaborated discussion of the war on terror's unique characteristics, and the reasons for which those characteristics hinder the implementation of humanitarian law in its context, see A. Roberts, Counter-Terrorism, Armed Force and the Laws of War, *44 Survival 13* (2002).

28. The term "gray zones" in this context refers to areas such as parts of Afghanistan, Somalia and Pakistan where no effective control is exercised.

29. Regarding the argument that Al-Qaeda wears a form of ideology more than a substantive existence, see J. Burke, Al-Qaeda: casting a shadow of terror, London, 2003. Admittedly, the removal of terrorist organizations' leaders could permanently or temporarily impede their operational capabilities, as happened with the apprehension of PKK leader Abdullah Ocalan by Turkey in 1999, or with the apprehension of Abimael Guzman, leader of the "Shining Path", in Peru in 1992. However, those organizations evolved around the charismatic figures of their leaders. It is doubtful whether highly decentralized groups such as Al-Qaeda, which is comprised of multiple terrorist cells and is based on ideology rather than a personality cult, would be gravely affected by actions directed against its leaders.

Cold War. Terrorist organizations are expected to employ their full power during their first strike,[30] knowing that retaliation cannot effectively be directed at them by the attacked state.[31] The new reality therefore lacks a steady equilibrium, meaning that humanitarian law treaties are unenforceable in this context.

A. DEBATE RELATING TO PARTIES OF ARMED CONFLICT

A central element of an armed conflict is the existence of 'parties'[32] to the conflict. Most of the terrorist attack in the world is perpetrated by loosely organized groups (networks), or individuals that, at best, share a common ideology. On the basis of currently available factual evidence it is doubtful whether these groups and networks can be characterised as a 'party' to a conflict within the meaning of IHL. Even if IHL does not apply to such acts they are still subject to law. Following the attacks of 9/11, the USA administration started the war. According to the National Security Strategy of the United States, the enemy of this war is not a single political regime or person or religion or ideology, but terrorism. It seems that the WAT is very strategic and significant. In fact, 'terror' or 'terrorism' cannot be a party to an armed conflict[33] and one cannot be at war with terrorism *per se*, for terrorism is a tactic, a method.[34] In fact, by combing the two into dubious notion of WAT, the USA administration is seeking to create a gray zone outside the ambit of law.[35] The issue of protecting civilians is at the center of the humanitarian challenge today because armed groups and armies try to avoid direct confrontation and find soft targets, but the fact that 'civilians are the soft target of war' is not new at all.[36]

30. Depending on tactical considerations, which could temporarily limit the power of the attack.
31. The US attack in Afghanistan, following the events of September 11th 2001, constitutes an exception to this proposition. However, two remarks should be made in this regard. First, the American attack's effectiveness in neutralizing the threat of Al-Qaeda and apprehending its leaders is subject to debate. Second, the elimination of the only sheltering regime of the organization prevents the repetition of such a concentrated large-scale military offensive.
32. The parties to an international armed conflict are two or more states (or states and national liberation movements), whereas in non-international armed conflict the parties may be both states and armed groups - for example, rebel forces- or just armed groups. In either case, a party to an armed conflict has a military-like formation with a certain level of organization and command structure and, therefore, the ability to respect and ensure respect for IHL.
33. Gabor Rona, "Interesting Times for International Humanitarian Law: Challenges from the War on Terror", *Fletcher Forum of World Affairs*, Vol. 27:2, Summer/Fall, 2003, p.60.
34. Dale T. Snauwaert, *"The Bush Doctrine and Just War Theory"*, *The Online Journal of Peace and Conflict Resolution*, 6.1, Fall, 2004, p. 122, available at< *www.trinstitute.org/ ojpcr/6_1 snau.pdf* > (viewed on 11 July 2014).
35. Irene Z. Khan, *"Global Security or Human Security? Recent Events in Perspective"*, *Journal of International Affairs*, Vol. 9, No. 1 & 2, June & December 2005, p.3.
36. Most of international humanitarian law has been developed in an era where mostly states and regular armies fighting each other, and that today's civilians are often at the center of conflict. They're the main target in some conflicts at the center in terms. Also, sometimes they're very much the actors of violence: those taking up arms and creating some difficulties to identify them as civilians. Now most of the conflicts are happening within a state, meaning that they are non-international armed conflicts. Nevertheless, there are international humanitarian laws applicable to it, which are mainly the additional protocols from 1977. So, the mere fact of a

B. INTERNATIONAL ARMED CONFLICT (IAC)

The rules of humanitarian law applicable to IAC are contained in the four Geneva Conventions (GC's I-IV) of 1949 and their Additional Protocol 1 of 1977. The scope of application of these rules is found in Common Article 2 of the four GC's.[37] This means that an IAC is one in which two or more states are parties. It should be noted that wars of national liberation have been classified as international armed conflict.[38] Art. 1(3) of Protocol I refer to this provision, bnt Art. 1(4) expands the field of application to national liberation wars, a provision vehemently opposed by the USA. Right to self-determination legalizes terrorism. In particular to say oppressed peoples are allowed to use any means to attain independence is liable to be misconstrued. The PLO,[39] KLA[40] and PKK[41] often summon up visions of fear, indiscriminate death and violent destruction. These national liberation movements[42] see themselves as

conflict opposing the state and non state armed groups has already been codified. It's not new, per se, but it creates some kind of legal asymmetry and practical problems because those non-international armed conflicts tend to be very polarized, radicalized. But a look at the history of international armed conflict, [there] were not, but sort of gentlemen parties. See: Jeremie Labbi, 'As Nature of Conflict Changes, Is International Humanitarian Law Still Relevant?' available at<*http://theglobalobservatory.org/interviews/721-as-nature-of-conflict-changes-is-international-humanitarian-law-still-relevant.html*>, (viewed on 6 September 2014).

37. API, Article 1.3 incorporate by reference GC Common Article 2 (Common article 2) on scope of application. Common Article 2 provides: 'In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.'
38. A war of national liberation is a conflict in which people are fighting against a colonial power, in the exercise of its right of self- determination. Whereas the concept of the right of self-determination is today well accepted by the international community, the conclusions to be drawn from that right for the purposes of humanitarian law and, in particular, its application to specific conflict situations are still somewhat controversial. Under Protocol I of 8 June 1977, *wars of national liberation* must also be treated as conflicts of an international character.
39. Palestine Liberation Organisation.
40. Kosovo Liberation Army.
41. *Partia Karkaren Kurdistan* - Kurdish Workers Party.
42. Regarding the term 'national liberation movement' see Sluka's comment on Jeff Sluka, "National Liberation Movements in Global Context" available at *www.tamilnation.org/cnfNZ96/jeffsluka.html*, accessed on 7 September 2014 - The use of the term 'national liberation movements' has political implications, particularly when the groups so named are generally referred to by states and the media as 'terrorists'. No one opposed to or critical of these movements calls them 'national liberation movements' because liberation (freedom) has positive value connotations for most people. Nowadays, in the conservative global New Right era we live in, most academics seem to prefer the term 'armed separatist (or secessionist) movements', which they claim is a more objective or neutral description ; It is to be noted that the present discussion does not attempt to address the issue of terrorism. Terrorism is an extremely controversial topic

'freedom fighters',[43] waging a war of national liberation[44] on behalf of their 'people' against an established oppressive government[45] to fulfill their legitimate right of self-determination.[46] Conflict between a national liberation movement and an established government is a unique form of conflict, creates many difficult legal questions. The major obstacle to the application of the status of belligerency to wars of national liberation is the reluctance of all States to admit that they have a serious conflict occurring within their borders. Prior to 1949, 'freedom fighters' were largely dealt with under the banner of municipal law. The Geneva Conventions of 1949 are, in principle, open only to States, they contain two provisions regarding accession to the Conventions or acceptance of the Conventions that could be of use to national liberation movements and allow for the application of the Conventions to wars of national liberation. According to the Common Articles 60/59/139/155[47]regarding accession and Common Article 2(3)[48] to the four Conventions, if the terms 'Power' or 'Powers' can be taken to encompass national liberation movements then these movements could accede to, or accept to be bound by, the Geneva Conventions. This was one of the more controversial issues to be dealt with at the 1949 Diplomatic Conference at Geneva

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that has defied definition - see Rosalyn Higgins, 'International Law and Civil Conflict' in *The International Regulation of Civil Wars*, Luard (ed.), 1972, p.9-14; Also see generally Walter Laqueur, *The New Terrorism*, Phoenix Press, London, 2001- While it is accepted that acts of terrorism have, at times, been committed during a war of national liberation and that a distinction must be made between an act of terrorism and a legitimate act of war committed during a war of national liberation, an indepth discussion of the phenemenon of terrorism falls outside the remit of this discussion.

43. Jeff Sluka, "National Liberation Movements in Global Context" available at < *www.tamilnation.org/cnfNZ96/jeffsluka.html* >, (viewed on 7 September 2014). Every nation people will defend its identity and territory from breakup and eradication. Facing absorption and subjugation, many nations have no other choice than to militarily resist the colonizing / conquering states. This is a defensive reaction. To defend their nations from being annihilated, many peoples have taken up arms and engaged in wars of national liberation.
44. A war of national liberation has been described as: the armed struggle waged by a people through its liberation movement against the established government to reach self-determination.
45. Jeff Sluka, supra note 43: National liberation movements are 'peoples' movements seeking freedom, independence, and / or autonomy from what are perceived as oppressive and usually 'alien' regimes. They are popular movements supported by whole communities of subjugated people, and depend on the active support of the population, mobilized by a revolutionary party or organisation.
46. It should be noted at the outset that identifying a war of national liberation can, in some instances, be quite difficult. This is mainly because States generally refuse to recognize a conflict as being a war of national liberation as this would mean that its governing policy was oppressive or racist or denying rights such as self-determination to its 'people'. It is important to note that a war of national liberation is one fought on behalf of, and by, the citizens of a State against the State. It is groups of citizens themselves that organise national liberation movements in an attempt to, for example, bring about a change in government and policy, as in South Africa, or to secede and form a new country.
47. From the date of its coming in force, it shall be open to any Power in whose name the present Convention has not yet been signed, to accede to this Convention.
48. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

whose goal was to revise the Geneva Conventions. While traditional international law had always held that internal conflicts were to be dealt with only under municipal law, one of the aims of the 1949 Conference was to bring non-international conflicts within the jurisdiction of the laws of war. In the year prior to this Diplomatic Conference the ICRC prepared the Draft Conventions for the Protection of War Victims and submitted them to the 17th International Red Cross Conference at Stockholm. These Draft Conventions saw a 4th paragraph being added to Common Article 2, which stated:

> *'In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no way depend on the legal status of the Parties to the conflict and shall have no effect on that status'.*[49]

Sometimes conflict with a non state actor extends beyond the borders of one state. In this case, the Geneva Conventions is not applicable. Some activities of (and against) transnational armed groups are nevertheless covered by the law of international armed conflicts, including all hostilities directed against the armed forces or the territory of one state by forces representing another state or acting *de facto* under the direction or control of that other state.[50] If IHL of international armed conflicts applies somewhere to a transnational armed group, it does not ensue that it applies to that group everywhere.[51] Indeed, what makes that law apply is the attitude of the states involved, not the nature or geographical scope of activity of the group. Until now, it has been regretted by some analysts and practitioners that once there was an international element to a conflict in a given territory, the entire conflict could not be classified as wholly international.[52] After 11 September 2001, the USA administration classified the 'WAT' as a

49. Pictet, *Commentary of the Geneva Conventions of 12 August 1949*, Vol. III, Geneva Convention Relative to the Treatment of Prisoners of War, Geneva, ICRC, 1960, 31.
50. See International Criminal Tribunal for the Former Yugoslavia, Judgement, Tadic, Appeals Chamber, July 15, 1999, paras. 116-144.
51. A transnational armed group, such as Al Qaeda in 2001 in Afghanistan, may well be under the direction and control of a state. IHL of international armed conflict will then apply (in Afghanistan it applied regardless because of the conflict between the United States and the Taliban, the latter representing, at the time, the *de facto* government of the country). Similarly, but more controversially, the law of international armed conflicts applies when a state is directing hostilities against a transnational armed group on the territory of another state without the agreement of the latter state (e.g., Israel in Lebanon in 2006, if we consider the acts of Hezbollah to not be attributable to Lebanon).
52. William K. Lietzau, *"Combating Terrorism: Law Enforcement or War?"*, in Michael N. Schmitt and Gian Luca Beruto, eds., *Terrorism and International Law, Challenges and Responses*, San Remo: International Institute of Humanitarian Law and George Marshall European Center for Security Studies, 2002, p. 80.

single worldwide IAC against a transnational non-state actor (Al Qaeda),[53] where the territorial boundaries of the conflict are undefined, where the beginnings are amorphous and the end undefinable, and, most importantly, where the non-state parties are unspecified and unidentifiable entities that are not entitled to belligerent status. Turning the whole world into a rhetorical battlefield cannot legally justify, though it may in practice set the stage for, a claimed license to kill people or detain them without recourse to judicial review anytime, anywhere. This is a privilege that, in reality, exists under limited conditions and may only be exercised by lawful combatants and parties to armed conflict. The targeted killing of suspected terrorists in Yemen in November 2002 by a CIA-launched, unmanned drone missile is a case in point. The killings are of dubious legality under humanitarian law for several reasons. First, unless the event is part of an armed conflict, humanitarian law does not apply, and its provisions recognizing a privilege to kill may not be invoked. The event must then be analyzed under other applicable legal regimes.[54] Second, even if humanitarian law applies, the legality of the attack is questionable because the targets were not directly participating in hostilities at the time they were killed,[55] and because the attackers' right to engage in combat is doubtful.[56] At the present

53. Since an international armed conflict under humanitarian law must be between two or more states. U.S. officials and other analysts have asserted that the global War on Terror is an international armed conflict even when it is not a conflict between states. For a legal explanation of the US position, see White House, Memorandum of February 7, 2002, Appendix C to Independent Panel to Review Detention Operations, Chairman the Honorable James R. Schlesinger to US Secretary of Defense Donald Rumsfeld, August 24, 2004, available at <*www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf*>; Anthony Dworkin, "Crimes of War Project, Excerpts from an Interview with Charles Allen, Deputy General Counsel for International Affairs", US Department of Defense, December 16, 2002, available at <*www.crimesofwar.org/onnews/news-pentagon-trans.html*>. For a critical assessment of the US position, see Marco Sassòli, 'Use and Abuse of the Laws of War in the 'War on Terrorism', 22 Law and Inequality: A Journal of Theory and practice (2004), pp. 198-203; Joan Fitzpatrick, "Speaking Law to Power: The War Against Terrorism and Human Rights", 14:2 *European Journal of International Law* (2003), p. 249; Jordan J. Paust, "War and Enemy Status after 9/11: Attacks on the Laws of War", 28 Yale Journal of International Law (2003), p. 325; and Catherine Moore, "International Humanitarian Law and the Prisoners at Guantanamo Bay", 7:2 *International Journal of Human Rights* (2003), p. 1; John B. Bellinger, 'Legal Issues in the War on Terrorism', available at <*http://www.state.gov/s/l/2006/98861.htm*>. (viewed on 6 September 2014).

54. Sweden's Foreign Minister, Anna Lindh, used the term "summary execution" and further stated: "Even terrorists must be treated according to international law. Otherwise, any country can start executing those whom they consider terrorists." Quoted in Walter Pincus, "Missile Strike Carried Out With Yemeni Cooperation; Official Says Operation Authorized Under Bush Finding," *Washington Times*, 6 November 2002, p.10.

55. Article 51.3, AP I; The U.S. position on this point is difficult to discern. The Yemen attack notwithstanding, the U.S. State Department remains critical of Israeli targeted killings of Palestinian militants. Press briefing by State Department Spokesman Richard Boucher, November 5, 2002.

56. The criteria of GC III, Article 4, that the United States invokes to deny POW status to detainees it deems "unlawful combatants" would also appear to apply to the CIA. The CIA is not part of the armed forces of the United States. Only members of the armed forces of a party to the conflict (other than medical personnel and chaplains) are combatants, entitled to participate directly in hostilities. API, Article 43.2.

time, the methods and means employed by the belligerents, the goals of the fighters and the nature of the parties involved in wars are quite different to the 'classical' warfare that took place in Europe and elsewhere.[57] Some conflicts that would be deemed as purely internal include large groups of fighters from abroad, financial and military backing from foreign governments, or incursions into and even occupation of foreign territory. 'Internal' armed conflicts are in reality often 'mixed' conflicts, that is, they take place largely within the territory of one state, but take place in an internationalised setting with a high level of foreign intervention. These conflicts both affect and are affected by the actions of neighbouring states and the international community at large. It is becoming increasingly difficult to categorise these conflicts as either international or non-international in character.

C. NON-INTERNATIONAL ARMED CONFLICT (NIAC)

A NIAC means fighting on the territory of a state between the regular armed forces and identifiable armed groups, or between armed groups fighting one another.[58] The rules applicable to NIAC are found in Common Article 3 to the GCs and in Additional Protocol II. The scope of application of these rules is also found in common article 3 and in Article 1 of Additional Protocol II.[59] It is now

57. Jed Odermatt, 'New Wars' and the International/Non-international Armed Conflict Dichotomy', available at <*www.isisc.org/dms/images/stories /PDF/Paper %20O dermatt. pdf*>, (viewed on 1 September 2014); See Kaldor, M., New and Old Wars: *Organised Violence in a Global Era*, Stanford University Press, 1999. However, one aspect of modern wars seems to distinguish them from conflicts of earlier eras, that is, their complex combination of international and internal elements. Modern wars are rarely categorsised as being purely 'international' or purely in 'non-international' in character, but are rather a mixture of internal and international conflict, taking place in a globalised context, involving both state and non-state actors. This pattern of conflict is far more complicated than the Clausewitzian notion of warfare in which state-controlled armies battle for control of territory. In some cases, the state is battling rebels who wish to take control of the state or secede from it, in others there is a struggle over control of natural resources or is fuelled by ethnic hatred. In reality, the modern war is often a mixture of all of these: profit making, criminal activity, foreign intervention and ethnic conflict. The one thing common to these conflicts, however, is that the civilian population is often subject to gross human rights violations; To some, the difference between 'old' and 'new' wars is over-stated, arguing that the so-called 'new' conflicts simply represent a return to normal patterns of armed conflict after the end of the Cold War. See for more details: Kalyvas, S., "New' and 'Old' Civil Wars: A Valid Distinction?", *World Politics*, vol.54, 2001, p.99-118.

58. Common Article 3, Geneva Convention, 1949; To be considered a non-international armed conflict, fighting must reach a certain level of intensity and extend over a certain period of time.

59. AP II: Part I. Scope of this Protocol: Art 1. Material field of application.
1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its

beyond doubt that these rules contained in Common Article 3 represent customary international law. They apply in any armed conflict, irrespective of whether it is international or non-international in character.[60] In reality, however, the lack of definition of NIAC has simply allowed states to deny that the Article applies to their conflict, for instance, by arguing that the fighting has not reached the level of intensity required for being considered an 'armed conflict'.[61] It is also difficult to ascertain, especially in the light of modern conflict, what 'not of an international character' entails. The majority of today's armed conflicts take place within the territory of a state: they are conflicts of a non-international character. Common Article 3 of Geneva Conventions is binding upon 'each party to the conflict', i.e., the non-state armed group as much (and as equally) as the government side.[62] The Geneva Conventions did not envision transnational[63] armed conflict. Common Article 3 applies only to armed conflicts within the territory of one state. The 'not of an international character' limitation renders the provision inapplicable to all armed conflicts with international or transnational

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territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

60. For detail on the substantive legal differences between international and non- international armed conflict, see J. Pictet (ed.), *Commentaries on the Geneva Conventions of 12 August 1949, Vol. III: Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, p. 31, quoted in J. Stewart, "Towards a single definition of armed conflict in international humanitarian law: a critique of internationalized armed conflict", *International Review of the Red Cross 850* (2003), p. 319-323; L. Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, 2002, p. 273.

61. G. Werle, *Principles of International Criminal Law*, The Hague: T.M.C. Asser Press 2005, p. 287; Ben Saul, "Terrorism and International Humanitarian Law", Legal Studies Research Paper, No. 14/16, February 2014, available at < *http://ssrn.com/abstract=2394300* >, (viewed on 7 September 2014); Ben Saul, "Terrorism and International Humanitarian Law" in Ben Saul (ed), *Research Handbook on International Law and Terrorism*, Edward Elgar, Cheltenham, 2014, chapter 13

62. Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge: Cambridge University Press, 2002, p. 136; See for a detailed and nuanced analysis Noelle Quenivet, "The Applicability of International Humanitarian Law to Situations of a (Counter)Terrorist Nature", in Roberta Arnold and Pierre-Antoine Hildbrand, eds., *International Humanitarian Law and the 21st Century's Conflicts*, Lausanne: Edis, 2005, p. 31-57.; Marco Sassoli, "Transnational Armed Groups And International Humanitarian Law", Program on Humanitarian Policy and Conflict Research, Harvard University, *Occasional Paper Series*, Number 6, Winter 2006; Cherif Bassiouni, "Legal Control of International Terrorism: A Policy?Oriented Assessment", 43 *Harvard International Law Journal*, 2002, p. 100.

63. Contemporary non-international armed conflicts are often in character. That is, the armed conflict spans the territories of several states even though the armed hostilities are not international (there is only one state involved or all states involves are fighting on the same side). Again, the U.S.-led "war on terror" provides an instructive example. Al Qaeda is a transnational organization with operational cells in many countries. Any armed conflict between a state and such a group will likely take on a transnational character. The question is when the application of international humanitarian law begins and ends in such conflicts. See: Derek Jinks, "The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts", *Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law*, Cambridge, January 27-29, 2003, p.8.

dimensions.[64] A common feature of many internal armed conflicts is the intervention of armed forces of another state, supporting the government or the insurgents. The situation of an internationalized NIAC can occur when a war occurs between two different factions fighting internally but supported by two different states.[65] The Syrian Civil war is an example of an armed conflict that, while being 'internal' in nature, follows the pattern of internationalisation of new wars. The Assad regime is supported, not only by the armed forces of Syria, but also by fighters from Iran[66] and Hezbollah[67] as well as other foreign fighters and extremist groups. The war has spilled over into incidents with Syria's neighbours, notably violence in Turkey.[68] The pivotal role of foreign support in terms of diplomatic, financial and logistic assistance to either side is also typical of 'new wars'. None of this, however, has transformed the conflict in Syria to an international armed conflict under international law. The ICRC, for example, has classified parts of the conflict as 'non-international' in character, and the Commission of Inquiry on Syria treats the conflict as an internationalized NIAC. The more problematic legal question is whether the conflict is international or non-international in nature. The Appeals Chamber of ICTY summarised its position that 'in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending on the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other state'.[69] Where a non-state armed group is engaged in protracted armed violence with a state and is operating from across an international border. It is a NIAC with the

64. *Ibid.*,The drafters of the provision envisioned its application only in truly internal conflicts. In addition, the full text of the provision offers some support for this reading the Article covers only cases of "armed conflict not of an international character, occurring in the territory of one of the High Contracting Parties." Despite its textual plausibility, this reading of the provision is arguably problematic. First, this interpretation would create an inexplicable regulatory gap in the Geneva Conventions. On this reading, the Conventions would cover international armed conflicts proper and wholly internal armed conflicts, but would not cover armed conflicts between a state and a foreign-based (or transnational) armed group or an internal armed conflict that spills over an international border into the territory of another state. There is no principled (or pragmatic) rationale for this regulatory gap. Finally, this reading of the provision misconstrues the considerations that limit the application of Common Article 3.

65. The most visible example of an internationalized armed conflict was the conflict in the Democratic Republic of Congo in 1998 when the forces from Rwanda, Angola, Zimbabwe and Uganda intervened to support various groups in the DRC. See- Stewart, G.S. "Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict", (2003), 85(850):313-350, p.315; See also: Gertrude C. Chelimo, "Defining Armed Conflict in International Humanitarian Law", available at < *www.studentpulse.com* >. (viewed on 31 August 2014).

66. "Iranian soldiers fighting for Assad in Syria, says State Department official", *Washington Post*, 21 May 2013.

67. "Hezbollah chief defends group's involvement in Syrian war", *Washington Post*, 22 May 2013.

68. "Syria denies Turkey Reyhanli car bombs role", *BBC News*, 12 May 2013 available at: < *http://www.bbc.co.uk/news/world-middle-east-22499326* > (viewed on 3 August 2014).

69. *ICTY, Prosecutor v. Dusko Tadi?*, Appeals Judgement, IT-94-1-A, 15 July 1999, Para. 84.

associated rights and obligations.[70] Where a state is party to such a NIAC and conducts military operations in a second state on whose territory the non-state armed group is present, views differ as to the legal consequences. Some analysts construe this requirement to mean that the conflict must be limited to the territory of a High Contracting Party.[71] For this element alone, terrorist attacks on civilian targets in New York may suffice, but retaliation against alleged terrorists in Yemen, for example, may not.[72] This is not because Yemen is not a party to the GCs. Rather, it is because common article 3 is of questionable application to an isolated, targeted killing of persons outside of U.S. territory. According to the jurisprudence of the International Criminal Tribunals for the former Yugoslavia[73] and Rwanda,[74] as well as under the definitions of the newly established permanent International Criminal Court,[75] hostile acts must be 'protracted' in order for the situation to qualify as an 'armed conflict'. In fact, the Yugoslavia Tribunal has specifically stated that the reason for this requirement is to exclude the application of humanitarian law to acts of terrorism.[76] On the other hand, the Inter-American Commission on Human Rights says that intense violence of brief duration will suffice.[77] Whether or not the conflict needs be protracted, and whether or not intensity can take the place of duration, the beginning and end must be identifiable to know when humanitarian law is triggered, and when it ceases to apply.

D. LEGAL STATUS OF DETAINED PERSONS IN THE FIGHT AGAINST TERRORISM

The distinction between combatants and non- combatants is the main principle

70. See, for example, "How is the Term 'Armed Conflict' Defined in International Humanitarian Law?", International Committee of the Red Cross Opinion Paper, March 2008, available at: <*www.icrc.org/web/eng/siteeng0.nsf/html/armed-conflict-article-170508*?> open document; and the judgment of the ICTY in April 2008 in the Ramush Haradinaj case, paras. 49, 60.
71. Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p.31
72. For analysis of the legal consequences of the killings in Yemen, see Anthony Dworkin, "The Yemen Strike: The War on Terrorism Goes Global," *Crimes of War Project* (November 14, 2002), available at <*http://crimesofwar.org/onnews/news-yemen.html*>.(viewed on 5 April 2003).
73. *The Prosecutor v Dusko Tadic, Para* 70, p. 37 (1995).
74. *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, Para. 619 (1998).
75. The Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 dated 17 July 1998, 37 ILM (1998) 999-1019, Article 8.2(f) contains this requirement, which may be seen as an expression of the drafter's belief that "protracted" is a defining element of non-international armed conflict, or merely that ICC jurisdiction is triggered only in case a non-international armed conflict is protracted.
76. *The Prosecutor v. Zejnil Delalic (Celebici Camp case), Judgment*, IT 96-21, Para. 184, (1998).
77. See *Abella* Case, Inter-American Commission on Human Rights, Report No. 55/97, Case No. 11.137, November 18, 1997, paras. 155-156; Miles P. Fischer, 'Applicability of the Geneva Conventions to "Armed Conflict" in the War on Terror', *Fordham International Law Journal*, Volume 30, Issue 3, 2006, p. 24.

of IHL and there is no place for a third category here.[78] No civilian can be the subject mater of any attack during armed conflict. The Third Geneva Convention does not require that everyone who takes up weapons on a battlefield receive POW status if captured. Common Article 2 of the Conventions limits their scope to armed conflicts between two or more High Contracting Parties. Thus, the bulk of the Third Convention protections, including POW status, are limited to belligerents engaged in international armed conflict between States. If civilians directly engage in hostilities, they are considered 'unlawful' or 'unprivileged' combatants or belligerents (the treaties of humanitarian law do not expressly contain these terms).[79] Such acts are normally unlawful, but if carried out within the context of an international armed conflict by persons who possess combatant status and in accordance with the rules and principles of IHL, they are lawful actions.[80] They may be prosecuted under the domestic law of the detaining state for such action. Both lawful and unlawful combatants may be interned in wartime, may be interrogated and may be prosecuted for war crimes. Both are entitled to humane treatment in the hands of the enemy.[81] In NIAC, combatant status does not exist. Prisoner of war or civilian protected status under the Third and Fourth Geneva Conventions, respectively, do not apply.[82] Persons detained

78. Rule 1 of the ICRC Study makes a clear distinction between civilians and combatants. Article 5 of the 3rd Geneva Convention of 1949 provides that: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention *until such time as their status has been determined by a competent tribunal*". That clause was clarified by Article 45 Protocol I (1977).

79. Civilians who are not members of a state's armed forces, such as terrorists, are usually considered "unlawful combatants" or "unlawful belligerents. Despite the common conjecture that Geneva Convention IV applies to these elements, some of the protections included in it are not usually applied to "unlawful combatants". See K. Dormann, The legal situation of "unlawful/unprivileged combatants", 849 IRRC 45 (2003).

80. Dinstein "The Distinction between Unlawful Combatants and War Criminals" in Y. Dinstein (ed.) *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 103 at pages 103-106.

81. Article 4 of Convention III defines who is a prisoner of war (and by implication a combatant). Members of a terrorist group can by definition not be members of the regular forces of a state falling under Art. 4(A)(1) or (3) of Convention III. They could be members of "other militias ...[or] volunteer corps, ... including resistance movements belonging to a [State] Party to the conflict" falling under Art. 4(A)(2). This provision requires them, however, to fulfill collectively (i.e., as a group) several conditions, including distinguishing themselves sufficiently from the civilian population and respecting the laws of war. Even if Al Qaeda in Afghanistan could have been considered as a militia belonging to the state, its members nevertheless could have been denied prisoner of war status because Al Qaeda did not comply with the conditions such a militia must fulfill under Convention III, in particular the respect of the laws and customs of war. See Article 4(A)(2) of Convention III and, for a detailed discussion, Luisa Vierucci, "Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to which Guantánamo Bay Detainees are Entitled", 1 *Journal of International Criminal Justice* (2003), p. 392-95.

82. From an IHL perspective, the term 'combatant' has no legal meaning outside of armed conflict. The four Geneva Conventions apply to situations of IAC. It is the Third Geneva Convention which regulates the protection of lawful combatants upon capture by the enemy. Its procedures for determination of entitlement to prisoner of war status by a 'competent tribunal' in case of doubt are mandatory.

in relation to a NIAC waged as part of the fight against terrorism are protected by Common Article 3 to the Geneva Conventions.[83] As earlier said, USA declared that 'WAT' is an IAC, but they claimed that members of terrorist armed groups are 'unlawful combatants'.[84] Such a category of so-called 'unlawful combatants' does not exist in IHL. The IHL becomes applicable when the armed forces of a State are engaged in reasonably protracted hostilities with a foreign adversary or are in occupation of (a portion of) another State's territory. Consequently, the 'WAT', whatever else it is, is not an international armed conflict in a legal sense.[85] The Geneva Conventions legally do not apply to the WAT because no terrorist organisation is a nation-state and has not signed the treaties. The question of the status and treatment of the detainees held at the American naval base at Guantanamo Bay has generated a huge amount of controversy and has played and will continue to play a fundamental role in proceedings before United States Federal Courts.[86] Within this context, a number of questions require attention. These include whether the IHL provides for the possibility of the detention and prosecution of persons as 'unlawful combatants' or 'unlawful enemy combatants' without granting them prisoner of war status. Another related question is to the extent such a possibility exists, whether this would signify that such unlawful combatants would fall outside the scope of the applicability of the Geneva Conventions and to at least some degree of legal protection which flows from them. Other related questions include what the requirements are under the Geneva Conventions in relation to the determination of an individual's status as

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83. Members of organized armed groups are entitled to no special status under the laws of NIAC and may be prosecuted under domestic criminal law if they have taken part in hostilities. Unlawful combatants do not qualify for prisoner of war status. Their situation upon capture by the enemy is covered by the Fourth Geneva Convention if they fulfill the nationality criteria and by the relevant provisions of the Additional Protocol I, if ratified by the detaining power. All persons detained outside of an armed conflict in the fight against terrorism are protected by the domestic law of the detaining state and by international human rights law.

84. Marco Sassoli, "Transnational Armed Groups And International Humanitarian Law", Program on Humanitarian Policy and Conflict Research, Harvard University, *Occasional Paper Series*, Number 6, Winter 2006; Gabor Rona, "Interesting Times for International Humanitarian Law: Challenges from the War on Terror", *Fletcher Forum of World Affairs*, Vol. 27:2, Summer/Fall, 2003, p.65

85. The military operations conducted against the Taliban government and organized units of Al Qaeda in Afghanistan and the war in Iraq, both of which are said to be part of the overall worldwide struggle against terrorism, do qualify as international armed conflicts to which the 'laws and customs of war', including the notion of combatant status, must be applied. See: Common Article 2 of the four Geneva Conventions of 1949.

86 The status and treatment of unlawful combatants of the Guantanamo detainees and United States policy towards the Geneva Conventions has been the subject of intense media coverage in major international newspapers and news programs, as well as in academic journals and in books and articles on current affairs. The subject has also come before United States courts, several of which are still pending a final outcome. See inter alia, Seymour M. Hersh, Chain of Command: the Road from 9/11 to Abu Ghraib (2004); K. Dörmann, "The Legal Situation of Unlawful/ Unprivileged Combatants" in *International Review of the Red Cross* (IRRC) Vol. 85, March 2003, 45; L. Bomann- Larsen, "License to Kill? The Question of Just vs. Unjust Combatants", in Journal of Military Ethics, Vol. 3, issue 2 (2004) 142.

either an unlawful combatant or a civilian, and whether or not the procedures put into place by the USA Government meet these requirements.[87] The Third Geneva Convention permits the government to detain enemy combatants for the duration of a conflict. The indefinite detention of terrorist suspects at Guantanamo Bay is one example of an issue, which to a large extent flows from different interpretations of the Geneva Conventions and the concept of armed conflict.[88] Still, the increasingly ugly realities of armed conflict in the 21st century may require yet another revision in the IHL. After all, despite additions that protect those fighting for unconventional armies, the Geneva Convention still don't address a scenario like the so-called war against terrorism, in which combatants like al Qaeda have no national affiliation whatsoever.[89] In case of doubt whether persons having committed a belligerent act are combatants, Article 5(2) of Third Geneva Convention prescribes that they must be treated as

prisoners of war 'until such time as their status has been determined by a competent tribunal.' The USA established such tribunals in the Vietnam war and the 1991 Gulf War, but it argued that, in the case of those detained in Guantanamo and arrested in Afghanistan, while IHL of international armed conflicts applied, there is no doubt as to the status of the individuals.[90] If the member of a transnational terrorist armed group is a civilian covered by IHL of IAC or if the law of NIAC applies and if that member takes a direct part in hostilities, he loses protection against attacks, but only for the time of such participation.[91] Commentators dispute both what 'direct participation in the hostilities' is, and for how long a civilian thus participating loses immunity from attack.[92] Protected civilians may not be detained, except for two reasons. First,

87. Terry Gill and Elies van Sliedregt, "Guantánamo Bay: A Reflection On The Legal Status And Rights Of 'Unlawful Enemy Combatants'", available at <-http://www.utrechtlawreview.org >, (viewed on 1 September 2014).
88. When the coalition launched its campaign against Al Qaida and Taliban in Afghanistan in 2001, many countries fully supported the legal conclusion that a State may engage in an armed conflict with an international terrorist network such as Al Qaida. In the beginning of 2002 states joined the coalition fighting in Afghanistan. Back then, most agreed that they were engaged in an international armed conflict in Afghanistan. This conflict in their view - and in the view of the ICRC - ended in the summer of 2002.
89. Alex Markels, 'Will Terrorism Rewrite the Laws of War?', available at *< http://www.npr.o rg / 2005/12/06/5011464/will-terrorism-rewrite-the-laws-of-war>*, (viewed on 19 August 2014).
90. Donald Rumsfeld, *Fiscal Year 2003 Department of Defense Budget Testimony*, available at *< www.defenselink.mil/speeches/2002/s20020205-secdef2.html >*, (viewed on 4 September 2014).
91. Protocol I, Art. 51 (3), and Protocol II, Art. 13 (3).
92. See for different approaches Frits Kalshoven, "Noncombatant Persons", in Horace B. Robertson, ed., *The Law of Naval Operations*, 64 (1991), pp. 311-312; and A. R. Thomas and James C. Duncan, ed., *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, International Law Studies*, 73, Naval War College, Rhode Island, 1999, p. 484; Hans-Peter Gasser, "Protection of the Civilian Population" in Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflict*, New York: Oxford University Press, 1995, pp. 232-233; Lisa Turner and Lynn G. Norton, "Civilians at the Tip of the Spear", 51 *Air Force Law Review*, 2001, pp. 27 and 31; Michael E. Guillory, *"Civilianizing the Force: Is the United States Crossing the Rubicon?"*, 51 *Air Force Law Review*, 2001, p. 117 and 120.

detention is permissible under domestic legislation (or security legislation introduced by an occupying power), for the prosecution and punishment of criminal offences (including for having directly participated in hostilities). Second, civilians may be interned for imperative security, upon individual decision made in a regular procedure to be prescribed by the belligerent concerned and which must include a right of appeal.[93] Such civilians are civil internees whose treatment is governed by extremely detailed provisions of the Forth Geneva Convention and their case must be reviewed every six months.[94]

SUGGESTIONS AND CONCLUSION

From the above discussion, it is clear that IHL do not respond properly to the ambiguous nature of war against terrorism. The failure to classify a state of affairs as an 'armed conflict' has grave legal and humanitarian consequences.[95] The Geneva Conventions were drafted based on the experience of two World Wars. During that time, armed conflicts between states ended with one party raising the white flag and surrendering. The Geneva Conventions were not designed for the asymmetric conflicts of today. The fight against global terrorist organisations is fundamentally different. It is for instance crystal clear, that these organisations never will adhere to IHL. As already noted, common article 3 historically assumed that a conflict would be confined to the territory of the state experiencing civil war. On that restrictive approach, hostile acts by *Al Qaeda* fighters outside the primary territory of the conflict would not constitute part of the existing conflict. They could only be dealt with by domestic law enforcement measures, and transnational criminal cooperation through extradition and mutual assistance. In legal terms the fighting will therefore unavoidably be asymmetric. States has been fighting non-state actors as so called 'terrorists' for decades in many parts of the world. They do not fight as uniformed soldiers, but carry out clandestine operations with the sole purpose of intimidating through the killing of as many civilians as possible. And they do not necessarily give up fighting, even though they are faced with an overwhelming opposing force - or certain death. Therefore, it is clear that the Geneva Conventions do not address all the challenges of fighting terrorism. Some scholars, politicians, and journalists claim that IHL as it stands was developed at another time and is not adequate for the new challenges raised by the contemporary kind of conflict with transnational terrorist armed groups.[96] A new, Convention of Armed Conflict against International Terrorism (Convention V under Geneva Convention) needs to be enacted in order to regulate the conduct of coalition forces and the

93. Articles. 41-43 and 78, Geneva Convention IV
94. Id., Articles 79-135
95. A Duxbury, 'Drawing Lines in the Sand- *Characterizing conflicts for the purposes of teaching International humanitarian law', Melbourne Journal of International law,* 2007, volume 8: 1-14, p.10.
96. See, for instance the (then) British Defense Secretary John Reid in a speech of April 3, 2006, at Banqueting House, Royal Palace of Whitchall, available online at <*www.mod.uk/DefenceInternet/AboutDefence/People/Speeches/SofS/20thcenturyRules21 stc enturyConflict.htm*> (viewed on 10 April 2014); certain remarks of US Defense

treatment of captured international terrorists. This new form of warfare must have a new means of regulating conduct between forces. This new Convention should have provisions relating to protections for non-military enemy combatants, including the right to a military commission, the opportunity to pray and observe their faith, access to a detailed military defense counsel while imprisoned, access to adequate military facilities, and quarters that are habitable. The standards of IHL of IAC should govern the protection of 'civilians' while those governing NIAC should apply to the treatment of 'combatants'. A unique law covering all aspects of the struggle between states and transnational terrorist groups would presumably involve creating a new category of conflicts for which new rules should be devised. Unless one is prepared to lose the advances made by IHL of international armed conflicts in the last one hundred and forty years, the new law should not replace the old law altogether but simply apply to a new category of transnational armed conflicts. In addition, transnational terrorist armed groups may also be parties to IAC, and it is unnecessary to recall that they respect IHL. Targeted killings by the USA would not be authorised by IHL because in the absence of an armed conflict there, IHL does not apply. In state practice, strong opposition to USA drone strikes within the UN Human Rights Council may indicate that many states oppose the extension of non-international conflicts to such situations, and prefer the conventional restriction of common article 3 to a single state's territory. Also, the assumption underlying IHL is that it applies to non-international conflicts chiefly because the state has lost control of part of its territory and people. This is not the case in third states on whose territory an *Al Qaeda* fighter (or other terrorist) is occasionally found. Law enforcement will ordinarily be sufficient to address such threats - assuming the state in question is willing and able to respond appropriately.[97]

Within the scope of IHL, terrorism and terrorist attacks are prohibited under all circumstances, unconditionally and without exception. As in the case of any development of IHL, the aim, rather, should be to improve the protection of the actual and potential victims of the situations. The designation 'global war against terrorism' does not extend the applicability of humanitarian law to all events included in this notion, but only to those which involve armed conflict. IHL permits members of the armed forces of a state to engage in hostilities during an armed conflict. They are termed as 'lawful' combatant and are

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Secretary Donald Rumsfeld at a press conference of February 8, 2002, available online at <*www.defenselink.mil/news/Feb2002/t02082002 t0208sd.htm*>, (viewed on 15 April 2014) and White House, 'Press Briefing by Ari Fleischer' of January 28, 2002 available online at <*www.whitehouse.gov/news/releases/2002/01/20020128?11.html*>, (viewed on on 11 June 2014); D. Montgomery, "Geneva Convention's Gentility; Treaty Stresses Civil Treatment of Prisoners", *Washington Post*, 17 February 2002, p.1.

97. Ben Saul, *'Terrorism and International Humanitarian Law', Legal Studies Research Paper*, No. 14/16, February 2014, available at <*http://ssrn.com/abstract=2394300*>, (viewed on 7 September 2014); Ben Saul, 'Terrorism and International Humanitarian Law' in Ben Saul (ed), *Research Handbook on International Law and Terrorism*, Edward Elgar, Cheltenham, 2014, chapter 13.

privileged with the status of prisoners of war (POW) in cases of their capture. But if a civilian is involved in direct hostilities then he/she is termed an 'unlawful' combatant, and will not be accorded the POW status and will be prosecuted under domestic law. Similarly 'enemy combatants' or militias and mercenaries who are captured are entitled to humane treatment and prosecution either according to IHL or domestic laws. But facilities like the Guantanamo Bay detention facility contradict the prescribed principles. The detainees are labeled 'illegal' or 'unlawful enemy combatant' and are neither accorded POW status nor are covered by the Geneva Convention. In case of war against terrorism, the lines between IAC, internal armed conflict, terrorism and criminality are becoming increasingly blurred.[98] The key principle of 'proportionality' needs further definition. The first Additional Protocol requires attackers to balance the concrete and direct military advantage of an attack against the risk of harm to civilians. Decisions about what constitutes a legitimate military objective are particularly difficult in many contemporary conflicts, where the objective is often not the complete military defeat of an enemy state, but rather the attempt to force a particular regime to comply with certain specified requirements. The notion of a military objective itself needs to be made more precise.

98. Anthony Dworkin, 'Rethinking the Geneva Conventions', in Crimes of War, available at <*https://www.globalpolicy.org/component/content/article/163/28228.html*>, (viewed on 23 August 2014).

Shared Parentage in India

Mr. Vijay P Tiwari*

ABSTRACT

Children are the most important asset of a nation and the world. Children, by reason of their physical and mental immaturity, need special safeguards and care, including appropriate legal protection, before as well as after birth and that the children, for the full and harmonious development of their personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Lot of work has been done worldwide in respect of children; at the behest of United National after adaptation of Convention on the Rights of the Child in 1989. However, much more is required to be done, especially in the area of custody of those children whose parents are separated/ intending to separate. In most of the jurisdiction, the custody of such children is given either to father or mother keeping in view the best interest of the child. However, it has been realized, that children need both parents for their proper emotional, psychological and overall growth and development. This line of thinking has led to the concept of shared parentage, which is, now becoming popular in most of the jurisdictions of the world. This research article is a humble attempt to bring in light such provisions in brief and also suggest if the same may be adopted in India.

INTRODUCTION

Children are the most important asset of a nation and the world. However, they have not received proper attention at world level until November 20, 1989, when, the United Nations General Assembly adopted the Convention on the Rights of the Child.[1] Although some efforts were made in Geneva Declaration of the Rights of the Child of 1924, Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (articles 23 and 24) and International Covenant on Economic, Social and Cultural Rights (article 10) for the welfare of children. Convention on Rights of the Child was first comprehensive treaty that sought to address the particular needs of children and to set minimum standards for the protection of their rights. It is the first international treaty to guarantee civil and political rights as well as economic, social, and

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1. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

cultural rights to children.[2] The Convention changed the way children are viewed and treated - i.e., as human beings with a distinct set of rights instead of as passive objects of care and charity.[3] The convention has recognized in its preamble that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth" and "that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"[4]

The unprecedented acceptance of the Convention clearly shows a wide global commitment to advancing children's rights. There is much to celebrate as we mark the 25th anniversary of the Convention, from declining infant mortality to rising school enrolment, but this historic milestone must also serve as an urgent reminder that much remains to be done. Too many children still do not enjoy their full rights on par with their peers.[5] One problem, which is taking alarming shape, is the problem of custody of children of separated couples, due to divorce or otherwise.

When marriages break down, acidic and protracted combat often follow over the custody of minor children. Traditionally, the norm was to give the enstody of minor children particularly of children under seven, to the mother, considering that the welfare of the children is best protected with mothers. However, rightness of such decisions were questioned more often than not, since there was no proper research on whether mothers are psychologically fit to take care of the child or whether the psychological growth of the child will be better if the custody is given to the father.

The modern tendency in child custody cases is to avoid any decisions based on any priori assumption that for the welfare of the child the custody should be given to the mother. Increasingly judges show understanding and compassion in their decisions and have moved away from the earlier pattern of judgments which unwittingly tended in the words of Dr. Arnold A.

Hutschnecker to be cruel, stereotyped and void of any genuine psychological awareness of the child's needs or interests.[6]

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2. The Convention on the Rights of the Child, 1989, available at <*http://www.amnesty usa. org/our-work/issues/children-s-rights/convention-on-the-rights-of-the-child*>.
3. The Convention on the Rights of the Child, 1989, available at <*http://www.unicef.org/crc/*>.
4. *Ibid.*
5. *Ibid.*
6. Nadir Modi, *"Child Custody: Mother or Father"*, (2000) 2 SCC (Jour) 1, available at <*http://www.ebc-india.com/lawyer/articles/94v3a3.htm*>.

In India, the courts have given paramount importance to the welfare of the child and even the custody of minor was given to fathers and their families[7] For example in *Shoib@Shebu* v. *Sabir Ali*[8] the Allahabad High Court held that the welfare of the child would be kept in view before deciding the custody. In that case in fact the son who was only four years of age was allowed to remain with the father since the court considered that the paramount interest of the four year old son was in keeping him with the father and the father's family.

Similarly in *Bilkis w/o Munne Khan v. Munne Khan*[9], a Mohammedan wife who was living separately from her husband filed a petition for custody of her minor son aged about two and half years. It was found that she neglecting the child even when their relations were cordial. On these facts the court held that it was not in the interest of the welfare of the child though the child was of tender years to give his custody to the wife. Custody of the child therefore was given to the father.[10]

Also in *Y. Varalakshmi v. Kanta Durga Prasad*[11], the Division Bench of the Andhra Pradesh High Court gave custody of five year old boy to the father in the interests of the child. The child had been happily residing with the father and his parents when the mother applied for custody. The trial court refused custody to the mother and the appellate court upheld the refusal.

In *Lekh Raj Kukreja v. Smt Raymon*[12], the Court was concerned with the question of the interim custody of a minor male child aged 11 years. The trial court gave the custody to the mother on the ground that the minor son would then be in the

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7. In India, The Guardians and Wards, Act, 1890, is a comprehensive legislation dealing with the appointment of a person as a guardian of a minor both in respect of his/her person or property. The Act makes it possible for any person to apply to be appointed as a guardian of a minor. The Act also provides for appointment of joint guardians, both in respect of the person and property of the minor. Section 17 of the Act, which is a key provision as regards appointment of a guardian, provides that a court shall be guided by what appears in the circumstances to be for the welfare of the minor. It further provides that the following matters will be regarded by the court as relevant for considering the welfare of the minor, namely; a) Age, sex and religion of the minor, b) The character and capacity of the proposed guardian, c) His nearness of kin to the minor, d) The wishes if any, of a deceased parent, and e) Any existing or previous relation of the proposed guardian with the minor or his property. If the minor is old enough to form an intelligent preference, the court may consider that preference while appointing the guardian. The Hindu Minority and Guardianship Act, 1956, provide in Section 8(5) that the Guardians and Wards Act shall apply in respect of an application under this Act. Section 6 of the Act enumerates the classes of natural guardians of a Hindu minor. Further, Section 13 of the Act provides that the welfare of the minor will be the paramount consideration. It is evident both from the scheme of the legislations and the decisions that have been rendered on the issue of fitness of a parent to be the guardian, that guardianship is a matter to be entrusted to either one of the parents or any other kin of the minor.
8. 1986 (II) DMC 505 at 506 (All. HC).
9. 1987 (32) M.P.L.J. 430.
10. *Supra* n.7.
11. (1989) 1 *DMC* 379.
12. 1989 (38) *DLT* 137.

company of his sister whose custody was with the mother. In revision it was held that the father was the natural guardian and that the welfare of the child also demanded that he should be in the custody of his father especially as the child himself also showed an inclination to stay with the father.[13]

On the same lines, in *Tara Chand Mavar v. Basanti Dev*[14], the Division Bench of the Rajasthan High Court in appeal reversed the decision of the Family Court giving custody of a seven year old minor son to his mother stating that sentimental considerations in favour of the mother ought not to prevail over the welfare of the minor where the father was a fit person to be a guardian and in the opinion of the Court it was in the interest of the minor son that he should be with the father and the father's family.

In *Shailaja J. Erram v. Jayant V. Erram*[15] once again the same question was decided by a Bench of the Bombay High Court in the same manner. In this case the mother was a working woman and remained outside the home until 4 p.m. The minor - a son - expressed his desire to reside with his father. The Court found that the minor was getting his education properly and that the aged parents of the father were in a position to look after the minor for the whole of the day. In these circumstances the Court came to the conclusion that the welfare of the minor demanded that he should be with the father and his family and not with the mother.[16]

Above decisions are selective and do not suggest that in every case, or in most cases, the best interest of the child is served when his custody is given to father or his family. Any such proposition would be as unjust and unsupportable as the opposite proposition viz. that in every case, or in most cases, the custody of the minor should remain with the mother. However, the face of child custody arrangements is changing. Numerous countries across the globe have adopted a preference for shared parentage systems over sole custody arrangements for child custody disputes post-divorce.[17] This trend has arisen largely in a response to changing familial roles (male care takers taking on more child rearing responsibilities) as well psychological studies revealing that the involvement of both parents in child rearing is preferable to sole custody arrangements.[18] But it must be noted with care that, such preferences for shared custody are often balanced with the "best interest of the child standard". The "best interest of the child" standard is increasingly utilized as the tool to evaluate child custody

13. *Supra* n.7.
14. 1989 (1) *DMC* 402 (Raj).
15. 1990 (2) *Mah LR* 492.
16. *Supra* n.7.
17. E.g. Australia, Family Law Amendment (Shared Parental Responsibility) Act, Section 61 DA (2005); Netherlands, Civil Code, Article 247 (2009).
18. Glover, R. and Steel, C., *"Comparing the Effects on the Child of Post-Divorce Parenting Arrangements, Journal of Divorce"*, Vol. 12 No. 2-3 (1989).

arrangements in many nations, particularly those who are signatories to the Convention on the Rights of the Child.[19] It requires family courts to consider the well-being of the child as paramount.

SHARED PARENTAGE - THE CONCEPT AND BACKGROUND

While considering the issue of the custody of a child, the best interest of the child is seen in a number of jurisdictions across the globe. According to the Convention on the Rights of the Child, "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" The Convention goes on to state that a child should be separated from his or her parents if there is "abuse or neglect of the child by the parents".[20]According to the United Nations Human Rights Commission, the "best interests of the child" is a proxy for the "well-being of a child" based on a variety of circumstances laid out by the Convention.[21] Welfare, as a decision criterion, is generally flexible, adaptable and reflective of contemporary attitudes regarding family within society.[22] However, there are two main criticisms of the best interest of the child standard. *First*, it is unpredictable and information intensive. Parents who are divorcing are thus left guessing in regard to how the court will handle their child custody dispute; this can lead to unnecessary pre-court bargaining that may indeed be harmful to both child and parents. This could be resolved by a more predictable rule based standard. However, a rule based standard is likely to be rigid and not consider the individual circumstances of each case. *Second*, the best interest of the child standard primarily focuses on the predicaments of the child rather than including the feelings and intentions of the parents. The parents are also actors within the family who have rights and their own welfare.[23] It would not be out of place to mention that in shared parentage, guardianship of the child is given to both the parents - in some jurisdictions only legal and in others both legal and physical.

SHARED PARENTAGE V/S SOLE CUSTODY ARRANGEMENTS

New researches on shared parentage indicate that shared parentage arrangements seem to be a better option for children. In a 1989 study of "intact families", shared parentage agreements and sole custody arrangements, children in shared parentage families fared better in regard to family relationships and self-understanding.[24]Similarly, a study in 1991 found that children in shared

19 The Convention on the Rights of the Child, Art. 3, (1989).
20 *Ibid*, Article 9.
21 UNHCR Guidelines on Determining the Best Interests of the Child, (2008).
22 Gilmore, Stephen, *Great Debates: Family Law*, Palgrave Macmillian, (2014) pp. 76-83.
23 Law Commission of India , Consultation Paper on Adopting a Shared Parentage System in India, 2014, available at < *http://lawcommissionofindia.nic.in/ Consultation%20 Paper%20 on%20Shared%20Parentage.pdf* >.
24 *Ibid.*

/joint custody families had lower incidents of misbehavior than children in single maternal custody families.[25] In a 1996 study, researchers found that children in shared parenting arrangements had higher grades, more school efforts and decreased prevalence of depression in comparison to sole custody families.[26] More recently, a study on the adjustment of children in joint-custody versus sole-custody arrangements found that children in joint physical or legal custody were better adjusted than children in sole custody arrangements.[27] On the other hand, several studies have shown competing information with regard to whether children (and families) fare better in sole or joint custody homes.[28] The practice being followed in some important jurisdiction is as follows:

UNITED STATES & CANADA

There are generally two forms of joint custody in the United States: Joint legal custody and joint physical custody. Joint legal custody, as defined for example in the State of Georgia, "means both parents have equal rights and responsibilities for major decisions concerning the child, including the child's education, health care...." Joint physical custody, as defined in Georgia, "means that physical custody is shared by the parents in such a way as to assure the child of substantially equal time and contact with both parents". Thirty five states in the United States have a presumption or strong preference for joint custody however; statutes delineate the circumstances in which such a presumption is resolutely disavowed. For example, the State of Idaho notes that "[T]here shall be a presumption that joint custody is not in the best interests of a minor child if one (1) of the parents is found by the court to be a habitual perpetrator of domestic violence".[29] The State of New York has several requirements regarding awarding joint physical custody. The Braiman rule requires that for orders of joint physical custody, there should be "relatively stable, amicable parents, behaving in a matured civilized fashion" and that such joint arrangements are prohibited where the parents are antagonistic to each other and demonstrate an inability to cooperate. Similarly in the District of Columbia, such a rebuttable presumption in favor of joint custody is extinguished upon a finding by a preponderance of the evidence that an "intra-family offense" (e.g. "child abuse", "child neglect", "parental kidnapping") has occurred[30]. In Canada under the Divorce Act, the court may grant an order of joint custody, however, such an

25. Rockwell-Evans, Kim Evonne, *"Parental and Children's Experiences and Adjustment in Maternal Versus Joint Custody Families" Doctoral dissertation,* 1991. North Texas State U.
26. Buchannan, M. & Dornbusch, *Adolescents After Divorce,* Harvard University Press, Buchannan, M. & Dornbusch, *Adolescents After Divorce,* Harvard University Press, 1996.
27. Bauserman, R., *"Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review", Journal of Family Psychology,* Vol. 16, No. 1, (2002), pp. 91-102
28. Julie Poehlmann, *"Representations of Attachment Relationships in Children of Incarcerated Mothers," Child Development* 76, no. 3 (May/June 2005): 679-696
29. Idaho, Title 32, Chapter 7, 32-717B, Joint Custody.
30. *Supra* n.24.

order must be "in the best interests of the child", it should take into account past conduct if "relevant to the ability of that person to act as a parent of a child", and "take into consideration the willingness of the person for whom custody is sought to facilitate such contact". The majority of States in the United States have a common ground in regard to the decision making power of each parent, with neither parent having a more advantageous control for joint decisions. However, some states allow for the parent with physical custody to have the ultimate responsibility in disputes.[31]

AUSTRALIA

Australia has a presumption of shared equal parental responsibility when devising parenting orders post-divorce. However, this presumption is limited by several factors: abuse of the child or another child, family violence, and the best interests of the child standard. The shared responsibility presumption does not address amount of time spent with each parent, but merely responsibility. Australia allows for expansive and detailed parenting plans that can deal with a wide variety of subjects, such as, the communication a child is to have with another person or other persons, the process to be used for resolving disputes about the terms or operation of the plan and "any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child". However, the Act repeatedly states, the "best interests of the child" is the "paramount consideration". Furthermore, Australian family courts rarely award joint physical custody in post-divorce arrangements. The reason being, that courts have developed a detailed list of preconditions for such shared physical custody. Such pre-conditions include: geographical proximity, compatible parenting, and ability of the parents to supervise the child, child's adaptability, mutual trust, co-operation and good communication. Furthermore, parents who wish to secure a joint physical custody arrangement must also prove other conditions such as: degree of maturity, value, attitude and behavior of the parents, and openness of mind to communicate with the other parent.[32]

UNITED KINGDOM

The United Kingdom has specific requirements for awarding shared residence orders (joint custody arrangements). First, such an arrangement must represent the factual reality of the child's life.[33] The court will evaluate whether to award a shared residence order or the combination of a residence order and a contact order.[34] Family courts in the United Kingdom take into account several factors before awarding joint physical custody: welfare principle, the no-delay principle

31. *Ibid.*
32. *Supra* n.24.
33. United Kingdom, A joint residence: Parental responsibility (2008) EWCA civ 867
34. United Kingdom, K (shared residence order) (2008) 2 *FLR* 380.

and the no-order principle.[35] The welfare principle includes several factors which are to ensure both the welfare of the child as well as consistency in the State. These factors include: "the ascertainable wishes and feelings of the child concerned, his physical, emotional and educational needs, the likely effect on him of any change in his circumstances, his age, sex, background and any characteristics of his which the court considers relevant, any harm which he has suffered or is at risk of suffering, how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs, and the range of powers available to the court under this Act in the proceedings in question". The no-delay principle notes that any delay in determining a question regarding the upbringing of a child shall be considered by the court as "likely to prejudice the welfare of the child".[36] The noorder principle holds that courts shall not make an order unless an order would be better for the child than making no order at all.[37]

SOUTH AFRICA

In South Africa, family courts are reluctant to award sole custody to either parent. Such an exclusive arrangement is usually resorted to only in the event that one of the parents is unfit for parenting or abused the child.[38] However, family courts in South Africa do not frequently award joint physical custody of children on the basis that such an arrangement would be disruptive for the child, particularly in cases in which the parents live far apart. Instead, courts grant joint custody (but not joint physical custody of the parent). South Africa offers a unique look at autonomy of the children in question for custody arrangements.[39] Of particular note, South Africa takes into account the opinions of the children in dispute. According to Chapter 10 of the South African Children's Act "Every child has a right to participate and have a voice".[40]

NETHERLANDS

In the Netherlands, there has been an increasing trend towards shared parentage. In 1996, the Dutch Parliament passed a law mandating that joint legal custody be the presumed standard for post-divorce parenting in the Netherlands. However, judicial decisions whittle down the force of this legislation.[41] From 2009, all

35. United Kingdom, Children Act, Part I, 2 (1989)
36. *Supra* n.37. a
37. *Supra* n.24.
38. Archard D and Skivenes M *"Balancing a child's interests and child' views"* 2009 *JCR*, page 2.
39. Barrat A and Burman S *"Deciding the Best Interests of the Child"* 2001 *SALJ*.
40. South Africa, Children's Act, Ch. 10 (2005) and see also: Law Commission of India, Consultation Paper on Adopting a Shared Parentage System in India, 2014, available at < *http://lawcommissionofindia.nic.in/Consultation%20Paper%20on%20Shared%20Parentage.pdf* >.
41. Shared parenting in the Netherlands', P. TROMP MSC, Dutch Father Knowledge Centre; (VKC), August 10, 013,< *file:///Users/aarti/Downloads/20130810-PeterTromp-Shared-Parenting-Netherlands.pdf* >.

divorces must be accompanied by a parenting plan based on the assumption of a shared parentage system.[42] The plan must include: the division in the care and parenting tasks, how to inform and consult each parent on parenting the children and the costs of caring and parenting the children.[43] If no plan can be agreed upon or the plan is not amenable, the judge has the discretion to send the divorcing parents to a mediator in order to acquire such a plan before continuing the divorce proceedings. The Dutch citizens appear to approve of such a trend with a 2012 poll revealing that 71% of those sampled, agree with co-parenting after divorce.[44]

THAILAND

There are generally two procedures for securing child custody arrangements in Thailand. The first is by mutual consent and the second, by the court.[45]Mutual consent is an option for previously married parents who have divorced by mutual consent, previously married parents who had an uncontested divorce, or unmarried couples in which the child is registered as the legitimate child of the father and the unmarried parents agree on the custody arrangement.[46] The court decides custody arrangements when, there was a contested divorce. In such cases, the court can award custody to the parents or to a third person as a guardian in lieu of the parents if it is in the "happiness and interest"[47] of the child.

SINGAPORE

Singapore family law requires the court to consider the best interests of the child. According to the Women's Charter,[48] the court may not make "any judgment of divorce or nullity of marriage or grant a judgment of judicial separation" unless the court is satisfied "that arrangements have been made for the welfare of the child and that those arrangements are satisfactory or are the best that can be devised in the circumstances" or "that it is impracticable for the party or parties appearing before the court to make any such arrangements".[49] The "welfare of the child" is the "paramount consideration" however, subject to this, the court shall consider the wishes of the parents and the wishes of the child.[50] The court may issue an injunction restraining the other parent from taking the child out of Singapore where "any matrimonial proceedings are pending" or "where, under

42. Netherlands, Civil Code, Article 247 (2009).
43. *Ibid.*
44. *Supra* n.24.
45. Thailand Civil and Commercial Code (Part III), Book IV, Section 1520.
46. *Ibid.*, Section 1547.
47. Thailand Civil and Commercial Code (Part III), Book IV, Section 1520, available at <*http://lawcommissionofindia.nic.in/Consultation%20Paper%20on%20Shared%20Parentage.pdf*>.
48. Singapore, Women's Charter (1961)
49. Women's Charter, Arrangements for Welfare of Children, Part 123 (1)
50. Women's Charter, Arrangements for Welfare of Children, Part 125 (2)9

any agreement or order of court, one parent has custody of the child to the exclusion of the other".[51]

KENYA

The Children Act governs child custody disputes in Kenya.[52] Kenyan law also draws the distinction between "actual custody" and "legal custody". "Actual custody" is the "actual possession of a child, whether or not that possession is shared with one or more persons".[53] "Legal custody" is "so much of the parental rights and duties in relation to possession of a child as are conferred upon a person by a custody order". The Kenya family courts consider several factors in awarding child custody such as: "the conduct and wishes of the parent or guardian of the child, the ascertainable wishes of the relatives of the child, ...the ascertainable wishes of the child, whether the child has suffered any harm or is likely to suffer any harm if the order is not made, the customs of the community to which the child belongs, the religious persuasion of the child, ...the circumstances of any sibling of the child concerned, and of any other children of the home, if any and the best interest of the child". It is important to note that Kenyan law does not place the "best interest of the child" necessarily as paramount and instead includes this as one factor to consider in the section describing child custody orders. However, in Part II of the Act, the law requires that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".[54]

OTHER ARRANGEMENTS

Alternating custody is a more specific form of shared parentage in which parents (or other guardians) share physical custody of the child by shifting the child between the guardians after extended time in each guardian's physical custody.[55] In Spain, shared custody is not only a preference but as per 2005 Act, it can be decided without the express agreement of both parents (all that is needed is the request of one of parents and favorable opinion of Prosecutor). Courts can on its own decide to grant a shared custody arrangement as in "this regime of custody the superior interest of the minor is well protected". On the whole, Spain has shown a general trend over the years towards a shared custody arrangement.[56] Currently, the law holds no preference for one parent over the other (mother

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51. *Supra* n.24.
52. Kenya, The Children Act 8 of 2001, Chapter 141; available at <*https://www.icrc.org/applic/ihl/ihlnat.nsf/a24d1cf3344e99934125673e00508142/95bcf642e7784b63c1257b4a004f95e8/$FILE/Children's%20Act.pdf*>.
53. *Ibid.*
54. *Supra* n.24.
55. *Ibid.*
56. *Ibid.*

versus father) and instead such arrangements (as noted above) are awarded based on the best interest of the child standard. In 2005, the Spanish Parliament modified the Civil Code and established the preference for shared custody arrangements in the law. The Supreme Court in 2010 held that instability (not having a single home for the child as the child is split between the parents) is not a factor to be considered in the court's decision to award shared custody.[57] In contrast, numerous countries across the globe continue to prefer legally, sole physical custody. For example, Norway has a legal presumption for sole physical custody. However, the child has "right of access to both parents even if they live apart". Norway awards considerable autonomy to the divorcing parents regarding the extent of the right of access only limited by the "best interests of the child standard".

CONCLUSION

Shared parenting is totally new concept to Indian legal jurisprudence. While the old principle of the father as the natural guardian, or mother is the best to protect the interest of a child below seven, has given way to the new concept of 'best interest of the child which may be father or mother' with visiting rights to other parent, who is not given the custody. This approach of the judiciary may lead to logical next step of shared parenting.[58]Although shared parenting or joint custody finds no mention in law in India, it is reported that Family Court judges do use this concept at times to decide custody battles.[59] However, further

57. Kitterod, R.H. & Lyngstad, J., *Untraditional Caring Arrangements among Parents Living Apart: The Case of Norway, Demographic Research*, Vol. 27, Art. 5 (2012), pp. 121-152.

58. Two examples of attempts to institutionalize shared parenting in India are noted below. A set of guidelines on 'child access and child custody' prepared by the Tata Institute of Social Sciences (Mumbai) for Family Court judges and Counselors in Maharashtra suggests that a child may reside alternately, one week with the custodial parent and one week with non-custodial parent, and that both custodial and non-custodial parent share joint responsibility for decisions involving child' s long term care, welfare and development.[58] Although the guidelines state that the above framing of the idea of joint custody is consistent with the 1989 UN Convention on the Rights of the Child, it must be noted that such a mechanical approach to understanding joint custody is inimical to the notion of best interest of the child, as it treats the child as a chattel to be passed around between the two parents every alternate week. The second example of joint custody is found in a recent judgment of the Karnataka High Court in KM Vinaya v B Srinivas[58]. In this case a two judge bench of the Court ruled that both the parents are entitled to get custody "for the sustainable growth of the minor child" and held that the minor child be with the father from 1 January to 30 June and with the mother from 1 July to 31 December of every year. The parents were directed to share equally, the education and other expenditures of the child. Each parent was given visitation rights on Saturdays and Sundays when the child is living with the other parent. The child was to be allowed to use telephone or video conferencing with each parent while living with the other. The six monthly arrangement found in this example is much more workable that the weekly arrangement and is likely to cause less instability and inconvenience to the child. It may be noted however, that the terms 'joint' or 'shared' do not mean giving physical custody to parents with mechanical equality, and it is here that judicial pragmatism and creativity is going to play a huge role in developing this concept further.

59. *Supra* n.24.

empirical research is needed to find out if it is in the 'best interest of the child' to give his custody to one parent for a week or even six months, since this will not allow him to settle down properly and may even hamper his/her emotional development. The author feels that the practice being adopted by courts in India that the custody of the child is given to one parent with visiting rights to other parents seems to be the best option and must continue to be followed in India.

"The Mask of Sanity" (a Psychopath): Is there a need to include Psychological Defence Plea in Criminal Jurisprudence?

Dr. Aman A. Cheema*

"If crime is the job description, the psychopath is the perfect applicant" .....R.D. Hare

The grotesque and brutal gang rape of Nirbhaya by six, especially the savage and cruel act by the juvenile-Mohammad Afroz alias Raju, of raping Nirbhaya the second time while she lay unconscious, the inhuman act of juvenile extracting the intestines of Nirbhaya with his bare hands and his suggestion to throw her out of the moving bus devoid of her clothes,[1] raises a question, "Was he a Psychopath to have committed such an atrocious crime?" This question in the mind of millions led Shilpa Arora Sharma to file PIL in the Supreme Court to keep the juvenile in special custody as his fierce act points to wide possibility that he was a psychologically abnormal and a grave threat to society and women if allowed to be free. She further contended that such psychopaths should not be released and kept in a place of strict detention.[2] The PIL further stated that such juvenile was a 'ticking time bomb' and hence a panel of criminal psychologists should be constituted to conduct clinical examination of the accused to assess whether he was a psychopath who would endanger the dignity, honour and lives of people if allowed to walk free? Such juveniles cannot be left open and free in the society as they are animals and can do any harm, the petitioner stated.[3]

The list of psychopaths doesn't end here. India has its quota of psychopaths committing mass murders in history right from Taimur lane to Nadir Shah to Emperor Babur Rule. The earliest among these is Thug Behram[4] from 1790 till

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1. "Delhi Rape: Juvenile raped woman twice and ripped off her intestines", *Hindustan Times*, New Delhi, 3 January 2013, available at < *www.hindustantimes.com* > (viewed on 1 December 2013).
2. "Delhi gangrape: SC moved for mental test of juvenile accused", *Hindustan Times*, New Delhi, 18 January 2013, available at < *www.hindustantimes.com* > (viewed on 1 December 2013).
3. "S.C. notice to Centre over PILs on juvenile act", *Tribune*, Chandigarh, 19 January 2013, available at < *www.tribuneindia.com* > (viewed on 1 December 2013).
4. From 1790 till 1841, during the advent of British rule, Thug Behram managed to kill 931 people. This was the period of East India Company in India and later on after the execution of Thug Behram manuscripts were written about his cold-blooded killings and his psychology by James Paton, then the East India Company officer. Thug Behram used his cummerbund as a rumal to execute his killings, with a large medallion sewn into it. With practiced skill he could cast the rumal so as to cause the medallion to land at the Adam's apple of his victims, adding pressure to the throat when he strangled them. Today the sinister Canova medallion, reputed to have been used in at least 65 murders, along with an aged hand-written document of 1831 supporting Behram's son Ali's continuance at an Indigo factory (Correspondence from the Quarter Master General's office regarding the Indigo Factory in the Sepoy Lines at (Vellore) are preserved in a private museum. He was executed in 1840 for killing more than 900 people, retrieved from

1841 during advent of British Rule. We all are witness to the merciless killings of women and children by Surendra Koli (of Nithari Fame)[5], Charles Sobhraj[6], Stone man[7], recently being Mohan Kumar[8], Chanderkant Jha[9] and many more.

<http://www.indiatvnews.com/crime/news/five-notorious-serial-killers-in-inida--1987.html?page=2> (viewed on 21 December 2013).

5. The infamous Nithari Case relates to the murder of young girls which took place in the house of businessman Moninder Singh Pandher in Nithari in Noida in 2005 and 2006. His servant Surinder Koli has been convicted of four murders and sentenced to death. 12 murders remain officially unsolved pending further legal proceedings. The murders came to light when in December 2006, two Nithari residents claims they knew the location of remains belonging to children who had gone missing in the previous two years. It was the water tank behind Moninder Singh's house D5. Both had daughters who had disappeared, and they suspected Surinder Koli, and domestic help at D5, had something to do with the disappearances. Koli confessed to killing six children and a 20-year-old girl known as "Payal" after raping them. It was afer a hue and cry in the media that Koli's employer, Moninder Singh Pandher, was picked up by the police on December 26 and Koli on December 27 in connection with the disappearance of Payal. The two accused in the case were already in police custody while the skeletal remains of the young children were being unearthed from behind and in front of Pandher's residence. On 12 February 2009, both the accused Moninder Singh Pandher and his domestic help Surender Koli were found guilty of the 8 February 2005 murder of Rimpa Haldar, 14, by a special sessions court in Ghaiabad. This verdict left the CBI red faced, as the CBI had earlier given a clean chit to Moninder Singh Pandher in all its chargesheets. Both the accused Mohinder Singh Pandher and his domestic help Surender Koli were given death sentence on 13 February 2009, as the case was classified as "rarest of rare". On 4 May 2010, Koli was found guilty of the 25 October 2006 murder of Arti Prasad, 7, and given a second death sentence eight days later. On 27 September 2010, Koli was found guilty of the 10 April 2006 murder of Rachna Lal, 9, and given a third death sentence the following day. On 22 December 2010, Koli was found guilty of the June 2006 murder of Deepali Sarkar, 12, and given a fourth death sentence. On 15 February 2011, the Supreme Court upheld the death sentence of Surender Koli. On September 10, 2009, The Allahabad High Court acquitted Moninder Singh Pander and overturned his death sentence. He was not named a main suspect by investigators initially, but was summoned as co-accused during the trial. Pandher faces trial in five cases out of the remaining 12, and could be re-sentenced to death if found guilty in any of those killings, available at *<http://www.in diatvnews.com/crime/news/five-notorious-serial-killers-in-india--1987.html?page=2>* (viewed on 21 December 2013).

6. One of the most notorious serial killers of all time in India, Charles Sobhraj whose mother was Vietnamese and his father was a Sindhi businessman. His life has been the subject of many books, movies and he still enjoys the life of a celebrity, sitting in his cell in a Kathmandu jail. Nicknamed "the Serpent" and "the Bikini Killer" for his skill at deception and evasion, he allegedly committed at least 12 murders. He was convicted and jailed in India from 1976 to 1997, but managed to live a life of leisure even in prison. After his release, he retired as a celebrity in Paris. He returned to Nepal and was arrested and tried there. He was sentenced to life imprisonment on August 12, 2004; the Supreme Court of Nepal convicted him and ordered life imprisonment on 30 July 2010. While Sobhraj is widely believed to be a psychopath, his motives for killing differed from those of most serial killers. Sobhraj was not driven to murder by deep-seated, violent impulses, but as a means to sustain his adventurous lifestyle. That, as well as his cunning and cultured personality, made him a celebrity long before his release from prison. Sobhraj enjoyed the attention, charging large amounts of money for interviews and film rights; he has been the subject of four books and three documentaries. His search for attention and his overconfidence in his own intelligence are believed to be responsible for his return to a country where authorities were still eager to arrest him. Currently his lawyers have been appealing to the French government to look into the matter and pressurize Nepal government to release Charles Sobhraj. Even while in prison he is still gaining media attention and recently in 2008 a Bengali woman claimed to be in love with Charles Sobhraj and it is even believed that marriage took place in the prison between the two. During 70s he killed about 12 tourists from Western origin in Southeast Asia, available at *<http://www.indiatvnews.com/crime/news/five-notorious-serial-killers-in-india--1987.html?page=2>* (viewed on 21 December 2013).

7. The Stoneman was a name given by the popular English language print media of Calcutta to an alleged serial killer who menaced the streets of that city in 1989. The Stoneman was blamed for thirteen murders over six months (the first in June 1989), but it was never established whether the crimes were the handiwork of one person or a group of individuals. The Calcutta Police also failed to resolve whether any of the crimes were committed as a copycat murder. To date, no one has been sentenced for these crimes, making this one of the greatest unsolved mysteries plaguing modern metropolitan Indian police forces, available at <http://en.wikipedia.org/wiki/Stoneman> (viewed on 5 February 2014).

The list is ever growing of these psychopaths. This ever growing list raises the concern of the society as to what motivates psychopaths to kill and maim? How can someone be so brutal and animal like in their acts? How can many killers "seem so normal" before and after the crime giving no hints of the atrocities they are about to commit. As very rightly said by Robert D. Hare *"Psychopaths are found in every segment of society, and there is a good chance that eventually you will have a painful or humiliating encounter with one. Your best defense is to understand the nature of these human predators……"*[10]

PSYCHOPATH: BEHAVIOURAL DESCRIPTION

The concept of a psychopathic personality was fully developed by Harvey *Cleckley* in fourth edition of the book "the Mask of Sanity" published in 1964. Cleckley described the psychopath as a 'moral idiot' or as one who doesn't feel empathy with others even though he or she may be fully cognizant of what is objectively happening around him. Cleckley went on to describe numerous characteristics of psychopathic personality such as the inability to feel guilt or

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8. Serial killer Mohan Kumar, charged with murdering 20 young women after luring them into affairs with him, was awarded the death penalty by the session's court. "There cannot be any other punishment than the death penalty to people who have shown such cruelty to not just one but several of them, this case deserved to be awarded death penalty," Sessions judge BK Nair said in his judgment. 'Cyanide Mohan", as he was described by the media, the school teacher would murder the women who fell in love with him and rob them of their jewellery. Mohan targeted his victims across Karnataka, with case filed in five districts - Kodagu, Kasargod, Bangalore, Hassan and Dakshina Kannada. Of the 20 cases filed against him many were transferred to the Mangalore court which found him guilty in three cases. Seven cases are under trial and 10 are still under various stages of investigation. Mohan was caught by Dr. Chandragupta, then ASP in Puttur subdivision, 2009. The session judge found Mohan guilty of killing Anitha of Barimar village, Leelavathi of Vamadapadav Village of Buntwal taluk and Sunanda of Peruvaje village of Sullia taluk. Mohan's modus operandi was to make amorous advances towards his victims. Once he got close them, the killer would, under pretext of getting married, take them to a distant place. He would persuade them to swallow pills of cyanide, convincing them that they would prevent pregnancy. All his victims fell for the ploy and died in various places mostly in lodges and rented accommodation. Pronouncing the sentence, judge Nair said it was a "rarest of re cases," observing that he had not come sueh a case in his service. The convict deserved no mercy either from the civil society or from the judiciary. What was more appalling that he was a schooi teacher and should have been set an example for the society by doing his job well, but despite having snch a noble job he stopped down to fiendish career in crime, the judge observed. "Looking into observed. "Looking into his modus operandi and manner of killing, it was planned murder, loot and rape of three innocent unmarried women. There was no enmity or sudden occasion to < *http://www.dnaindia.com/bangalore/report-serial-killer-of-women-sentenced-to-death-1939143*> (viewed on 23 December 2013).
9. Chandrakant Jha was born in Ghosai village of Bihar in 1967. He came to Delhi in 1986 and started working as a laborer in Delhi. His modus operandi was to kill his victims and dump them in front of Tihar Jail. He confessed that all his victims were his employees and he used to keep them in Hyderpur. He took case of them like his children and gave them shelter, but at times even the petty things would annoy him and punishment for such a breach of behaviour was only death. He would tie up the limbs of his victims on the pretext of punishing them. He then went on to strangle them with his nanchaku and chopping off their head and limbs. He left a lot of trails behind with his murders that led to his arrest in 2007. Available at <*http://www.boydom.com/2012/12/07/top-10-indian-serial-killers/*> (viewed on 20 December 2013).
10. Robert D. Hare, *Without Conscience: the Disturbing World of the Psychopaths Among us*, Guilford Publications Inc., New York, 1993.

shame, an absence of delusion and other signs of irrational thinking, an absence of 'nervousness' or psychopathic manifestations, unreliability, chronic lying, superficial charm, poor judgment and failure to learn from previous experiences, pathologic egocentricity and incapacity for love, above-average intelligence, on-going antisocial behaviour, self-centeredness so rarely commit suicide, impersonal sex life, trivial and poorly integrated and failure to follow any kind of life plan." *James D. Page in his work "Abnormal Psychology"* goes on to explain that individuals possessing average or superior intelligence who are neither neurotic nor psychotic but at the same time are social misfits and borderline mental cases are labeled as psychopathic personalities. These include pathological liars, sexual prevents, tramps, amoral individuals, eccentrics, misanthropes and certain types of emotionally unstable individuals.[12] *Robert D. Hare* has extended Cleckley's ideas to develop the Hare Psychopathy Checklist to include Glibness / Superficial Charm, grandiose sense of self worth, need for stimulation and/or proness to boredom, conning and/or manipulative, callous and/or lack of empathy, parasitic lifestyle, poor behavioral controls, promiscuous sexual behaviour, early behavioural problems, impulsivity, irresponsibility, failure to accept responsibility for won actions, juvenile delinquency, criminal versality.[13]

Another criminologist Frank Schmallenger explains that psychopathic indicators appear early in life, often in the teenage years. They include stealing, fighting, vandalism and lying.[14] From early childhood psychopaths exhibit antisocial nature. Not only are they thoughtless of the welfare of others, they seize every opportunity to deceive and exploit associates. Sexual development is usually retarded or abnormal. Perversions of all types are common and these are accepted without shame and conflict. Marriages are transient affaires that generally end in failure. Many have ingratiating and charming manners that enable them to made favourable impressions on their victims; others are aggressive and quarrelsome; and still others are weak, passive, inadequate individuals, almost all are selfish, stubborn and egocentric.[15] *"……..the whole thing - the cries, the blood, the agony - gave me relaxation and a certain pleasure. ……What I did was not for sexual pleasure. Rather it brought me some peace of mind. ……Don't blow my brain out! The Japanese want to buy them" -*

11. Frank Schmallenger, *Criminology Today*, Prentice hall Inc., New Jersey, 1996, p. 2002; Anthony Walsh and Craig Hemmens, *Introduction to Criminology:* A text/Reader, Sage Publications Inc., Washington D.C., 2014, p. 286.
12. James D. Page, *Abnormal Psychology: A Clinical Approach to Psychological Deviants*, Tata Mc Graw-Hill Publishing Company Limited, Now Delhi, 2000, p. 395
13. R.D. Hare, *The Hare Psychopathy Checklist-Revised*, Multi Health Systems, Toronto, 2003 in Anthony Walsh and Craig Hemmens, *Introduction to Criminology:* A text/Reader, Sage Publications Inc., Washington D.C., 2014, p. 286.
14. Frank Schmallenger, *Criminology Today*, Prentice Hall Inc., New Jersey, 1996, p. 202
15. James D. Page, Abnormal Psychology: *A Clinical Approach to Psychological Deviants*, Tata Mc Graw-Hill Publishing Company Limited, New Delhi, 2000, p. 396.

these words of Andrei Chikatilo, nicknamed the Butcher of Rostov, the Red Ripper, and the Rostov Ripper, who committed the sexual assault, murder and mutilation of a minimum of 52 women and children between 1978 and 1990 echoes today even.

Simon states that psychopaths at first glance seem quite 'well put together'. He suffers neither delusions, hallucinations, not memory impairment; contact with reality appears solid; however, he is unable to conform behaviour to social norms, defer gratifications, control impulses, tolerate frustration, profit from corrective experiences or identify with others and form meaningful relationships with them.[16]

Dennis Nilsen, a known serial killer once said *"I wish I could stop but I could not. I had no other thrill or happiness.....I don't lose sleep over what I have done or have nightmares about it....."*. If we go by the words of Denuis Nilsen, then a question is raised as to why the psychopaths can't control his or her impulses, identify with others and feel empathy for others? Why can the psychopath not conform his or her behaviour to social norms? The answer to these questions lies in the study of the various theories of psychopathy.

PSYCHOPATHY: ITS THEORETICAL EXPLANATION

1. THE AROUSAL THEORY

It is generally agreed that there are individual differences in the quality and quantity of stimulation necessary for each person to reach the hypothetic optimum. *Eysenck* in 1967 hypothesized that personality differences are largely due to differential needs for stimulation, which are dictated by functional properties of the reticular formation.[17]

Arousal theory suggests that psychopaths have a pathologically low level of autonomic and cortical arousal when compared to non-psychopathic individuals. That is why these psychopaths do not become automatically aroused to stimuli that would otherwise be stressful, exciting and frightening to non-psychopaths.[18] A psychopath is unable to reach optimal arousal levels with the same amount of stimulation that normal find adequately arousing. So the psychopath engages in behaviour that society refers to all thrill-seeking, chancy, antisocial or inappropriate in order to reach satisfying cortical arousal.[19]

The contemporary research suggests that psychopath has a pathological need for

16. C.L. Simons, *"Anti Social personality disorder in Serial Killers: the thrill to kill", The Justice Professional*, 14(4) 2001, pp. 345-356.
17. Curt R. Bartol and Anne M. Bartol, *Criminal Behaviour: A Psychosocial Approach*, Prentice-Hall Inc., New Jersey, Washington D.C., 2014, p. 286.
18. Anthony Walsh and Craig *Hemmens, Introduction to Criminology: A text/Reader*, Sage Publications Inc., Washington D.C., 2014, p. 286.
19. *Supra* n.17, p. 64.

excitement and thrill because of some deficiency in or excessive habituation property of the Reticular Activating System.[20] So when the level of arousal falls below the optimum, *stimulation and/or sensation-seeking behaviour and* sensory intake increases dramatically to raise the arousal level to the desired optimum.[21]

2. NEUROBIOLOGICAL THEORY

There have been strong associations and a belief that psychopathic individuals are biologically different from the norm in the sense that their nervous system is structurally different. The human nervous system can be divided into two major parts on the basis of either structure or function. The structural division - the way it looks physically - is perhaps the clearest distinction. The Central Nervous System (CNS) and the Peripheral Nervous system (PNS) are the two principal parts. CNS comprises the brain and spinal code and PNS comprises all nerve cells (called neurons) and nerve pathways located outside the CNS. All the interpretation, thoughts, memories and images occur in the brain. The electrical activity, i.e. electroencephalograms (EEG's) as called 'Brain Waves', in the CNS recorded by electroencephalograph provide us that psychopaths cortes functions differently from the no-psychopath. Hill and Watterson in 1942 in their investigation revealed that 65% of the aggressive psychopaths demonstrated abnormal EEG's. Subsequent studies by Craft in 1966; Hare in 1970; *Mednick and Volanka* in 1980 revealed significantly higher incidences of EEG abnormality of a slow-wave variety (immature brain wave patterns). Hare suggestions that slow wave activity represents delayed brain maturation. Since some evidence indicates that EEG patterns of many psychopaths resemble those of children, it is arguable that the brain and cortical functioning of the psychopath is immature and child like. It is appealing because the behavioural patterns of the psychopath - self-centeredness, impulsivity, inability to delay gratification and inordinate stimulation seeking - resemble the behavours of children.

In sum contemporary research focusing on Central nervous system characteristics reveals definite indications of inordinate amounts of abnormal brain-wave patterns, mostly of a child like nature, in the EEG's of the psychopaths. The data suggests that the psychopathic central nervous system is immature and doesn't develop fully till around age 40 to 45.[22] However *Blair* argued that the lifestyle of the psychopath may exacerbate neurobiological impairments if any rather than the impairments being defined at birth.[23]

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20. *Ibid.*
21. *Supra* n.17.
22. *Supra* n.17, pp. 56-61.
23. R.J.R. Blair, *Neurobiological basis of Psychopathy, British Journal of Psychiatry*, 182, 2003, pp. 5-7.

3. AMYGDALA AND OTHER CORTICAL DYSFUNCTION

Amygdala[24] and other cortical dysfunction are closely associated between the difficulties that psychopaths have in emotional processing. There is now to a certain extent agreement that Amygdala dysfunction in the underlying neural structure responsible for the development of psychopathic tendencies.[25] *Kiehl's* et al. study provided evidence that criminal psychopaths demonstrated significantly less affect-related activity in the amygdale, when compared to criminal no-psychopaths and non-criminal controls.[26]

4. PASSIVE AVOIDANCE LEARNING

One influential theory of psychopathic behaviour is that psychopaths suffer from a deficit in passive avoidance learning. *Lykken* in 1957 observed that adult psychopaths were less able to learn a passively avoid punished responses where the punishment in question consisted of the administration of an electric shock and interpreted this finding as consistent with the notion of reduced conditioned anxiety in psychopaths.[27] Lykken used tasks to demonstrate psychopath's poor avoidance learning. The tasks required the respondents to learn a 'mental maze' and at specific points the respondents had to choose a response from a possibility of four. The correct response from the four led to progression in the maze; however one of the four responses led to an electric shock. The main observation of the study was the extent to which control respondents learned to passively avid the electric shocks, whereas psychopaths made significantly more responses resulting in punishment, thus providing evidence of poor avoidance learning in psychopaths.[28]

5. Psychogenic Factor Theory

Studies reveal that psychogenic causes contribute to psychopathic development. Faulty family environment, complete or continuous absence of parents, parental

24. The Amygdala is an almond shaped mass of nuclei located deep within the temporal lone of the brain. It is limbic system structure that is involved in many of our emotions and motivations particularly those that are related to the survival. The amygdale is involved in the processing of emotions such as fear, anger and pleasure. The amygdale is also responsible for determining what memories are stored and where the memories are stored in the brain. It is thought that this determination is based on how huge an emotional response an event invokes. The amygada is involved in several functions of the body including arousal, autonomic responses associated with fear, emotional responses, hormonal secretions and memory, Available at < *www.biology.about.com* > (viewed on 1 February 2014).
25. *Supra* n.18 p. 287.
26. K.A. Kieht, A.M. Smith, R.D. Hare, A. Mendrek, B.B. Froster, J. Brink et. al., Limbic abnormalities in affective processing by criminal psychopaths as revealed by functional magnetic resonance imaging. *Biological Psychiatry*, 50, 2001, pp. 677-684.
27. Angela Seerbo, Adrian Raine, Mary O'Brein et.al., *Reward Dominance and Passive Avoidance Learning in Adolescent Psychopaths. Journal of Abnormal Child Psychology*, 18, 4, 1990, pp. 451-463
28. *Supra* n.18, p. 288.

loss, inability to form attachments to parents or other care givers early in life, sudden separation from the mother during the first six months during the first few years of life; deficiency in childhood role playing, inability to identify with ones parents during childhood and adolescence and severe rejection by others.[29]

Buss in 1966 described two types of parental behaviour he felt are conducive to psychopathic patterns. In the first type parents are cold and distant to the child allowing no close relationship to develop. In the second type, discipline, rewards and punishment are inconsistent and capricious. Instead of learning right and wrong, the child learns to avoid blame and punishment by lying or by other manipulative means.[30]

The above mentioned theories and studies suggest that genetics, the biological and psychological makeup and environment factors all put together interact to build a psychopathic personality.

PSYCHOPATH AND CRIMINAL JUSTICE SYSTEM

The existing criminal justice system has evolved over a long period of time. It primarily reflects common-sense metaphysical and moral judgments about human nature and free will. Principles of criminal responsibility and punishment assume that human beings for the most part are capable of controlling their behaviour. Criminal liability rules presuppose that the ordinary person has a reasonable opportunity to conform to legal standards delineating permissible conduct. According to this vision of human behaviour, it is morally fair for society to impose restrictions and burden on the individual who chooses not to comply with these standards.[31] In other words, Indian criminal jurisprudence is firmly rooted in the concept of individual 'Free Will'. Indian Criminal Justice System is laid on the foundation that there are two constituent elements of crime - *Actus Reus and Mens Rea*. Actus Reus connotes an overt act, the physical result of human conduct. Act means a conscious or willed movement. It is a conduct, which results from the operation of the will. The second essential element on which the entire field of criminal law is based is *mens rea*. Mens is the state of mind indicating culpability. It is commonly taken to *mens* some blameworthy mental condition, whether constituted by intention or knowledge or otherwise, the absence of which on any particular occasion negatives the intention of a crime. Though *mens rea* in not defined in the Indian Penal Code, 1860 but different terms and words such as 'voluntarily', 'malignantly', 'criminal knowledge or intention', 'fraudulently', 'maliciously' etc. indicate the blame

29. *Supra* n.14, pp. 72-73.
30. *Supra* n.17, p. 73.
31. Rebecca Dresser, *Criminal Responsibility and the "Genetics Defense"*, 1999 in Jeffrey R. Botkin, William M. McMahon & Leslie Pickering Francis (Ed.), *Genetics and Criminality: The Potential Misuse of Scientific Information*, American Psychological Association, Washington D.C., 1999, pp. 163-173.

worthy mental condition required at the time of the commission of the offence, in order to constitute an offence.[32]

Lord Kenyon in *Fowler* v. *Padget*[33] states that the intent and the act must both concur to constitute the crime. No act is per se criminal; the act becomes criminal when it is done with a guilty mind.[34] According to Austin, any movement of the body, which is not in consequence of the determination of the Will, is not a voluntary act. It is only an act done voluntarily that amounts to an offence.[35] A long standing criminal law rule holds that punishment is morally appropriate solely for the persons who voluntarily commit criminal acts. According to this rule, it is unfair to punish someone who lacked the ability to retrain from the harmful conduct. Existing legal doctrines recognize certain instances in which accused persons ought not to be held responsible and, accordingly, ought not to be punished for committing a criminal offence.[36] The Indian Penal Code, 1860 incorporates a full chapter on 'General Exceptions'[37] whereby defence of acts not done voluntarily[38] can be taken to exonerate the accused of criminal liability.[39] This includes the Insanity Defence Plea as well. Then the question is raised *"Can a Psychopath take Insanity Plea?"*

PSYCHOPATH AND INSANITY DEFENCE PLEA

The evolution of moderu insanity defence is another illustration of the law's reluctance to depart from the presumption that person's ordinarily exereise choice and control over their aetions. The foundation for the law of insanity was laid down by the house of Lords in 1843, in what is popularly known as the *M'Naughten* case whereby it was held that to establish the defence of insanity, it

32. Dr. KI Vibbute, *PSA Pillai's Criminal Law*, Lexis Nexis Butterworths, New Delhi, 2008, p. 57.
33. (1798)7 TLR 509.
34. Prof. K.N. Chandrasekharan Pillai and Shabistan Aquil, *Essays on the Indian Penal Code*, Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2005, p. 68.
35. *Supra* n.32, p. 36.
36. Rebecca Dresser, *Criminal Responsibility and the "Genetics Defense"*, 1999 in Jeffrey R. Botkin, William M. McMahon & Leslie Pickering Francis (ED.), *Genetics and Criminality: The Potential Misuse of Scientific Information*, American Psychological Association, Washington D.C., 1999, 99, 163-173.
37. The Indian Penal Code, 1860 incorporates the defence of Insanity, Infancy, Judicial Acts, Involuntary Intoxication, Consent and Compulsion, Mistake of Fact and Private Defence under the chapter titled 'General Exception'.
38. Section 39 of the Indian Penal Code, 1860 defines voluntarily as "A person is said to cause an effect 'voluntarily' when he causes it by means whereby be intended to cause it or by means which, at the time of employing those emens he knew or had reason to believe to be likely to cause it."
39. Aman A. Cheema, Asish Virk, *"Reinventing Lombroso in the Era of Genetic Revolution: Whether Criminal Justice System Actually imparts Justice or is Based on 'Convenience of Assumption'?"*, *International Journal of Criminology & Sociological Theory*, 5, 2, August 2012, pp. 936-946.

must be clearly proved that at the time of committing the crime, the person was so insane as not to know the nature and quality of the act he was doing, or if he did know it, he did not know that what he was doing was wrong.[40]

The Indian Penal Code, 1860 does not define unsoundness of mind but to exempt a man from criminal liability for unsoundness of mind must reach such a degree that it materially impairs the cognitive faculties of the mind that can form a group of exemption from criminal responsibility. A distinction must be drawn between insanity affecting the cognitive faculties of a man and that affecting the Will and emotions. It is only the first that is within the purview of Section 84 of the Indian Penal Code.[41]

It was in the *Lakshmi* v. *State*[42] case, where the court held that mere ignorance of the nature or quality of the act was not, what was the determining factor but the capacity to know the same. A person could believe many things, however his belief could never protect him, once it was established that he has the capacity to distinguish between right or wrong.

Here, the emphasis is on the individual's ability to comprehend the outcome of her conduct or appreciate its nature. As a result, the individual may be completely exonerated.[43] In contrast, psychopaths know the difference between right and wrong, yet emotionally lack the feeling of what is right and wrong. Unlike individuals with mental disorders such as schizophrenia or dementia who may have impaired cognitive capacity, psychopathic individuals understand that specific actions are against the law or violate social norms; however, although they may be able to make accurate judgments about legal or moral violations, they appear to lack an important factor that motivates individuals to behave morally - emotional capacity. Psychological and neuroscientific studies are providing increasing empirical evidence demonstrating the important of emotion in moral judgment and behavior, and characterizing the deficits observed in psychopathy. Such evidence provides empirical support for the recent argument by Morse (2008) who concludes that "severe" psychopaths are neither morally responsible nor deserving of blame and punishment because they do not understand the point of morality, lack a conscience and the capacity for moral understanding and rationality.[44]

The discoveries of fundamental anatomical and physiological differences

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40. *Supra* n.32, pp. 137-138.
41. Padmaja Chakravarty, *"Review of the Insanity Defence in India: A case for Refrom"*, *Central India Law Quarterly Review*, XIV, 2001, 421-442.
42. *AIR* 1963 All 534.
43. Meghna Rajadhyaksha, *"Condemned by Birth: The Implications of Genetics for the theories of Crime and Punishment"*, *Socio-Legal Review*, 2, 2006, pp. 85-103.
44. Andrea L. Glenn, Adrian Raine, William S. Leufer, *"Is it wrong to criminalize and punish Psychopaths?"*, *Emotion Review 3 (3):302-304 (2011)*.

between the brains of psychopaths and non-psychopaths including non-spychopath criminals, providing that psychopathic traits may be inherited, has set the stage for arguments that even those who commit the worst of crimes should be held responsible. After all they did not choose their genetic makeup or to be born without the capacity for empathy.[45]

Now the Question arises, should not the criminal law accommodate increasing psychological and neuro-scientific evidence that the acts psychopathic personalities do are not always entirely voluntary? Should not the insanity defence plea be reformed to accommodate psychological defence plea? What happens when a genetics expert testifies regarding a person's innate capabilities of committing an offence? Philosopher *Dan Brock* asked, *"If a person's genetic structure is a principal cause of behaviour and that genetic structure is completely beyond the individual's control, can an individual justifiably be held responsible for the resultant behaviour?"*[46]

PSYCHOLOGICAL DEFENCE PLEA: NEED OF CRIMINAL JURISPRUDENCE

The need of the hour is to include psychological defence plea in the criminal jurisprudence. With the psychological defence plea in place, the psychopath will not at all be exonerated of his crimes and liability but those affected could receive treatment either as an inpatient at a mental hospital or in the facility where they are incarcerated. They would also be subject to mandatory behavioural studies by criminologist and psychologists for further understanding their disease and crimes.[47] Long incarceration without any treatment will not solve any purpose.

The belief that psychopaths are impossible to treat is not well supported by available evidence. Second there are suggestions that psychopathy may be treatable given sufficient doses of treatment. *Salekin's* review of treatment reports indicated that psychopathic individuals often did improve with treatment, as indexed by the reduction in psychopathic traits or rates of recidivism. Psychopathic patients were as likely as non-psychopathic patients to

45. Ronald Schouten, Jim Silver, *"The Insanity Defence: An intersection of Morality, Public Policy and Science"*, available at< *http://www.psychologytoday.com/blog/almost-psy cho path/201208/the-insanity-defense* > (viewed on 1 February 2014).
46. Mark A. Rothstein. (1999). *"The Impact of Behavioural Genetics on the Law and the Courts", Judicature*, 83(3), available at <*http://www.ornl.gov/sci/techresources /Human_ Genome/publicat/judicature/article5.html*> (viewed on 26th August 2010).
47. Alloyson L. Gay, *"Reforming the Insanity Defense: The need for a Psychological Defect Plea", Student Pulse*, 2, 10, 2010, available at <*http://www.studentpulse.com /articles/304 / reforming-the-insanity-defense-the-need-for-a-psychological-defect-plea*> (viewed on 20 January 2014).

benefit from adequate doses of treatment.[48] A number of studies do provide empirical evidence as to what can constitute appropriate treatment methods to use with psychopaths. Wong and Hare in 2005 reported guidelines in their psychopathy treatment and suggested that suitable treatment program should focus on changing behaviour rather than trying to change the core personality characteristics.[49] Moreover, as *George Dvorsky* writes in his research that psychopaths have lots of good things going for them. Psychopaths make for great CEO's in the business world. Their positive traits of the need for stimulation and proness to boredom cannot let them sit still and pushes them to constantly think about how to do better. Dutton further argues that psychopaths are fearless, confident, charismatic, ruthless and focused - qualities which are tailor made for success in 21st century society. Specifically, attributes like coolness under pressure and strong desire give rise to successful surgeons, fire fighters, movie stars and attorneys. Weed out psychopathy and you may lose some very important personality traits that help to create the greater whole that is humanity.

"...the truest expression of humanity is the ability to extend empathy towards others - even those incapable of mustering empathy themselves" ...George Dvorsky.

48. M. Caldwell, J. Skeem, R. Salekin, G.V. Rybrock, *"Treatment response of Adolescent offenders with Psychopathic Features: A 2 Year Follow-up"*, *Criminal Justice and Behaviour*, 33, 5, (2006), 571-596.
49. *Supra* n.18, p. 292.

Criminal Liability in Cases of Gross Medical Negligence: Crossroads of A Medico-legal Conundrum Ahead

Dr. Debasis Poddar*

ABSTRACT

Professional negligence seems to be a serious concern and this is more so in case of medical negligence as human health is involved therein. So far as liability is concerned, a moot point is whether and how far criminal liability may be imposed on an errant medical practitioner as a measure of deterrence and as concurrent to civil liability which seems order of the day under law of tort(s). While driver of a motor vehicle may be accused of criminal negligence out of his negligent driving, medical practitioner cannot be spared for loss of human life out of his negligent treatment or surgical operation. On the other side, there is concern that a medical practitioner may allow his patient to succumb to ailment in case there is life risk in treatment or operation required as omission cannot attract criminal liability. Omission may, at its worst, attract allegation of professional misconduct to be adjudged by medical fraternity and, may turn toward civil liability to be settled by damages. No wonder that there is lawlessness in the jurisprudence of medical negligence vis-à-vis the criminal liability. Recent judgments of the Supreme Court of India in a series of cases vis-à-vis negligence death reiterate the same. Thus, even after close proximity to Bolam's test, subtle questions related to such liability are yet to be settled till date. The author hereby put forth emphasis over social responsibility of medical practitioners and thereby suggested statutory code of conduct as a set of self-contained code to preempt legal action against them. At the same time, the concerned authority ought to attain legitimacy through its heterogeneous composition, objective perception with no iota of professional bias and blindfold application of the code over errant medical practitioners. After all, as per the Bothilo's test, read with "complete justice" as per Article 142 of the Constitution of India, the judiciary possesses an ancillary power to intervene in its process and thereby set aside professional bias of the forum, if any. Quasi-judicial process of medical profession ought to be judicious enough to resemble regular judicial process.

INTRODUCTION

Practice of medical treatment seems one among the oldest professional activities all over the world. While every sundry professional endeavour includes a chance of success and failure, the latter therefore is integral part of any professional life. In legal practice, for instance, advocates of both sides cannot win the legal battle

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through adversarial process of litigation in vogue in the common law system with the result that advocate(s) of one side ought to loose the battle which may be for no fault on the part of advocate(s) concerned. Likewise, in the medical practice, all battles cannot be conquered by any physician or surgeon for a hard reality that life has its own limit and to be culminated with death even for no fault on the part of physician and/or surgeon concerned. The author is indeed aware of the same, and thereby limit the forthcoming paragraphs to the cases where a professional medical practitioner looses his battle for his own fault and, in particular, himself contribntes to such failure through gross negligence on his part which may lead the victim or his survivor(s) to frame a legally viable charge of criminal liability for such negligence agalnst professional integrity of the practitioner concerned. The anthor has had no prejudice to the profession concerned and their academic effort is limited to work out a better method to place errant practitioner(s) before justice delivery system under available *lex loci* in India.

PUBLIC HEALTH AS PART OF ESSENTIAL SERVICE

Since time immemorial, public health is a matter of concern in socio-legal order and deficiency of service concerning maintenance of public health is no new issue over which there is a perennial conundrum to balance the rights of physician and his patient. Indeed there is straight forward vision to this end,[1] but there lies a set of differing opinions to an extent that administration of justice all over the world continues to grapple over the matter to arrive at a consensus vis-à-vis balance of competing concern for rights on both sides.

In its age-old antiquity, civilization was tough enough to handle serious cases of medical negligence.[2] By and large, such a trend seems to be in vogue in history of the Occident though, in ancient Indian jurisprudence, provision for introducing

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1. "To what extent is the doctor subject to the law? ... The doctors must be servant and not the master of his patients and the community. Everybody, and especially the professional man, must be accountable and the law is one of the means whereby that accountability to the patient, his family and society is revealed and enforced. The law, hopefully, should help to create conditions congenial to the advance of medicine, to the benefit of the patient, to the protection of the doctor and to the good of the community. It should be clear, comprehensive, balanced, flexible and facilitating".
   In Alec Samuel, *"The Doctor and the Law", The Medico-legal Journal*, Vol XLIX, part IV, 1981, p. 139; in K. Mathiharan and Amrit K. Patnaik (ed.), *Modi's Medical Jurisprudence and Toxicology*, twenty-third ed., third reprint, LexisNexis Butterworths Wadhwa Ngpur, New Delhi, 2009, p. 149-150.
2. "In earlier civilizations, medical negligence was considered more as a crime rather than as a tort. The purpose of criminal proceedings is to protect and vindicate the interest of the public by punishing the defender (the physician) and/or meting out a penalty. The victims were usually not awarded any damages in criminal proceedings. "With the progress of civilization, medical negligence was increasingly treated as a tort by the judiciary so that the victims can be provided with damages". K. Mathiharan and Amrit K. Patnaik (ed.), *Modi's Medical Jurisprudence and Toxicology*, twenty-third ed., third reprint, LexisNexis Butterworths Wadhwa Ngpur, New Delhi, 2009, p. 150-151.

criminal liability was left to the ruler to accommodate the same in suitable cases wherever there is gross medical negligence.[3] Even in modern India, public health as a matter of state policy attains priority under part IV of its Constitution and improvement (not only maintenance) of public health is identified to be one of the primary duties of "the State" as per the definition under Article 12, read with Article 36 of the Constitution.[4] A fundamental right to life (meant for all and not citizens only) under Article 21 of the Constitution contemplates and supplements the directive principle abovementioned.[5] Together Articles 21 and 47, as part of fundamental law of the land, constitute a legal wisdom and consequent obligation on every citizen of India engaged in medical profession to attain excellence and to adjure violence over human life which may be construed to be public property, at least in the given context of widespread medical negligence being too inimical to maintenance of public health, even if one may forget improvement of the same as per the original wisdom of the Constitution.[6]

NEGLIGENCE AS ANATHEMA TO MEDICAL PROFESSION

As may be understood even in common sense, negligence in any form or content attracts inconvenience and criticism, more so while negligence of a professional service provider causes inconvenience to the detriment of his client. In particular, so far as medical profession is concerned, negligence of medical practitioner may put his patient to serious health hazard including death-not without reason that a case of negligence is anathema to medical profession and to public health as well. Let us therefore enter into the jurisprudence against negligence.

By its classical definition, negligence, as a tort, lacks intention to perpetrate harm to other and thereby attracts cause of action for remedy of unliquidated

3. "We do not find in the Dharmasastra-s and Arthasastra-s any rule stating that the degree of the penalty to be imposed depended upon the degree of guilt. This characteristic feature can frequently be found elsewhere in ancient Indian law.It seems that a greater penalty had to be imposed on a physician who intentionally gave improper medical treatment, a lighter penalty on a physician who acted negligently or carelessly, and a still lighter penalty on a physician whose improper medical treatment was due to misapprehension caused by ignorance. Although such a rule was not stated *expressis verbis* in the Dharmasastra-s and Arthasastra-s the judge (king) certainly had the right to subject his sentence, as far as the degree of the penalty was concerned, to the degree of guilt of the accused physician proved during the investigation of his case. L. Sternbach, "Judicial Studies in Ancient Indian Law", Part I, Motilal Banarsidass, Delhi, 1965, p. 316.
4. "The State shall regard the raising of standard of living of its people and the improvement of public health as among its primary duties". Article 47, The Constitution of India, 1950.
5. "No person shall be deprived of his life or personal liberty except according to procedure established by law". Article 21, the Constitution of India, 1950.
6. "It shall be the duty of every citizen of India-to safeguard public property and to adjure violence; to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. Article 51A(i)(j), The Constitution of India, 1950.

damages (read compensation).[7] The same, however, may attract penal prosecution in case such negligence is so rash or negligent that the same may be treated to be a gross negligence on the part of accused to defend himself through the want of *mens rea* (read guilty mind). But here lies perfect catch-22 in the sense that the borderline between (civil) negligence and criminal negligence is so blurred that law against criminal negligence so often than not suffers from a Shakespearean conundrum- to be or not to be, that is the question. Even otherwise, in its classical connotation, the term "criminal negligence" sounds like an oxymoron as negligence does lack a guilty miud without which no action or omission may be a (criminal) offence. Still there is provision for criminal negligence in the form of an amendment to the Indian Penal Code, 1860 (hereafter referred to as the IPC) to fill in subtle vacuum- no wonder that application of section 304A, IPC is occasional, if not rare per se. Intention behind such provision was to resist recklessness on the part of citizenry while operating in public domain and thereby likely to cause damage to society through such recklessness despite axiomatic truth known to one and all that such attitude may lead to individual or collective disaster which may be construed to be a virtual mens rea to this end.

While this ought to be known even in case of any sundry driver of motor vehicle, this may at ease be presumed that the same is known to all medical practitioners. Civil proceeding under law of torts is no bar to criminal proceeding as both of them share concurrent jurisdiction and not at all mutually exclusive to one another. But criminal proceeding against errant medical practitioner is no rare phenomenon as there is plethora of like cases all over the world and despite the fact that uamber of such cases hardly reflects magnitude of instances of gross medical negligence even in the United States,[9] one may understand magnitude

7. "In the Law of torts negligence is carelessness. In some cases either negligence or wrongful intent is required by law as a condition of liability. Each involves a certain mental attitude of the defendant toward the consequence of his act. He intends those consequences when he foresees and desires them, and therefore does the act in order that they may happen. He is guilty of negligence, on the other hand, when he does not desire the consequences, and does not act in order to produce them, but is nevertheless indifferent or careless whether they happen or not and therefore does not refrain from the act notwithstanding the risk that they may happen. R.F.V. Heuston (ed.), *Salmond on the Law of Torts*, thirteenth ed., Sweet & Maxwell Ltd., London, 1961, p. 404.

8. Indian Penal Code S. 304A Causing death by negligence provides that whoever causes the death of any person by doing any rash or negligent act not amounting culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

9. Defenders of traditional litigation suggest that "The threat of liability is what works as a deterrent to improve patient safety." The simple logic of legal theory is indeed impressive: If wrongdoers are made to pay the costs of their wrongdoing, they will do less wrong. However, the real world suggests significant shortcomings in this logic for most medical care: Most negligent medical injuries never result in any claim, and many claims are not valid. There are seldom clear standards to follow, and experts routinely disagree on whether particular conduct was negligent. The legal system's low credibility among physicians undercuts the influence of legal results on the very audience meant to be influenced. Tort signals are also very slow, as the typical payment occurs more than four years after an injury,

in India even without quantifying the same. Except the rarest occasions in course of judicial process, there is no provision for reparation in criminal jurisprudence which is but operative under law of tort(s) and consumer protection. People therefore rush toward the court for reparation.[10] Thus instances of medical negligence are so often than not escapes with impunity which could have contributed to the ever-increasing corpus of criminal negligence. Otherwise the volume of such criminal proceedings could be a subject in itself.[11] Even in the given circumstance, there is plethora of available judgments, of which one may explore representative ones to construct the archetype of jurisprudence against criminal negligence vis-à-vis medical practice.

KURBAN TO KATARA: A QUEST FROM PILLAR TO POST

After the so called *Bolam's* test[12] was established to ascertain criminal negligence, the judiciary in India initiated to follow the same legacy in similar situation. The judgment in *Kurban Hussein Mohammedali Rangwalla v. State of Maharashtra*[13] seems the first of its kind in India where the Court was by and

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by which time the behaviors involved may well have changed. Further, few legal costs are imposed on physicians who are sued, because almost all are pooled through insurance. A physician's malpractice premium is very unlikely to be based on claims history, although institutional rates are generally experience rated. Indeed, larger hospitals often self-insure, and therefore bear the full cost of their own claims. Randall R. Bovbjerg and Robert A. Berenson, *Surmounting Myths and Mindsets in Medical Malpractice, Health Policy Briefs*, The Urban Institute, October 2005, p. 3. Available at <*http://www.urban.org /Uploaded PDF/411227_medical_malpractice.pdf*> (Viewed on January 10, 2010.

10. "... in a criminal prosecution (for medical negligence) victim gets nothing except a mental satisfaction. The victims, therefore, prefer to file a civil suit preferably under the Consumer Protection Act, 1986. As a result, very few cases of medical negligence under penal code have come to the notice of the courts". K.D. Gaur, *Textbook on the Indian Penal Code*, fourth ed., Universal Law Publishing Co. Pvt. Ltd., Delhi, 2009, p. 509.
11. In India, usually s. 304-A of IPC is used to register to complaint against a medical practitioner for alleged criminal professional negligence. Interestingly, this is the section used to frame charges against an erring driver in a road traffic accident for accusing the death of a person by rash and negligent driving. If the patient survives and suffers from the effects of alleged grievous injuries sustained during the treatment, the medical practitioner can be framed under either section 337 or section 338 of IPC. K. Mathiharan and Amrit K. Patnaik (ed.), Modi's Medical Jurisprudence and Toxicology, twenty-third ed., third reprint, LexisNexis Butterworths Wadhwa Nagpur, New Delhi, 2009, p. 180-181.
12. *Bolan v. Friern Hospital Management Committee* (1957) 1 WLR 582. Available at< *http://oxcheps.new.ox.ac.uk/casebook/Resources/BOLAMV_I%20DOC.pdf*>(Viewed on January 10, 2010).
13. In order that a person may be guilty under section 304-A, the rash or negligent act should be the direct or proximate cause of the death. ... We may in this connection refer to *Emperor v. Omkar Ram Pratap* where Sir Lawrence Jenkins had to interpret section 304-A and observed as follows- "To impose criminal liability under s. 304-A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans*; it is not enough that it may have been the cause sine qua non". *Kurban Hussein Mohammedali Rangwalla v. State of Maharashtra* [1964 INDLAW SC 362]. Also available at <*http://judis.nic.in/supremecourt/ imgs.aspx*> (Viewed on January 10, 2010).

large aware of ratio of the same without express mention as such. Indeed the Court followed precedent to decide the case, but such a clear case may be lodged only once in a blue moon. Here the Court is seemingly keen toward certainty of law[14] than to introduce law in a changing society[15] with the result that the Court preferred archaic position and set aside conviction and sentence of the appellant. The author bereby submits tbat this was otherwise a fit case to apply underlying rationale of the *Bolam's* test[16] in terms of criminal negligence though not at all related to medical negligence. Stlll the judgment deserves to be celebrated as a landmark one as the same demonstrated its concern over such contentious matter way back in mid-sixties in spite of its backward inertia toward archaic precedent. However, let us move forward to next case.

In *Laxman Balkrishna Joshi v. Trimbak Bapu Godbole and Another,*[17] a case of medical negligence, the Court introduced imperative of reasonable duty and care to introduce underlying vision of the *Bolam's* test and held the appellant liable, but this was a case of civil liability and, in the absence of any consumer forum, the Court played role of consumer court to provide civil remedy and not decided question of criminal liability. The case demonstrates a good faith over professiou available in the then society which went down at later point of time.

In *Paramanand Katara v. Union of India,*[18] again another judgment not related to typical medical negligence the way the same is understood nowadays, the

14. Friedmann, *Law in the Making*, Stevans & Sons, London, 1961.
15. Friedmann, *Law in a Changing Society*, Universal Law Publishing Co. Pvt. Ltd., London, 1961.
16. *Supra* n.12.
17. "The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those, duties gives a right of action for negligence to, the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires: (cf. *Halsbury's Laws of England* 3rd ed. vol. 26 p. 17). The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. But the question is not whether the judgment or discretion in choosing the treatment be exercised was right or wrong, *Laxman Balkrishna Joshi v. Trimbak Bapu Godbole and Another* [1968 *INDLAW* SC 91]. Available at <*http://judis.nic.in/supremecourt/imgs.aspx*> (viewed on January 10, 2010).
18. 1989 *INDLAW* SC 47. It was held that Preservation of human life is of paramount importance. That is so on account of the fact that once life is lost, the status quo anto cannot be restored as resurrection is beyond the capacity of man. The patient whether he be an innocent person or be a criminal liable to punishment under the laws of the society, it is the obligation of those who ate in charge of the health of the community to preserve life so that the innocent may be protected and the guilty may be punished. Available at <*http://cms.nic.in/ncdrcrep/judgement/000P24099.htm*> (Viewed on January 10, 2010).

Court reiterated professional duty of medical practitioners in cases of grave emergency irrespective of status of the patient concerned which will be determined in course of judicial process. This was a public interest litigation filed by advocate *Pandit Paramanand Katara* which contested the existing procedure of execution in India. Together the judgments abovementioned set a quest from pillar to post to transcend widespread ignorance over patient's rights as per criminal jurisprudence. However, with the passage of time, rights of medical practitioners also become a matter of serious concern to attain balance of *bona fide* rights between medical practitioner and his patient. An altogether new set of such cases since mid-nineties marked a beginning of the end in its earlier quest, though arguably, with the paradigm shift in the economic policy toward globalization.

TOWARD INTEGRITY OF MEDICAL PRACTITIONERS

Three decades after *Kurban*, another judgment once again upheld civil liability of medical practitioners. Judgment in *Indian Medical Association v. V.P. Shantha and Others*,[19] however, seems no progress of the law against medical negligence even in terms of civil liability: (i) in spite of introduction of consumer protection jurisprudence meanwhile, there is no additional wisdom inserted in its context (ii) like *Kurban*, the judgment once again reiterates civil liability of practitioner and not his criminal liability. Civil liability was anyway established beforehand and there was no further jurisprudence. The author is not at all

19. "In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control. In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services. Immunity from suit was enjoyed by certain profession on the grounds of public interest. The trend is towards narrowing of such immunity and it is no longer available to architects in respect of certificates negligently given and to mutual valuers. Earlier, barristers were enjoying complete immunity but now even for them the filed is limited to work done in court and to a small category of pre-trial work which is directly related to what transpires in court. *Saif Ali v. Sidney Mitchell & Co.*, (1980) 1 A.C. 198; *Rees v. Sinclair* (1974) 1 *N.Z.L.R.* 180; *Giannarelli v. Wraith* (1988) 81 *A.L.R.* 417]. Medical practitioners do not enjoy any immunity and they can be sued in contract or tort on the ground that they have failed to exercise reasonable skill and care. *In Indian Medical Association v. V.P. Shantha and Others* [1995 *INDLAW SC* 132] it was held that "It would thus appear that medical practitioners, though belonging to the medical profession, are not immune from a claim for damages on the ground of negligence. The fact that they are governed by the Indian Medical Council Act and are subject to the disciplinary control of Medical Council of India and/or State Medical Councils is no solace to the person who has suffered due to their negligence and the right of such person to seek redress is not affected". Available at <*http://cms.nic.in/nc drcrep/judgement/00OP24099.htm* > (Viewed on January 10, 2010).

interested to put practitioners in the dock, neither hesitated to plead that the same was another loss of opportunity to attain justice for victims of medical negligence.

Judgment in *Dr. Suresh Gupta v. Government of N.C.T. of Delhi and Another*[20] seems the first of its kind in true sense of the term which was delivered to address the impugned issue in its length and depth. Indeed the Court took due notice over increasingly broken confidence between medical practitioner and his patient, but also took care and caution on its part not to contribute to such a breakdown lest there may be allegation against the Court on the part medical profession to this end. While delivering the judgment, here the Court was adhered to the *Bolam's* test and articulated its position accordingly. The Court seemingly read a word 'gross' despite no express existence of the same in section 304A of the IPC, 1860 and thereby insisted on high degree of negligence to be apparent on the face of record. The Court offered a distinction between judgment of error and gross negligence. While the former seems enough to establish civil liability as per *res ipsa loquitur*,[21] the latter requires to be proved beyond reasonable doubt.

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20. For fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be as high as can be described as "gross negligence" or recklessness". It is not merely lack of necessary care, attention and skill. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable. Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing great disservice to the community at large because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own safety than giving all best treatment to their patients. This would lead to shaking the mutual confidence between the doctor and patient. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence. Between civil and criminal liability of a doctor causing death of his patient the court has a difficult task of weighing the degree of carelessness and negligence alleged on the part of the doctor. For conviction of a doctor for alleged criminal offence, the standard should be proof of recklessness and deliberate wrong doing i.e. a higher degree of morally blameworthy conduct. Mere lack of proper care, precaution and attention or inadvertence might create civil liability but not a criminal one. The courts have, therefore, always insisted in the case of alleged criminal offence against doctor causing death of his patient during treatment, that the act complained against the doctor must show negligence or rashness of such a higher degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence alone is punishable. *Dr. Suresh Gupta v. Government of N.C.T. of Delhi and Another* [2004 *INDLAW* SC 563]. Available *at* < *http://judis.nic.in/supremecourt/imgs.aspx*.> (viewed on January 10, 2010).
21. "Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence". *Jacob Mathew v. State of Punjab and Another* [2005 *INDLAW* SC 452]. Also available at < *http://cms.nic.in/ncdrcrep/judgement/00OP 24099.htm* > (Viewed on January 10, 2010).

Judgment in *Jacob Mathew v. State of Punjab and Another*[22] seems praiseworthy in terms of its precision, but blameworthy in terms of its decision. This was again an appropriate case to apply a criminal liability on errant medical practitioners along with hospital and the gross negligence was apparent on the face of record. The Court, however, restrained to slap criminal liability, and perhaps correctly, as the same was a borderline case which may otherwise be interpreted as an instance of pure accident. Though there is no iota of doubt over civil liability in the case, whether and how far application of exhausted oxygen cylinder in good faith may constitute criminal negligence is matter of conjecture. Anyway the same may not transcend space for reasonable doubt. And, as per the *Bolam's test*,[23] there is space for the accused to get rid of criminal proceeding. The Court was also mindful over adverse aftermath of its position which may affect social order.[24] The Court also pronounced what law ought to be and thereby preferred the same to what law is as per the statute book. The covert implications of judgment in Dr. Suresh Gupta are reiterated through overt expression in Jacob Mathew which marked progress in terms of march of the law.[25] A salutary part of the judgment is its care and caution over both sides of the coin with prognostic vision that lack of balance may anyway turn the table upside down. Thus Jacob Mathew seems jurisprudent enough to this end.[26]

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22. *Ibid.*,"Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high a standard traditionally described as gross negligence. In fact, negligence at that level is likely to be indistinguishable from recklessness".
23. *Infra* n 33.
24. *Supra* n. 22. Indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to the society.
25. *Ibid.*,The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution. The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly.
26. *Ibid.*,We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasize the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefers recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against".

Being a post-*Bolitho*[27] judgment, however, Jacob Mathew fell too short to convey the message toward errant practitioner of the community or his statutory authority being governed by his fellow medical practitioners who are alleged to suffer from professional bias. Rather, rationale and decision of its judgment was appreciated by medical practitioners for partial safeguard in support of medical profession.[28] With due sympathy toward innocent practitioner, the position is against wisdom of the Preamble to the Constitution vis-à-vis equality of status and opportunity for all its citizens. Since *Kesavananda*, the Preamble is declared to constitute part of basic structure of the Constitution though one may put a counterargument with contrary view of the same Court that unequals cannot be treated as equals. The author hereby refutes the same as this is yet to be applicable to the members of all other professional services in India.

RECENT JUDGMENT: THE END OF AN ORDEAL

Of late there was another judgment, the last of its kind till date, which completed a full cycle to this end. Before exploring the judgment of the Court, let us read a judgment of the National Consumer Disputes Redressal Commission (hereafter referred to as the NCDRC) which reversed the blame against the complainant.[29] A naïve reading of the judgment may leave readership confused whether the same is voice of the NCDRC or that of opponent unless and until subsequent note is read. Indeed there is solace that the Apex Court of India offered a contrary position.[30] The Court not only differed with botli- jndgment of NCDRC and the

27. Infra n. 34.

28. *Supra* n 22. "Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying *Bolam's* test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been leveled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld".

29. *Dr. Kunal Saha and Others* v. *Dr. Sukumar Mukherjee and Others*, National Consumer Disputes Redressal Commission on 01/06/2006, Original Petition no. 240 of 1999. Available at: <*http://cms.nic.in/ncdrcrep/judgement/000P24099.htm*> (viewed on January 10, 2010).

30. Criminal negligence is the failure to exercise duty with reasonable and proper care and employing precautions guarding against injury to the public generally or to any individual in particular. It is, however, well settled that so far as the negligence alleged to have been

High Court at Calcutta- hnt also came down heavily upon the rationale of such judgments. As *S.B. Sinha*, J observed, however, there was practical uncertainty in terms of fixing criminal liability over any particular individual among many errant practitioners which left him helpless to slap criminal liability even though otherwise relevant in such classic circumstance,[31] and even after proved beyond reasonable doubt.[32] After such travesty of justice in *Malay Kumar Ganguly*, a question may be raised whether and how far criminal liability for medical negligence may be applicable in practice. The question is relevant as a classic circumstance occurred in the case to apply criminal liability against the practitioner's gross negligence, be the same collective and not individual, on whose part seems apparent on the face of record. Even if individual liability may not be ascertained, under sections 34 and 149 of the IPC, there are appropriate provisions for collective liability on the part of accused persons in terms of common intention and common object respectively. Interestingly enough, this is also a post-*Bothilo* judgment.

BOLAM TO *BOTHILO*: TOWARD GREATER ACCOUNTABILITY

The modern common law jurisprudence of criminal liability vis-à-vis any gross medical negligence initiated its odyssey with the so called *Bolam's* test (1957)[33] which is by and large a balance of competing interests between errant practitioner and his victimized patient. Thus, being organized community,

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caused by medical practitioner is concerned, to constitute negligence, simple lack of care or an error of judgment is not sufficient. The cause of death should be direct or proximate. For an act to amount to criminal negligence, the degree of negligence should be much high degree. A negligence which is not of such a high degree may provide a ground for action in civil law but cannot form the basis for prosecution. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. *Malay Kumar Ganguly and Dr. Kunal Saha v. Dr. Sukumar Mukherjee and others* [2009 INDLAW SC 994]. Available at: < *http://judis.nic.in/supremecourt/imgs.aspx* > (Viewed on January 10, 2010).

31. *Supra* n.30. A patient would feel the deficiency in service having regard to the cumulative effect of negligence of all concerned. Negligence on the part of each of the treating doctors as also the hospital may have been contributing factors to the ultimate death of the patient. But, then in a case of this nature, the court must deal with the consequences the patient faced keeping in view the cumulative effect. In the instant case, negligent action has been noticed with respect to more than one respondent. A cumulative incidence, therefore, has led to the death of the patient. It is to be noted that doctrine of cumulative effect is not available in criminal law. The complexities involved in the instant case as also differing nature of negligence exercised by various actors, make it very difficult to distil individual extent of negligence with respect to each of the respondent. In such a scenario finding of medical negligence under section 304-A cannot be objectively determined.
32. Anon, "Legal implications of Anuradha Saha death case, the People for Better Treatment", Kolkata. Available at: <*http://www.pbtindia.com/Anuradha_Story/Anu_4.htm*> (Viewed on January 10, 2010).
33. *Bolan v. Friern Hospital Management Committee* (1957) 1 WLR 582. Available at: < *http://oxcheps.new.ox.ac.uk/casebook/Resources/BOLAM%201%20DOC.pdf*> (Viewed on January 10, 2010).

practitioners won the first round with the result that the Bolitho (1997) invoked a new beginning.[34] A rationale behind introduction of the Bothilo lies in the chronicle of an ordeal on the part of Bolam's test which was crippled by professional bias of concerned professional bodies which so often than not turned its blind eye toward the guilt of errant practitioner. As per Newton's third law, the *Bothilo* becomes operative. Together these two offers a set of rules complementary and supplementary to one another and thereby walk hand-in-hand.[35] In case the *Bothilo* follows the dilution of the *Bolam's* test though its myopic vision, another test will initiate to contest errant practitioners. Professional bias and/or lack of judicial confidence (toward criminal liability for gross medical negligence) cannot offer long term resistance. Imperative need of this hour is a quest for reform like that of the United States.[36] Even in India, such a parallel process is operative to this end. Initiated its odyssey with interest of

34. *Bolitho v City & Hackney Health Authority* (1997) 4 *ALL ER* 71, a decision which is seen by some as qualifying the *Bolam* test.In this case, the patient was a two-year-old boy who had a past history of hospital treatment for Croup, and was re-admitted to hospital under the care of two doctors. The following day, he had difficulty breathing on two occasions. On both occasions, doctors were paged to attend to the patient but none of the doctors who were paged attended even though they said they would. On these two occasions, the patient appeared to return to a stable state rather quickly. However, about half-an-hour after the second occasion, the patient suffered total respiratory failure and a cardiac arrest, resulting in severe brain damage and subsequently died. The Court held that a doctor could be liable for negligence in respect of diagnosis and treatment despite a body of professional opinion sanctioning his conduct, if the Court is satisfied that the body of opinion relied on was not reasonable or responsible. K. Shanmugam, "SMA Lecture 2001", *Singapore Medical Journal,* 2002,vol. 43(1):008. Available at: <*http://www.sma.org. sg/smj/4301/ 430111.pdf* > (Viewed on January 10, 2010).

35. *Ibid.*,pp10-11,The rights of the doctors have to be balanced by the rights of the patients, while at the same time keeping the societal interests in perspective. The *Bolam* test, properly applied, does balance the rights. It protects doctors who act in accordance with the provisions accepted by their profession; and it allows a patient to sue, when he can show that his doctor had fallen below what the profession considers acceptable. Bolitho can be seen as a narrow exception to the *Bolam* test - it makes practical common sense because you cannot expect a Court to wholly accept the views of several medical experts to exculpate a doctor if that medical expert evidence is illogical. Bolitho simply requires the judge to scrutinize medical evidence in the same fashion as they would expert evidence in any other type of negligence case. To that extent, a faithful application of *Bolam* and Bolltho would mean that the Court will accept the views of a respected body of experts. The House of Lords in Bolitho was careful to say that there is only in rare cases and that it would "very seldom" be right for a judge to reach a conclusion that the views genuinely held by a competent expert are unreasonable.

36. The top five types of alternative reform: 1. More even-handed liability reform; 2. More data and performance benchmarks for legal and insurance systems; 3. More attention to medical discipline; 4. Increased support for patient safety research and development; 5. Experimentation with alternate, non-judicial systems; Randall R. Bovbjerg and Robert A. Berenson, "Surmounting Myths and Mindsets in Medical Malpractice, Health Policy Briefs", The Urban Institute, October 2005, p. 6. Available at < *http://www.urban.org/ UploadedPDF/411227 medical_malpractice.pdf*> (Viewed on January 10, 2010).

medical practitioners,[37] even the Law Commission of India appears to be mindful of its role to attain optimum balance in terms of competing interests.[38] However there are miles to go to this end.

Striking a balance between competing interests seems need of the hour in general. The Supreme Court of India, however, found otherwise. In course of final disposal of a long pending matter, the Court went in favour of patient with its purpose deliberated in the judgment.[39] What the Court did not write was its judicial realism that, out of their uneven socio-economic status and opportunity, a literal balance between physician and patient so often than not destabilize comprehensive balance between them vis-à-vis access to Justice since socio-economic reach of physician is abysmally higher than common patient to (mis)use fault lines of administration of justice under common law system in India that holds poor rank with poor marks (ninety fourth rank out of one hundred seventy four with thirty six marks out of one hundred scale) in 2012 worldwide assessment of Transparency International.[40] Under given circumstance in administration of justice, by courtesy systemic fault and human greed, perhaps no judgment may claim a better jurisprudence than one delivered by the Court in this case. At bottom, the Court followed similar wisdom followed by it since decades back, albeit in divergent context, that there is equality only among equals and to equate unequals is to perpetuate inequality. Not only that, even decades back, the Court went on to find parallel jurisprudence as developed by its US counterpart as well and thereby established this principle as derivative of the Constitution itself.[41] An extension of the same to medical negligence case may not be too far to drag

37. There is also a view that the doctors must be protected if civil and criminal actions are instituted against them. *The 196th Report of the Law Commission of India on Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners)*, 2006,p.414.Available at< *http://lawcommissionofindia.nic.in/reports/rep196.pdf*> (Viewed on January 10, 2010).

38. Indifference towards victims of accidents and those in emergency medical conditions and even women under labour who are about to deliver is not peculiar to India but is prevalent in other countries also. In the United States, there is a statute called EMTALA (Emergency Medical Treatment and Labour Act) which was enacted by introducing it in 1986 into the Consolidated Omnibus Budget Reconciliation Act, 1985 (COBRA). This Act is also known as the Patient Anti-Dumping Act. It imposed a mandatory duty on hospitals to give medical treatment to patients in emergency medical condition and women under labour, failing which the defaulter can be punished under the criminal law. *The 201st report of the Law Commission of India on Emergency Medical Care to Victims of Accidents and during Emergency Medical Condition and Women under Labour*, 2006, p. 414. Available at < *http://lawcommissionofindia.nic.in/reports/rep201.pdf*> (Viewed on January 10, 2010).

39. *Dr. Balaram Prasad* v. *Dr. Kunal Saha* & Others [MANU/SC/1098/2013]

40. Available at< *http://www.transparency.org/cpi2012/results*> (Viewed on January 1, 2012).

41. Right to equal protection of laws or equality before law in, 'benefits and burdens' by operation of law, equality amongst equals and unequality amongst unequals is firmly rooted in concept of equality developed by courts in this country and in America. *Indra Sawhney and Others.* v. *Union of India and Others* [MANU/SC/0104/1993].

the constitutional chord for justice for common patient while (s)he is way behind from physician in status and opportunity.

In its latest judgment to dispose of a cluster of cases pending before it, therefore, the Court came heavily upon clinical establishments to send its pulse to all others as well that henceforth gross lethargy with life and health of patient may receive no compassion and to be dealt with severely. Physicians, in individual capacity, may be held responsible for negligence. However, on criminal liability, the Court is non-committal so far as judicial policymaking is concerned.

From the text of its latest judgment, therefore, wait-and-watch policy of the Court seems clear.[42] Besides errant physicians and clinical establishments, the Court issued a note of caution to related statutory institution as well. Mentioning name, the Court sent a covert message that Medical Council of India, being (wo)manned by physicians, ought to do away with all its partisan practices of favouring fellow physician out of professional fraternity despite gross negligence of errant physician is otherwise apparent.[43] Before initiating *culpa* as last resort against stakeholders in medical practice, the Court is thereby engaged to explore other possible options to curb negligence and strike workable balance. In its given status, the judgment itself conveys a note of humiliation for medical profession.

NEED FOR A SELF-CONTAINED CODE OF CONDUCT

Indeed a self-contained code of conduct for medical practitioners was introduced way back in 2002.[44] Also there is overt mention of moral turpitude or criminal acts to constitute professional misconduct and consequent disciplinary action.[45] But there lies age-old cliché of shifting the burden of bailing wild cat to one another with the result that the court and the council mutually pass inconvenient matters to one another as per their own convenience. The code, therefore, being otherwise good enough to restore lost glory of medical

42. *Supra* n. 38, paragraph 149.The doctors, hospitals, nursing homes and other connected establishments are to be dealt with strictly if they are found to 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 forms their human right. We, therefore, hope and trust that this decision acts as a deterrent and a reminder to those doctors hospitals nursing homes and other connected establishments who do not take their responsibility seriously.
43. *Ibid.*, paragraph 150, Since the conduct of doctors is already regulated by the Medical Council of India, we hope and trust for impartial and strict scrutiny from the body.
44. The Indian Medical Council (Professional Conduct, etiquette and Ethics) Regulations, 2002.
45. 7. **Misconduct.**- The following acts of commission or omission on the part of a physician shall constitute professional misconduct rendering him/her liable for disciplinary action. 7.5 Conviction by a court of law for offences involving moral turpitude/criminal acts.

profession, falls short of efficacy.[46] Further there lies chronic problem of strict implementation of the code of conduct abovementioned- an imperative need toward improvement of the state of affairs in the affairs of state. After all, there may be no question of betterment unless and until maximum medical practitioners, even if not all, pledge themselves as better people for better treatment. In the age of worldwide corruption, this seems too hard to keep medical profession away from evil syndrome of contemporary age and its people. A law school learner of India, for instance, may at ease identify handful instances of obviously uofair medical practice over which there may be no liability- civil or criminal- though the same prima facie constitute unfair practices in true sense of the term.[47] Further, there are instances of structural negligence for which the liability becomes too uncertain to ascertain on any particular individual practitioners so much so that even victim cannot identify his offender(s), if any.[48] Perhaps public interest litigation is left to be an only remedy introduced so far, but entertainment of the same so often depend on discretion of the judge(s) concerned. Thus there are umpteen instances of medico-legal conundram which affect people with impunity and people suffer from such instances due to no fault on their part. Such is an age of subversion from within. Despite jurisprudent wisdom for balance, message of the Court is likely to fall on deaf ears.

CONCLUSION

An instance of medical negligence, whatever gross that may be, seems unlikely to be proved beyond reasonable doubt. This is more so as there are broad general exceptions to law of crimes which may at case accommodate any such instance. For instance section 80, read with section 87, of the IPC may offer escape routes to any errant practitioner irrespective of intensity and frequency of negligence. A potential non-cooperation from medical community also offers heavy

46. Anuj Sharma and Samiran Nundy, "Rules for Medical Practice", *Indian Journal of medical Ethics*, 2002, July-September; 10(3). The code has covered the entire range of medical ethics and, if followed, will restore the dignity and honour of our once-noble profession. Available at <*http://www.issuesin medicalethics.org/103ed039.html*> (Viewed on January 10, 2010).

47. Nikhil Gurnani, Medical negligence. An article uploaded by indlaw.com Available at: <*http://consumer.indlaw.com/search/articles/?8452a248-bdea-410f-a338-518748fddb50*> (Viewed on January 10, 2010).

48. V.R. Krishna Iyer, "Book review of R.K. Bag, *Law of Medical Negligence and Compensation*", *Hindu (online edition)*, Features, September 18, 2001.We live in times when more and more people rush to hospitals. But their appointments with the specialists turn out to be disappointments on account of a variety of factors. I may call it hospito-pathology. The birth of deformed babies, cretinism and other infantile diseases may be explained; the extensive environmental pollution, exposure to radiation during pregnancy, popular consumption of wrong drugs and other paedogenic infirmities are the price of crazy modernity. Who is liable for these technological culpabilities? Here the rule of law must run faster to defend the right to life". Available at <*http://www.thehindu.com/the hindu/2001/09/18/stories/13180178. htm*> (Viewed on January 10, 2010).

deterrence to the judiciary. Criminal liability seems still imperative not only for rule of law, but to restrain evolution of extrajudicial methods in the absence of legal method. Nowadays instances of harassment of medical practitioners spread and the spread seems more in such provinces where allegation of medical negligence occurs more though there may be no ready database to fortify this assumption beyond doubt. But a mob may not be bothered over database and the State may not be able and/or willing to handle such mob daily. In their own professional interest statutory medical authority, being (wo)manned by medical practitioners and allegedly subject to professional bias, ought to be prudent enough to save its institutional reliability through blindfold disposal of cases and thereby avert harsh judicial intervention which facilitates the medical Council recreate its credibility along with that for medical profession. So often than not, an extrajudicial harassment occurs since there is no faith over the quasi-judicial or judicial process left to public perception which is travesty of both professions- medical and legal. The same is nonexistent in the Occident as such professionals enjoy confidence of the public. The crisis lies, therefore, more in application of rule of law than in application of liability- civil or criminal is a point apart.

Except in extreme cases, *culpa* cannot be a moot point to address such negligence. Few relations- between teacher and learner, legal practitioner and litigant, medical practitioner and patient- are similar, if not exactly the same, to fiduciary relations and deserve delicate treatment in public domain. Along with technical knowledge, dedication and devotion are required on the part of the former for effective service to the latter. Volition rather than compulsion is the key to success for this purpose. Sooner both sides appreciate this axiom seems better.

As an instrument of social transformation, law ought to be kept as last resort while recent trend rushing to consumer forum- a commodity fetish in urban India- with corrosive effect to these relations. But, in peri-urban *Bharat*, rushing to the person of physician ruins the relation in its roots and thereby leaves irreversible damage that prompts others not to take avoidable risk there. Trust-building process is what is emergent than (ab)use of law and its court like panacea to cure a(ny) sundry evil in modern society. While the occidental life world itself prompts to jeopardy, albeit under the (dis)guise of modernity, a prudent recourse lies in resort to the tradition of not-so-modern oriental life world prevailing in the so called pre-modern society. Trust-building process between these otherwise commercial(ized) relations seems an emergent need of the hour and both sides owe equitable responsibility to extend hands in larger strategic interest; and in greater social interest as well.

Abandoned and Divorced by Nri Husbands: Harassment of Women in A Globalising World

Ms. Priti Rana*

ABSTRACT

With the advancement of globalisation in the last decade, new features and tactics of woman-abuse have begun to emerge. In all societies, harassment of women manifests in many forms, in national, and increasingly, in transnational spaces. Transnational abandonment of Indian wives by their NRI (Non-Resident Indian) husbands constitutes an emerging face of harassment against women. This paper explores various socio-legal aspects of abandonment of Indian wives in their home countries by their immigrant husbands. Since it is believed that marriage defines a woman and divorce is still culturally unacceptable, abandonment has debilitating and far- reaching consequenees for married women. It profoundly affects financial, emotional, physical, and social conditions of abandoned women and renders their lives and livelihood virtually nonviable. Two important features of abandonment of wives highlighted in the paper are deception and the deliberate infraction of women's legal rights. Most frequently, desertion is followed up by the husbands starting divorce proceedings and obtaining ex parté divorces due to the women's inability to appear in courts abroad. As women fail to appear in court or secure legal representation from their natal countries, they lose out on furthering their own and their children's financial interests. The major legal issue in transnational abandonment of women is that courts in two countries that are involved may have disparate laws. Furthermore, these courts may ignore each other's judgments and thereby, issue conflicting orders. Such jurisdictional disagreements and legal contradictions often jeopardise the financial and social rights of women who are not in a position to protect them. International laws, especially Hague Conventions have designed some guidelines to govern these conflicts, but the majority of these laws still need to be tested and implemented.

INTRODUCTION

The issue of "NRI marriages" has gained paramount importance over the years as the problem of Indian women trapped in fraudulent marriages with Non- Resident Indians (NRIs)[1] and people of Indian Origin (PIOs) has assumed alarming dimension. With the characteristic Indians' desire for migration to foreign countries, marriages to Non Resident Indians (NRI) promising greener pastures for not only the girl but her entire family, are seen as the easiest way to migrate

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1. Though a gender neutral term, NRI marriages, generally and for the purpose of this paper, is to be understood as a marriage between an Indian woman and an Overseas Indian man (which would include NRIs and foreign citizens of Indian origin).

abroad. Further there are allurements by marriage agents and families feel that such unions would elevate their status in society. In the eagerness not to let go of such opportunities, families totally ignore even the common cautions that are observed in traditional matchmaking. Marriages are therefore rushed into, and as the statistics show that up to two out of ten times they turn ont to be fraudulent. In several other instances there have been reports of mental and physical abuse. Nearly 30,000 women have been abandoned and 15,000 cases registered in the Northern State of Punjab alone.[2] Further, the Ministry of Overseas Indian affairs warns, that there are certain risks involved in these kinds of marriages. Families who hurriedly marry off their daughters overlook the fact that in the event that things go wrong, the woman's recourse to justice is greatly constrained by the fact that such marriages are not governed only by the Indian legal system but also by far more complex private international laws involving the legal system of other country too.[3]

The problem is manifold and includes various kinds of harassment of married women in foreign countries like non-consummation of marriages, marriages of convenience, concealment of earlier existing marriage by the husband before marrying an Indian woman and lack of social security faced by an Indian woman on the foreign soil once the marriage is broken and ex parte divorces are obtained. A most conspicuous disturbing trend, however, appears to be the easy dissolution of such marriages by the foreign courts even though their solemnization took place in India as per the Indian laws. Though matrimonial disputes are one of the most challenging and complex areas for legal intervention within any system, what makes the situation complex particularly in the Indian context is the fact that in the absence of uniform civil laws, the personal laws of various religious communities continue to be different, thus making the matrimonial disputes, especially in inter-religious marriages, even more difficult to deal with. In this already complex scenario, the legal complications get multiplied manifold when a marriage steps beyond the borders of a country and its legal system, in a phenomenon that has come to be known as "NRI marriages". These marriages have to then enter the domain of private international law that deals with the interplay and conflict of laws of different countries, which makes the issues therein that much more complex.

THE PROBLEM OF 'ABANDONED BRIDES'

In recent years, abandonment of Indian wives by their NRI (non-resident Indian) husbands has taken on epidemic proportions. The phenomenon of wives abandoned by their NRI husbands has been growing invisibly for more than a decade. Nearly every Indian state has women deserted by NRI men who live in various foreign countries including Canada, UK, various European and Middle

2. National commissiou for Women, *The Nowhere Brides: Report on Problems Relating to NRI Marriages*, 2011, pp. 3-4. Available at <*http://new.nic.in*>.
3. *Ibid.*, p. 6.

Eastern countries, and the USA. The pattern of NRI wife abandonment falls into three categories: (a) a woman who is married before her husband migrates to a foreign country or while he is visiting India but is never sent sponsorship for a visa to join him; (b) a woman who has been residing abroad with her husband is either deceptively or coercively taken back to India and left there without her passport, visa, and money and thus without any way of rejoining her husband; and (c) a woman who is residing with her husband in a foreign country suddenly finds her husband has disappeared leaving her in the lurch.

In the first situation, women who are already married may be left behind in the home country by their migrant husbands with the promise that they will send their wives travel papers as soon as possible. The couple may keep in touch for a while and the wife might receive periodic financial support. However, both the contact and financial support dwindle as time goes by and ultimately dry up completely. At this point, the men may disappear altogether leaving no clue for their wives to find them abroad. Alternately, some husbands may even visit their wives a few times on vacation; placate them with fresh assurances of sending visa sponsorship, and leave again.[4] A variation of the above setting is the immigrant man who returns to his home country to marry and leaves with promises to send for his wife soon. Again, no visa sponsorship papers arrive for the woman. In *Neeraja Saraph* v. *Jayant Saraph*,[5] the wife who got married to a software engineer employed in the United States was still trying to get her visa to join her husband who had gone back after the marriage, when she received the petition for annulment of marriage filed by her NRI husband in the US court. The husband never called or wrote and never came back again.

Most of these marriages are quick arrangements, as the men turn up in their home countries on short holidays and get married in split second decisions. Hence, these women have acquired the label 'holiday brides'. In both the above scenarios, women are left in limbo without any way of contacting their husbands or knowing what to do next. Many women keep waiting with the assumption that their husbands may be in difficulties beyond their control.

The second pattern of abandonment entails women who are already living abroad with their husbands and are deceived into returning to the home country for a visit either alone or accompanied by their husbands. They may also be tricked into trusting their husbands with their travel papers. Once in the home country, the men may destroy their wives' passports and visas to intentionally block their re-entry to the foreign country and depart without notifying their spouses. Without valid travel documents, these women are helpless and trapped in their home countries without any reliable recourse. Once the husbands are

4. Malhotra, A., & Malhotra, R. *Report on seminar on "NRIs Abandoned Brides-A Challenge to Meet*, Panjab University, Chandigarh, 2007, February 14.
5. (1994) 6 SCC 461.

back to the foreign country, they routinely withdraw sponsorship for their wives' dependent visas, diminishing the women's options further and leaving them virtually no way of returning to the foreign country. In *Harmeeta Singh v. Rajat Taneja*,[6] the wife was deserted by her husband within 6 months of marriage as she was compelled to leave the matrimonial home within 3 months of joining her husband in the US. Women are often so flabbergasted by this betrayal that they do not know how to repair not only the relational rift but also the problem of uprooted residency.

According to the Ministry of Overseas Indian Affairs, some women are taken abroad only to be brutally battered, assaulted, abused both mentally and physically, malnourished, confined and ill treated by their husbands and sometimes their in-laws for dowry. In *Venkat Perumal v. State of A.P.*[7] the wife has alleged that she was subjected to harassment, humiliation and torture during her short stay at Madras as well as US and when she refused to accept the request of her husband to terminate the pregnancy, she was dropped penniless by her husband at Dallas Airport in the US and she returned back to India with the help of her aunt and on account of the humiliation and agony she suffered miscarriage at Hyderabad. In certain cases, wives reach the foreign country of their husband's residence and are left waiting at the international airport, abandoned in a foreign country. They are deserted with no support or means of sustenance or the permission to stay on there. There are several cases where a woman later learns that her NRI husband has given false information about his job, immigration status, or earning to con her into marriage. Some of these men turn out to be married already or living with another woman abroad.[8] Keeping in mind the socio cultural situation in India, once abandoned these 'holiday' brides lose everything including their social standing.

The Ministry further warns of the aggravated risks in marriages to Overseas Indians. These include the woman's increased feelings of isolation, difficulties owing to constraints of language, difference in culture, lack of a support network of friends and family and readily available monetary support. Further she is confronted with the problem of the lack of knowledge of the foreign criminal justice system, police and legal system.[9] Most of these women have no place to take shelter when they are thrown out of their matrimonial home by their husbands and not received by their parents. It is hardly surprising that even as the number of NRI marriages is escalating by thousands every year, with the

5. 102 (2003) DLT 822.
6. (1998) DMC 523.
8. Bhushan, Kul, *NRI Marriages: Dreams to Nightmares*, Indo-Asian News Service, London, 2006, p. 113.
9. Ministry of Overseas Indian Affairs, "Marriages to Overseas Indians- A guidance booklet", Ministry of Overseas Indian Affairs, New Delhi, 2007, p. 9, available at <*http://moia. gov.in /pdf/Marriages_to_Overseas_Indians_a_Guidance_Booklet.pdf*>.

increasing Indian Diaspora, the number of matrimonial and related disputes in the NRI marriages have also risen proportionately, in fact at some places much more than proportionately.

ABANDONMENT, DIVORCE, AND BARRIERS TO JUSTICE

In the majority of cases, after abandoning their wives in their natal countries, men initiate divorce proceedings in the foreign country. The process of such divorce is fraught with problems for women who are deserted outside the country. In many cases, the women may never receive the notice of filing, a copy of complaint, and the notice of appearance. Although service of such notices is a necessary step for valid divorce in most of the countries, men's families or other hostile parties may suppress such notices and forge the recipient's signature to indicate legally binding acceptance.[10] Frequently, the divorce notices are served improperly; that is, not personally. Even when the notice is served properly, it may reach a woman late with only a couple of weeks at hand to respond. Most women tend to be ignorant of the laws of the foreign country and often do not have easy access to legal advice in their home countries.[11] In countries like India where family law allows one party of a married couple to contest divorce petitions, even after receiving the divorce notice, a woman may not comprehend that by refusing to receive or respond to a divorce notice from the foreign court, she allows the divorce to be concluded by default and ex-parté after the required elapse of time. In *Veena Kalia v. Jatinder N. Kalia,*[12] the NRI husband obtained ex-parte divorce decree in Canada on the ground not available to him in India.[13]

Receiving ex-parté divorce is a rule for these abandoned women rather than an exception. It is more than likely that immigrant men abandon their wives in their home countries to privilege their own interests and ensure women's non-participation in the divorce proceedings. Without adequate financial resources to travel abroad, any means of obtaining a travel visa, or with their traveling papers destroyed, abandoned women have little chance of responding to the court notice of appearance in person. Neither can they hope to retain an attorney in the foreign country who would represent their interests and legal rights in court.[14] Thus, most women are forced to accept an ex-parté divorce without protest. By their non-response, the women are perceived by the foreign courts to

10. Dasgupta, Shamita, *"Woman Abuse in a Globalising World: Abandonment of Asian Women" in Indian Journal of Research,* 2011, p. 4.
11. Sheel, Ranjana, *"The Migrant Indian Community", Indian Journal of Gender Studies,* 28, 2011, p.12.
12. *AIR* 1996 Del. 54.
13. See also *Y. Narasimha Rao v. Venkata Lakshmi* (1991) 2 *SCR* 821; *Maganbhai v. Maniben AIR* 1985 Guj. 187; Anubha v. Vikas Aggarwal 100 (2002) DLT 682.
14. Ghosh T., *"NRI restrained from marrying a second time in India". Telegraph,* May 30, 2014, available at <*http://www.nriinternet.com /Marriages/Desrted_Wife/2005/Jan_/5Calcutta Court_stop_USNRI/*> (Viewed on August 5, 2014).

forego spousal support, equitable property settlement, as well as child support.[15] For the women, the barriers to demanding reasonable justice in the foreign country seem so convoluted and formidable that the majority relinquish after ineffectually knocking on many doors.

However, the repercussions of such ex-parté divorce are far reaching on such abandoned women's lives. The consequences of abandonment and subseqnent divorce exteud to women's social, economic, and emotional disenfranchisement. The stigma of divorce is still profound, particularly on women. When a waiting bride is never allowed to join her émigré husband, she may be socially branded as a total farlure and someone who cannot please her husband and in-laws. The divorce only adds fuel to this maligning of reputation. For women who have been living abroad and brought back to their home countries and discarded, the consequences might be even worse. Away from the community's eyes, relatives and ueighbors might decide that the women may have transgressed badly from the 'good wife' role, and hence been rejected. In both cases, women's social standings and their safety are placed at risk. As women unwanted by their husbands, they are considered disposable by the rest of the society.

The effect of such public disgrace is emotionally calamitous on these abandoned women. Most are traumatized by their husband's duplicity and at loss about their present and future status. Many do not fully understand the proceedings in a foreign land that have rendered them 'divorced' and their own powerlessness to effect any change.[16] A significant number of wives abandoned by their husbands end up financially dependent on their in-laws and parents. Often, they have to exchange servitude for the survival of their children and themselves. Others, who may be educationally qualified and become financially independent, are also not spared social ostracism. Such financial dependence and emotional strain prevent women from seeking legal justice locally and transnationally.

When deserted for a long time, some women seek intervention of Indian courts, particularly to receive some sort of financial support from their NRI husbands. Some women file lawsuits against their abandoning spouses on the basis of dowry extortion and matrimonial cruelty (IPC 498A), but the cases remain pending when non-resident husbands do not respond to court issued notices to appear in person.[17] Given the reluctance of Indian women to expose 'private'

15. Bhuyan, R. *"Navigating gender, immigration, and domestic violence"* in S.D. Dasgupta (Ed.),
Body evidence: Intimate violence against South Asian women in America, Rutgers University Press New Brunswick, NJ, 2008, pp. 229-242.
16. Solanki, G.A, *"Fraudulent NRI Marriage and Vulnerable Brides"* in *Indian Journal of Research*, 2012, Vol. 1 Issue 10, p.92.
17. Abraham, V., *"Married to despair: Abandoned wives lead hopeless lives in Kerala village"*, *The Week*, 2012, July 27, available at <*http://www.the-week.com/23jul27/life11.htm*> (viewed on August 5, 2014).

information to the 'public' world and the historical mistrust of law enforcement and the legal systems, such lawsuits are rare events rather than widespread phenomenon.[18] Unless a woman's family utterly supports such a move both financially and emotionally, it is highly unlikely that she can even initiate such a step. Although Indian courts are more likely to quickly allocate a small amount of interim maintenance for the women, implementation of these judgments are apt to be impossible in another country. Allotment of permanent maintenance or divorce in Indian courts also tend to be unattainable as the NRI men do not appear in court by seeking continuance interminably and the incredible backlog of cases congesting the Indian legal system. On the other hand, women who dare to take their husbands to court, may become more vulnerable to abuse and harassment not only from their affinal families but also their communities.

SPLIT JURISDICTION AND ABANDONED WOMEN

The foremost legal challenge that transnationally abandoned women face is the problem of jurisdiction when the habitual residences of the spouses are in different countries, thus rendering judicial or administrative decisions virtually unenforceable. The issue of split jurisdiction becomes even more pronounced when the courts in the two countries involved have disparate laws and pass conflicting judgments. Such jurisdictional disagreements and legal contradictions often jeopardize the financial and social rights of women who are not in a position to protect them in the first place. In cases of transnational abandonment, an abandoned wife may file for restitution of conjugal rights in India and receive a decision in her favor, while the foreign court may concurrently grant an ex-parté divorce in response to the resident husband's petition. In the foreign court case, the wife may end up without any monetary awards and maintenance based on her non-participation in the proceedings. Case laws from Indian High Courts and Supreme Court further highlight this conflict of jurisdiction.

In *Harmeeta Singh v Rajat Taneja,*[19] the Delhi High Court passed an order of restraint against the husband to stop him from continuing with divorce proceedings in the U.S. while a maintenance case was going on in India filed by the abandoned wife. The High Court asked the husband to present a copy of this order to the U.S. court and observed that if he still obtained a divorce from the U.S. courts, such a divorce would not be recognized in India. Since under Section 44A of the Civil Procedure Code (CPC) the United States was not a "reciprocating territory," orders issued by a U.S. court would not be automatically recognized by the Indian court. As per CPC, foreign decrees from

18. S.D Dasgupta, Gurnani, A., Kaushal, S., & Lodhia, S. (2005). *Resources, strategies, and barriers for assisting women abandoned transnationally.* presented at Aarohan: South Asian Women Rise Up Against Violence conference, September 9-11, New Brunswick, NJ.
19. *102 (2003) DLT 822.*

non-reciprocating countries must be filed in Indian District courts to seek recognition and enforcement.

Section 44A of the CPC provides for execution of decrees passed by courts in a reciprocating territory. It lays down that where a certified copy of decree of any of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as it has been passed by the District Court. Government of India has notified Singapore, Malaysia, UK, New Zealand, Hong Kong and Fiji as reciprocating territories.

In a similar case, the Supreme Court of India refused to recognize a divorce decree obtained by the abandoning spouse from a Circuit Court in Missouri. The Circuit Court in Missouri had issued the decree on the basis that the marriage was "irrevocably broken" and the petitioner had fulfilled the minimum requirement of residence having lived there for ninety days prior to filing for divorce. In *Harmeeta Singh v. Rajat Taneja*[20] the Delhi High Court made an observation that even if the husband succeeded in obtaining a divorce decree in the US, that decree would be unlikely to receive recognition in India as the Indian court had jurisdiction in the matter. The Indian courts have also made this very clear in their own pronouncements that they will not simply mechanically enforce judgments and decrees of foreign courts in family matters. The Supreme Court of India in *Y. Narsimha Rao v. Y. Venkata Lakshmi*[21] observed that "habitual residence" should not mean a temporary residence that can merely serve the purpose of obtaining a divorce decree and ruled, "The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married." The court itself laid down the only three exceptions to this rule:

(i) Where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married;

(ii) Where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married;

(iii) Where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

Unfortunately, the problems of jurisdictional conflict and legal contradiction are not resolvable by unilateral ruling about choice of applicable law for dissolution

20. *Ibid.*
21. (1991) 2 *SCR* 821.

of marriage and establishment of maintenance obligation. Rulings such as the Indian Supreme Court decision quoted above can only go so far, and its enforcement in the transnational context will remain elusive if the abandoning spouse refuses to submit to Indian jurisdiction and cannot be extradited. When abandonment and dissolution of marriage occur in transnational arenas, bi-lateral, multilateral, and/or international agreements are required to clarify the choice of applicable laws that protect the rights of both the petitioner and the respondent.

RECOMMENDATIONS FOR REFORM AND CHANGE

1. COMPULSORY REGISTRATION OF NRI MARRIAGES

Registration of marriages has yet not been made compulsory in India, it has only been recommended. Section 8 (1) of the Hindu Marriage Act, 1955 makes it optional for State Governments to provide rules for registration of marriages. But such registration of marriages is the crying need of the hour and must be made compulsory in the case of overseas Indians. Such registration shall ensure that all conditions of valid marriage are complied with.[22] This will in turn also provide proof of marriage and act as a deterrent for bigamous practices. The States in India with high migration incidence should make and notify rules under section 8 providing for compulsory registration of marriages and incidental matters related thereto.[23] Simultaneously, it should be made obligatory that the NRI spouse must give intimation of registration of his marriage to the concerned Embassy or High Commission of India, in the country in which he is presently resident.[24] Parliamentary legislation on compulsory registration of marriage is therefore highly desirable. This will bring country- wide uniformity in the substantive law relating to marriage registration.

2. LEGISLATIVE SAFEGUARD TO PROTECT THE INTERESTS OF WOMEN

With the large number of NRIs now permanently living in overseas jurisdictions, it has now become important that some composite legislation is enacted to deal with the problems of NRIs to avoid them from importing judgments from foreign courts to India for implementation of their rights.[25] The myriad issues of NRI marriages were analysed by the Honourable Supreme court of India in the case of *Neeraja Saraph v. Jayant Saraph,*[26] and it was held "although it is a

22. Solanki, G.A, "Fraudulent NRI Marriage and Vulnerable Brides", *Indian Journal of Research*, 2012, Vol. 1 Issue 10, p.92.
23. National commission for Women, *Abandoned Indian Woman: Trapped in NRI Marriage*, 2011, p. 16.
24. *Ibid*, p. 18.
25. *Supra* n.2, p. 22.
26. (1994) 6 SCC 461.

problem of Private International Law and is not easy to be resolved, but with change in social structure and rise of marriages with NRIs the Union of India may consider enacting a law like the Foreign Judgments (Reciprocal Enforcement) Act, 1933 enacted by the British Parliament. Under section 1 in pursuance of which the Government of UK issued Reciprocal Enforcement of Judgments (India) Order, 1958." It was further suggested by the Bench that the feasibility of a legislation safeguarding interest of women may be examined by incorporating such provisions as:

2.1. No marriage between a NRI and an Indian woman which has taken place in India may be annulled by a foreign court.

2.2. Provision may be made for adequate alimony to the wife in the property of the husband both in India and abroad.

2.3. The decree granted by Indian courts may be made executable in foreign courts both on principle of comity and by entering into reciprocal agreements.

3. ADDITION OF BREAKDOWN AS A GROUND FOR DIVORCE

Dissolution of marriage on the ground of breakdown of marriage as an additional ground for divorce should be introduced when at least one of the spouses is an NRI subject to safeguards provided by legislation. The Law Commission of India had recommended[27] amendments in the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 to make irretrievable breakdown of marriage as a new ground for granting divorce among Hindus. Such a ground would provide NRI spouses a judicial forum in India to seek a remedy on Indian soil rather than importing foreign judgments of alien courts and give a chance to the Indian spouse to defend on convenient and equitable terms in Indian courts. In *Ms. Jorden Diengdeh v. S.S Chopra,*[28] the Supreme Court of India observed that it is necessary to introduce irretrievable breakdown of marriage as a ground of divorce in all cases. The need for this amendment must be strongly mooted by the states with high NRI population to the Government of India since inter-country migration from such states is significant and in large numbers.

4. EX-PARTE DIVORCE BY FOREIGN COURTS BE BARRED

It has already been depicted how, with minimal effort, a divorce can be obtained in a foreign court owing to lenient legal system for grounds for divorce. But a marriage can only be dissolved under a law according to which it was solemnised in the first place and that is the fundamental law of the land. Hence if a marriage is annulled under foreign jurisdiction then the proceeding would

27. Law Commission of India, *Two Hundred and Eleventh Report on Laws on Registration of Marriage and Divorce- A Proposal for Consolidation and Reform*, October, 2008, p. 34.
28. *AIR* 1985 SC 935.

become void ab initio and the divorce decree would have no value.[29] The Supreme Court of India has ruled that "the jurisdiction assumed by the foreign court as well the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married." The Indian courts have also made this very clear in their own pronouncements that they will not simply mechanically enforce judgments and decrees of foreign courts in family matters.

5. INTERNATIONAL CONVENTIONS AND BILATERAL TREATIES

The problem of abandoned brides as with any other case involving Private International Law rules need to be solved on a case by case basis and often result in great disparity in judgments as each country has its own private international law rules. With nearly 70 members representing all continents, the Hague Conference on Private International Law is a global inter-governmental organisation with the mission of working for the "progressive unification" of these rules.[30] Since 1902 a number of treaties and conventions have been drafted specially to address the issues of marriage, divorce, and maintenance & child abduction. There is an urgent need to comprehensively and extensively examine these international conventions and bilateral treaties which have relevance and importance for the issues relating to NRI marriages.

a. Convention on the Service Abroad of judicial and Extrajudicial Documents in Civil or Criminal Matters, 1965 (Service Convention)

This Convention was framed with the object of creating the appropriate means to ensure that judicial and extrajudicial documents to be served abroad are brought to the notice of the addressee in sufficient time and to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure. Since India, USA, Canada and Australia (countries with maximum Indian migrants) are parties to this convention therefore this Convention is helpful in mitigating cases of *ex-parte* divorces where the women have not received proper and timely notice of the initiation of divorce proceedings in a foreign state.

b. Convention on the Recognition of Divorce and Legal Separation, 1970

The Convention stipulates that a divorce decree or legal separation obtained in a contracting state will be recognised by another contracting state if at the time of the proceedings, it was the respondent or the petitioner's habitual residence.[31]

29. *Sheenam Raheja v. Amit Wadhwa* 2012 (131) DRJ 568.
30. Supra n.23, p. 25.
31. Art. 2, Convention on the Recognition of Divorce and Legal Separation, 1970.

Furthermore, a contracting state may refuse recognition where such recognition is manifestly incompatible with its public policy. Therefore even this section of the Convention is helpful in mitigating cases of ex-parte divorces. But India has not ratified or acceded to this Convention.

c. Convention on the Laws Applicable to Maintenance Obligation, 1973

Article 5 mentions that recognition or enforcement of a decision may, however, be refused if the recognition or enforcement of the decision is manifestly incompatible with the public policy of the State addressed; or if the decision was obtained by fraud in connection with a matter of procedure. This article therefore refuses recognition to a decision in favour of the NRI husband obtained in the country of his residence, by fraud in connection with a matter of procedure or if it is manifestly incompatible with public policy. Neither Canada nor India has ratified this Convention.

d. Convention on Celebration and Recognition of Validity of Marriage, 1978

Article 11 (1) states that a contracting State may refuse to recognise the validity of a marriage, when at the time of the marriage, under the law of that State one of the spouses was already married. Further, Article 14 states that a contracting State may refuse to recognise the validity of a marriage where such recognition is manifestly incompatible with its public policy. these provisions refuse recognition to bigamous marriages entered into by the NRI husbands in their country of residence, while they remain married to the spouses they abandoned in India. Both Canada and India are not parties to this Convention.

CONCLUSION

Transnational abandonment of wives is a particularly challenging issue because of the legal complications it generates, the difficulties in arriving at a just solution, and the complexities in dealing with cultural as well as legal expectations of different nations. Unfortunately, the abandonment of women has grown significantly in the wake of increased global migration. As Indian men and women migrate to foreign countries, the enjoyment and infringement of their rights occur in transnational spaces - that is, spaces that extend beyond national boundaries and encompasses psychological, legal, emotional, cultural, and economic areas spanning different nations. Due to such straddling of boundaries, special issues and problems arise for individuals and families who live in transnational domains. The substance of harassment of women is affected by a community's culture, history, and the intricacies of the realities it faces. Thus, harassment is never a static phenomenon but a dynamic one that engenders different forms to fit the cultural, institutional, and individual

32. *Id.*, Art. 8.

actualities of the time. A bandonment of women in their natal countries while their husbands reside in different jurisdictions, effectively erects barriers around women to prevent them from accessing legal and financial justice. A number of Hague Conventions offer legal remedies that could provide abandoned women in India with financial relief, custody, divorce and ultimately, a semblance of justice. However, like all international agreements, Hague Conventions are meaningless unless the Indian government sign and agree to abide by these.

Right to Information Under Environmental Law: The Changing Perspective

Dr. Kshemendra Mani Tripathi*

PERSPECTIVE

In India, we have one inherited norm, that is, non-disclosure of facts and information, while openness is an exception. The Constitution of India enjoins upon the State to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice- social, economic and political shall inform all the institutions of the national life.[1] But, question of achieving a just social order has not been an easy task. It primarily depends on certain factors, viz; namely, *the form of system in which it has to be applied, and the role of State.* Under the Constitution of India, we have proclaimed ourselves as participatory democracy where free flow of information becomes inevitable. Unless the people are informed the democracy has no meaning.[2]

At the conceptual level ***Prof. Sathe*** has characterized 'Right to know' into two dimensions:

- **Broader Sense:** In broader sense, it means right to education, to learn, etc.
- **Narrower Sense:** In narrower sense, it means the right to have information as to who takes decisions, how they are taken and what they are?

RIGHT TO INFORMATION UNDER INTERNATIONAL LAW

The *Universal Nations Declaration on Human Rights (UNDHR)*[3], 1948 specifically mentioned right to know or information along with the freedom of expression in Art. 19. It reads as follows:

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1. See forward note by *Prof. Upendra Baxi* in S.P. Sathe, The Right to Know, Tripathi Publications, Delhi, 1991.
2. Prof. S.P.Sathe, *Right to Know*, Tripathi Publications, Delhi, 1991, has made a point that in the development of the right to know lies primarily the promise of maturation of Indian Constitutional democracy. Development of right inherits from knowledge and for knowledge information is necessary. *Prof. Upendra Baxi* also supports this contention when he says, "Information becomes knowledge when it is grounded in, and related to the total structure of power and domination".
3. *Tenth of December* is recognized as *Human Rights Day.*

"Everyone has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers".

The General Assembly of the United Nations adopted the *International Covenant on Civil and Political Rights* (herein after referred as *ICCPR*) in 1976, which is substantially based on *UNDHR. Art.19 (2) of ICCPR,* which specifically mentions right to obtain information, reads as follows:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the right provided in paragraph 2 of this article carries with it special duties and responsibilities. It may, therefore, be subject to certain restrictions, but there shall only be such as provided by law and are necessary:

   Firstly, for respect of the rights or reputation of others;

   Secondly, for the protection of national security or of public order (order public), or of public health or morals.

The *European Convention on Human Rights and Fundamental Freedom* was signed by the member States of the Council of Europe at Rome, 4th Nov1950. Sponsored by the Council of Europe, this important regional Charter of Human Rights went beyond the *Universal Declaration of Human Rights* in "imposing binding commitments to provide effective remedies in regard to a number of the rights specified in Universal Declaration[4]". Article 10 of this Convention laid down certain rights foe the freedom of expression. It reads as follows:

a. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and import information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from acquiring the licensing of broadcasting television or cinema enterprises.

b. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity

4. The United Nations Cooference on the Human Environment, 1972 also known as the Stockholm Conference, in its Proclamation (6th) stresses that "through ignorance or indifference we can do massive and irreversible harm to the environment on which we can achieve for ourselves a better life in an environment".

or public safety for the prevention or disorder of crime, for protection of health or morals, for the protection of reputation or rights of other for preventing the disclosure of information received in confidence, or of maintaining the authority and impartiality of the judiciary.

RIGHT TO INFORMATION UNDER INTERNATIONAL CONFERENCE / CONVENTIONS

At the international forums, the need of information and mass communication has been recognized. The Stockholm Conference, through its Principles/ Proclamations,[5] has projected the importance of information. Principle 19 reads as:

> *"It is also essential that mass-media of communications avoid contributing to the deterioration of the environment, on the contrary, disseminate information of an educational nature, on the need to protect and improve the environment in order to enable man to develop in every respect".*

Again, Principle 20 of the Conference elaborates the need for scientific information. It reads as follows:

> *"The free flow of up-to-date scientific information and transfer of experience must be supported and assisted, to facilitate the solution of environmental technologies, should made available to countries on terms which would encourage their wide dissemination without constituting an economic burden on the developing countries".*

After an interval of nearly two decades when the countries met in Earth summit, the quest for citizen participation was felt as to tackle the environmental problems.[6] *Principle 10* dealt with this issue which reads as:

> *"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities and the opportunity to participate in decision making widely available. Effective access to judicial and*

5. The United Nations Conference on Environment and Development (UNCED), also known as the Rio Summit, Rio Conference, also sought the need for the information through its other Principles, like *Art.17* of the Convention on Biological Diversity stresses "communication of information related to environment", and *Art.12* of convention on Management, Conservation and Sustainable Development of all types of forests stresses for 'International Exchange of Information'.
6. *ILM, Vol. IV.* Pg.878.

administrative proceedings, including redress and remedy, shall be provided".[7]

RIGHT TO INFORMATION UNDER INDIAN ENVIRONMENTAL LAWS

The importance of right to information under statutory enactments has been accepted to achieve the goal of environment protection. Although, all these environmental legislations have one very key aspect, i.e. the right to seek information is obtained by the concerned 'Boards' and simultaneously the duty has been cast upon the persons concerned to give information to such boards. But, at the same time no such duty has been cast upon the boards about their functioning to provide information to the consumers of environmental justice.

RIGHT TO INFORMATION UNDER WATER ACT, 1974:

Section 20 of the Water Act, specifically empowers the State boards "to make surveys of any area and gauge and keep records of the flow or volume and characteristics of any stream or well in such area... and may take such other steps as may be necessary in order to obtain any information required for the purpose aforesaid". *Section 20(2)* empowers the State board to give such information as to the abstraction or discharge (sewage or trade effluent into any stream or well) at such times and in such forms as may be specified in the directions. Without prejudice to the provisions of sub-section (2) a State board may, with a view to preventing or controlling pollution of water give directions requiring any person in charge of any establishment where any industry or trade is carried on, to furnish to it information regarding the construction, installation or operation of such establishment or of any disposal system or of extension addition thereto in such establishment and such other particular as may be prescribed. It is important to note that the *Water Act, 1974* provides mandatory functions of the Central and Sate boards which also deal environmental information.

These powers include;

a) To plan and organize the training of persons engaged or to be engaged on programmes for the prevention, control or abate of water pollution on such terms and conditions as the Central board may specify.[8]

b) Organise through mass-media a comprehensive programme regarding the prevention and control of water pollution.[9]

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7. Section 20 (1) of Water (Prevention and Control of Pollution) Act, 1974.
8. *Supra* n. 8, Section 16(e); 16 (2)(g)
9. Section 16 (f); similar functions have been dealt under sections 17(a), (d) and (e). See CM Jariwala, *"The Emerging Indian Environmental Law Vision", Education and Information*, Vol.34, 1996, pg.117.

c) Collect, compile and publish technical and statistically relating to water pollution and the measures devised for it effective prevention and control and prepare manuals, codes or guides relating to treatment and disposal of sewage and trade effluent and disseminate information connected with.[10]

PUBLICATION OF NAMES OF OFFENDERS:

Section 46 gives power to the court to make public, by publishing in the newspapers the names and residence of the offenders being convicted of an offence for the second time. The idea behind publishing the names of offenders seems to be two fold;

a. To make the public informed or bring in to their notice the offender's name and residence.

b. Keeping a check on others by restricting them to submit such like offences.

RIGHT TO INFORMATION UNDER AIR ACT, 1981

The Air Act provides for mandatory function of the Central and State boards which mainly includes;

a. Plan and cause to be executed a nation-wide programme for the preventien, control or abatement of air pollution;[11]

b. Organize through mass-media a comprehensive programme regarding the prevention, control or abatement of air pollution;[12]

c. Collect, compile and publish technical and statistical data relating to air pollution and the measures devised for its effective prevention, control or abatement and prepare manuals, codes or guides relating to prevention, control er abatement of air pollution.[13]

The State board is empowered to obtain information (regarding the types of air pollution emitted into the atmosphere and the level of emission of such air pollution) from the occupiers or any other person carrying on any industry or operating any control equipment or industrial plant and for the purpose of verifying the correctness of such information.[14]

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10. *Supra* n. 8, Section 16 (2)(b).
11. *Ibid.*, Section 16 (2) (f)
12. *Ibid.*, Section 16 (2) (g)
13. *Ibid.*, Section 16 (2) (g) (i), similar function are being performed by the State Boards under section 17
14. *Ibid.*, Section 9.

RIGHT TO INFORMATION UNDER ENVIRONMENT PROTECTION ACT, 1986

Section 3 of the Environment Protection Act, 1986 vests power in the Central Government to take such measures as are necessary or expedient for the purpose of protecting and improving the quality of environment. It also gives power to the Central Government for "Collecting and dissemination of information in respect of matters relating to environmental protection". In cases, where there is apprehended danger due to accident or other unforeseen act or event, the concerned person is required to intimate the fact of such occurrence and assist in rendering information to the concerned authorities or agencie.[15]

THE JUDICIAL APPROACH TO RIGHT TO INFORMATION

There is no specific enactment in India imposing a duty on the government to supply information to an individual seeking it. Instead, government actions are thickly veiled by the archaic Official

Secrets Act of 1923. The Gujrat government's decision in October 1988 to declare 12 villages near the site of the Sardar Sarovar Dam project as a prohibited place under this Act is an example of the reach of this law.

Having felt the need to allow greater citizen access to official information, the judiciary is gradually shaped the broad contours of the right to know. The courts have derived the fundamental right to know from two distinct constitutional sources - the fundamental right to freedom of speech and expression guaranteed in Art.19 (1) (a) and the fundamental right to life and personal liberty under Art.21 of the Constitution.

Highlighting the role of press in mass education Justice Venkatramiah observed, "In today's free world freedom of press is the heart of social and political intercourse. The press has now assumed the role of *'public educator'*[16] making formal and non-formal education possible in a large scale, particularly, in the developing world, where television and other kinds of modern communication are still not available for all sections of society. The purpose of press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgements".[17]

The Indian Express case articulated the role of press as a public educator. The Supreme Court, however, in *Sakal* Newspaper[18] advocated for professional treatment to press being guaranteed under Art.19 of the Constitution.

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15. *Indian Express Newspaper (P) Ltd. v. Union of India,* AIR 1996 SC 515.
16. *Indian Express Newspaper v. Union of India, AIR* 1962 SC 305
17. *Ibid.*
18. *AIR 1965 SC 865.*

The Supreme Court in State of *U.P. v. Raj Narain*[19] has given birth to the right to know out of the freedom of speech and expression guaranteed by our Constitution. In this case the court said that "the people have the right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all bearing".

The *judges transfer case*[20] was the crucial point in judicial delineation of right to information in India. In this case a constitutional bench of Supreme Court recognized the right to know to be implicit in the right to free speech and expression under of the Constitution. Justice PN Bhagwati for the court observed that, "This is the new democratic culture of open society towards which every liberal democracy is moving and our country should be no exception. The concept of open government is the direct emanation from the right t free speech and expression guaranteed under *Art.19 (1) (a)*. Therefore, disclosure of information in regard to the functioning of government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest bearing in mind all-time that disclosure also serves an important aspect of public interest ".[20]

Art.51A (g) of the Constitution makes the citizens responsible for protection of the environment. It is, therefore, necessary that they have a right to know. Infact, the apex court has opined in *Reliance Petrochemical case*[21] that there is a strong link between *Art.21* and the right to know particularly where secret government decisions may affect health, life and livelihood. The court observed that people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. The right puts greater responsibility upon those who take upon the responsibility to inform. Reiterating this principle in *Essar Oil ltd*[22] the apex court also emphasized the role of voluntary organizations in the environment management,[23]"The role of voluntary organizations as protective watch-dogs is to see that there is no unrestrained and unregulated development...it cannot be over emphasized ...our jurisprudence is replete with instances where voluntary organizations have championed the cause of conservation and have been responsible for creating an awareness of the necessity to preserve the environment so that the earth as we know it and humanity may survive".

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19. *S.P. Gupta v. Union of India, AIR* 1982 SC 149
20. *Ibid.*
21. *Reliance Petrochemical v. Proprietors of Indian Express Newspaper Ltd., AIR* 1989 SC 190
22. *Essar Oil ltd. V. Haldar Utkarsh Samiti, AIR* 2004 SC 1834.
23. Id. at 1845.

In *Bombay Environment Action Group v. Pune Cantonment Board*[24] the Bombay High Court held that a recognised group has a right to examine municipal permissions granted to private builders. The judgment is of seminal importance because it transfers the right to know from judicial rhetoric into a substantive enforceable right. More significantly, it recognises the right to know to be a distinct, self-contained right, independent from the government's claim to privilege under Indian Evidence Act, 1872.[25]

Further, the court upholds the petitioner's right to know without requiring any proof of government irregularity. Indeed, the only requirement for a recognised environmental group must act *bonafide* and for a genuine purpose. The Supreme Court, while endorsing the judgement of the Bombay High Court, further extended this right to all persons residing within the area as well as to any social group, interest or pressure groups. Further, the Supreme Court carved out a very limited "interest of security" exception to this right (in comparison to Bombay High Court's requirement of genuine purpose).

Right to Environmental Information and the creation of environmental awareness

The right to information (an individual and group recognized in a number of international instruments[26]) is highly relevant to the environment. It not only constitutes an essential attribute to the democratic processes and the principle of popular participation but is also a key to the success of the environmental programme and implementation of the laws on the environment.[27] Not only this right has been recognized in the homespun environmental jurisprudence but there is also a clear awareness of the necessity of creating environmental awareness through teaching and instruction at the different levels of education.[28] The Supreme Court by an earlier order dt.22.11.1991 had directed the State government and other authorities to create environmental awareness amongst the students through education. In its recent order of Dec.18, 2003 the court accepted the partial compliance with by respondent's states and other authorities, bearing in mind the burden the burden that might be imposed on students by introducing an additional subject of environment.[29]

24. Bombay High Court, Writ Petition No. 2733 of 1986.
25. Section 123, 124 and 126 of the Act deals with official communication, communication in relation to affairs of the State and unpublished official records.
26. See common Art.19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. On the importance of environmental information see Principle 19 of the Stockholm Declaration. Principle 10 of the Rio Declaration, the World Charter of Nature, 1982, 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage.
27. See generally *G.S. Tiwari, "Conservation of Biodiversity and Techniques of People's Activism", 31 JILI (2001) 215-219.*
28. *M.C. Mehta v. Union of India (1992) 1 SCC 358.*
29. *M.C. Mehta v. Union of India, (2004) 1 SCC 571.*

Legal Dimensions of Disaster Management: Global and Indian Perspectives

Dr. Alok Gupta*

ABSTRACT

Disasters, both natural and man made, strikes countries in developed and developing countries, causing vast destruction and human sufferings. Due to diverse geographical and geological features prevalent in different regions of the globe, various types of disasters like floods, droughts, earthquakes, cyclones, tsunami, landslides, volcanoes, forest fire, etc. strikes according to the vulnerability of the area. Each year these disasters take a heavy toll on human life and property and impacting the nation's economic and cultural health. Disasters can happen at any time and place according to the vulnerability of the area. Enactment of effective laws are critical for effective disaster management in the country. They strengthen protective infrastructure and assist governments to move people out of harm's way. They help communities to understand the risks they face and to make themselves safer. They motivate, organize and promote cooperation between government, civil society and the private sector, and guard against forgetfulness when it has been a long time since that last major crisis. On the other hand, weak laws can sap public confidence, entrench old ways of thinking and enable a culture of inactivity. They make it even harder for committed individuals to make a difference. There are number of countries giving due importance to the disaster management laws relating to their management.

INTRODUCTION

Disasters, both natural and man made, strikes countries in developed and developing countries, causing vast destruction and human sufferings. Due to diverse geographical and geological features prevalent in different regions of the globe, various types of disasters like floods, droughts, earthquakes, cyclones, tsunami, landslides, volcanoes, forest fire, etc. strikes according to the vulnerability of the area. Each year these disasters take a heavy toll on human life and property and impacting the nation's economic and cultural health. The population is more rapidly vulnerable to natural disasters due to rapid industrialisation and urban growth affecting the lives of the millions of the people. Changing global environment also threaten the mankind with the

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number of disasters like cyclones, global warming, rising sea level, dronght, tsunami, etc. In the recent years there has been increase in human and economic losses from disasters. These losses could havo been substantially reduced if an effective early warning system with good community preparedness could have been implemented. In this paper an attempt has been made to analysis the legal framework of Disaster Management in India with reference to Disaster management Act 2005 and light has also been thrown on the disaster management acts prevalent in different countries of the world.

LEGAL AND REGULATORY FRAMEWORKS

Legal and regulatory frameworks comprise tbe laws, executive orders and other legal instruments that set the ground rules for governmental and non-governmental activities relating to disasters and risk reduction. They define the authorities, responsibilities and roles of officials and organisations, establish legal authority for organisations and programmes, and sometimes create organisations and coordination mechanisms. They may dictate or encourage relevant policies, practices and processes. Of the 119 national reports submitted to the World Conference on Disaster Reduction, Kobe, 2005, 80 % included some form of legislation for disaster management. Typically, the national legal and regulatory framework is governed by a core piece of legislation, often referred to as the National Disaster Management Act. Disaster Management Law of Indonesia (April 2007) for example called for specific implementing regulations to be enacted by the Government including one on the role of international institutions and international non-governmental institutions in disaster management in the country.

WHY LAWS FOR DISASTER MANAGEMENT?

Disasters can happen at any time and place according to the vulnerability of the area. Enactment of effective laws are critical for effective disaster management in the country. They strengthen protective infrastructure and assist governments to move people out of harm's way. They help communities to understand the risks they face and to make themselves safer. Tbey motivate, organize and promote cooperation between government, civil society and the private sector, and guard against forgetfulness when it has been a long time since that last major crisis. On the other hand, weak laws can sap public confidence, entrench old ways of thinking and enable a culture of inactivity. They make it even harder for committed individuals to make a difference.

BEST PRACTICES IN DISASTER MANAGEMENT[1]

Best practices followed in some of the countries are as follows:-

1. Law and disaster risk reduction at the community level: Background report; International Federation of Red Cross and Red Crescent Societies, Geneva, October 2011

- **Laws can involve communities and civil society**

  In Nepal, many DRR committees have been able to legally register as community-based organisations, allowing them to access government assistance and participate formally in local government processes.

- **Laws can improve knowledge and education**

  Following the adoption of a new act in the Dominican Republic, the Ministry of Education has included key aspects of DRR in its ten year education plan, supporting the teaching of hazard awareness.

- **Laws can improve land management - even for poor communities**

  In Brazil, municipalities are called upon to designate "Special Social Interest Zones" with the goal of progressively legalizing and securing homes built outside of land management rules.

- **Laws can set realistic standards for community construction**

  In Nepal, the Department of Urban Development is disseminating "Mandatory Rules of Thumb", a set of voluntary guidelines intended to assist owner-builders to construct earthquake and fire safe smaller buildings.

- **Laws can ensure adequate funding at community level**

  New legislation adopted in the Philippines ensures that 5% of annual local revenues are set aside and strictly reserved for disaster risk reduction and preparedness activities.

- **Laws can mandate community risk mapping**

In Sweden, municipalities play the primary role in the promotion of comprehensive risk management programmes, and are mandated to undertake floods, landslides and forest fires risk mapping.

LEGISLATIVE FRAMEWORK OF DISASTER MANAGEMENT IN DIFFERENT COUNTRIES

JAPAN: DISASTER COUNTERMEASURES BASIC ACT 1997[2]

For the purpose of protecting the national territory, the life and limb of the citizens and their property, this Act provides for the establishment of a machinery working through the State and local governments and public corporations and the clarification of where responsibilities lie, and provide for the formulation of disaster prevention plans and basic policies relating to

2. Disaster Countermeasure Basic Act. National Land Agency, Japan, 1997

preventive and emergency measures and rehabilitation programs to deal with disaster, and other necessary measures as well as financial action, thus ensuring an effective and organized administration of comprehensive and systematic disaster prevention with a view toward the preservation of social order and the security of the public welfare.

SOUTH AFRICA DISASTER MANAGEMENT ACT. 2002

The Disaster Management Act, 2002 provides for the integration of risk reduction strategies into all development initiatives and the development of a strategy to reduce the vulnerability of people, especially poor and disadvantaged communities, to disasters. It also provides for the **establishment of Disaster Management Centre** to ensure that an effective disaster management strategy is established and implemented by all spheres of government and other disaster management role players; to co-ordinate disaster management in all spheres of government; and to promote and assist the implementation of disaster management measures in all sectors of society.

AUSTRALIA: DISASTER MANAGEMENT ACT 2003[3]

The main objects of this Act are: (i) to help communities mitigate the potential adverse effects of an event, prepare for managing the effects of an event, and effectively respond to, and recover from, a disaster or an emergency situation; (ii) to provide for effective disaster management for the State; (iii) to establish a framework for the management of the State Emergency Service and emergency service units to ensure the effective performance of their functions.

SRI LANKA: DISASTER MANAGEMENT ACT. 2005

The Disaster Management Act is an act to provide for the establishment of the National Council for Disaster Management; the disaster management centre; the appointment of technical advisory committees; the preparation of disaster management plans; the declaration of a state of disaster; the award of compensation and for matters connected therewith or incidental thereto.

ZAMBIA: DISASTER MANAGEMENT ACT NO. 13 OF 2010

An Act to: establish and provide for the maintenance and operation of a system for the anticipation, preparedness, prevention, coordination, mitigation and management of disaster situations and the organisation of relief and recovery from disasters;

ANGUILLA: DISASTER MANAGEMENT ACT, 2007

An Act to provide for the effective organisation of the preparedness, management, mitigation of, response to and recovery from emergencies and

3. Disaster Management Act. 2003, Office of the Queensland Parliamentary Counsel, 2011

disasters, natural and man-made, in Anguilla and for related purposes.

ANTIGUA AND BARBUDA: DISASTER MANAGEMENT ACT

An act to provide for the effective organisation of the preparedness, management, mitigation of, response to and recovery from emergencies and disasters natural and man-made in Antigua and Barbuda.

PHILIPPINES : NATIONAL DISASTER RISK REDUCTION MANAGEMENT ACT OF 2010

An Act for strengthening the Philippine disaster risk reduction and management system, providing for the national disaster risk reduction and management framework and institutionalizing the national disaster risk reduction and management plan, appropriating funds therefore and for other purposes. The focus of the PDRRM Act is on disaster prevention and risk reduction by putting more emphasis on strengthening the communities' and people's capacity to anticipate, cope with and recover from disasters, as an integral part of development programs.

NETHERLANDS: DISASTER MANAGEMENT ACT

In the Netherlands legislation distinguishes between an emergency and a crisis. Both the emergency and the crisis should be considered as subtypes of a disaster. Dutch legislation relating to emergency management and crisis control is currently laid down in a number of separate laws and acts such as Disasters and Major Accidents Act 1985 and Fire Department Act 1985.

THAILAND : DISASTER FREVENTION AND MITIGATION ACT 2007

There is a National Disaster Prevention and Mitigation Committee to (1)formulate the National Disaster Prevention and Mitigation Plan. (2) Determine and pre-approval of the plan before submitting it to the Cabinet. (3) To integrate the development on disaster prevention and mitigation mechanism among Government agencies, Local administrations, and other relevant private sectors effectively. (4) To recommend, support and promote on any disaster prevention and mitigation activities. (5) To propose regulations on remuneration, recompenses, and other expenses related to disaster prevention and mitigation operations, and those regulations shall be in accordance to rules and regulations of Ministry of Finance.

FIJI: NATURAL DISASTER MANAGEMENT ACT, 1998[4]

The Natural Disaster Management Act 1998 provides for the establishment of National Disaster Management Council to have an overall responsibility for

4. Fiji Natural Disaster Management Act, 1998

disaster management; develop suitable strategies and policies for disaster mitigation and preparedness and for training, management and public education in disaster management. It also prepare and implement adeqnate rehabilitation programmes after disasters, to recommend policies, strategies and alternatives to the cabinet.

INDONESIA: DISASTER MANAGEMENT LAW 2007

The main features of the act are:-

National Disaster Management Agency shall have the tasks of: a). providing guidelines and directions on disaster management which include disaster prevention, emergency response, rehabilitation, and reconstruction in a fair and equitable manner; b). setting disaster management standardization and requirements by virtue of Legislation; c). communicating information on activities to community; and others.

PARADIGM SHIFT IN DISASTER MANAGEMENT (DM) IN INDIA[5]

On 23 December, 2005, the Government of India took a defining step by enacting the Disaster Management Act, 2005, which envisaged the creation of the National Disaster Management Authority (NDMA), headed by the Prime Minister, State Disaster Management Authorities (SDMAs) headed by the Chief Ministers, and District Disaster Management Authorities (DDMAs) headed by the Coliector or District Magistrate or Deputy Commissioner as the case may be, to spearhead and adopt a holistic and integrated approach to disaster management. There will be a paradigm sbift, from the erstwhile relief-centric response to a proactive prevention, mitigation and preparedness-driven approach for conserving developmental gains and also to minimise losses of life, livelihoods and property.

It provides for:

- The creation of a policy, legal and institutional framework, backed by effective statutory and financial support.
- The mainstreaming of multi-sectoral DM concerns into the developmental process and mitigation measures through projects.
- A continuous and integrated process of planning, organising, coordinating and implementing policies and plans in a holistic, community based participatory, inclusive and sustainable manner.

National Vision

The national vision is to build a safer and disaster resilient India by developiug a

5. National Disaster Management Authority, Govt. of India: National Disaster Management Guidelines: Preparation of State Disaster Management Plan 2007

holistic, proactive, multi-disaster and technology driven strategy for DM through a culture of prevention, mitigation and preparedness to reduce the impact of disasters on people through the collective efforts of all government ageucies supported by Non-Governmental Organisations (NGOs).

INSTITUTIONAL FRAMEWORK UNDER THE DISASTER MANAGEMENT ACT. 2005[6]

National Disaster Management Authority (NDMA)

The DM Aet mandates the NDMA to lay down policies and guidelines for the statutory authorities to draw their plans. In essence, the NDMA concentrated on prevention, mitigation, preparedness, rehabilitation and reconstruction and also formulate appropriate policies and guidelines for effective and synergized national disaster response and relief. It also helps in coordinating the enforcement and implementation of policies and plans. *It consists of The National Executive Committee, State Disaster Management Authority (SDMA), State Disaster Management Authority (SDMA), District Disaster Management Authority (DDMA)* and other agencies.

Initiatives for Disaster Management during the Last Decade

i) The first initiative towards formulating a systematic, comprehensive and holistic approach to all disasters was the setting up of a High Powered Committee (HPC) in August 1999 under the Chairmanship of Shri J.C. Pant. The HPC prepared comprehensive model plans for DM at the national, state and district levels.

ii) The National Committee on Disaster Management is an all party National Committee on Disaster Management (NCDM) was set up after the Gujarat earthquake, under the Chairmanship of the Prime Minister aud with representatives of national and state level political parties, for catalyzing and euabling the preparation of DM plans and suggesting effective mitigation mechanisms.

iii) India has been following five year national plans. The earlier five year plans did not mention disaster management. The Tenth Five-Year Plan 2002-2007 for the first time had a detailed chapter entitled Disaster Management: The Development Perspective.

The Eleventh Five Year Plan 2007-2012[7] states,

"The development process needs to be sensitive towards disaster prevention, preparedness and mitigation. Disaster management has therefore emerged as a

6. *www.ndma.gov.in*
7. Govt. of India, *Planning Commission, Eleventh Five Year Plan* 2007-2012

high priority for the country. Going beyond the historical focus on relief and rehabilitation after the event, there is a need to look ahead and plan for disaster preparedness and mitigation in order to ensure that periodic shocks to our development efforts are minimized." Disaster management has emerged as a high priority for the country. The Eleventh Five Year Plan aims at consolidating the process by giving impetus to projects and programs that develop and nurture the culture of safety and the integration of disaster prevention and mitigation into the development process.

ANALYSIS OF THE VARIOUS LEGAL FRAMEWORKS

The Disaster Countermeasures Basic Act in Japan aim at the establishment of a effective and efficient machinery working through the State and local governments for the formulation of policies for the preveution of disasters and ensuring an effective and organized administration of comprehensive and systematic disaster prevention. The Disaster Management Act, 2002 in South Africa provides for an integrated and coordinated disaster management policy that focuses on reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, quick response to disasters and provides the establishment of national, provincial and municipal disaster management centre. The Disaster Management Act 2003 in Australia helps the communities mitigating the potential adverse effects of disaster and provides for the framework for the management of the State Emergency Service and emergency service units to ensure the effective performance of their functions. Disaster Management Act, 2005 in Sri Lanka provides for the establishment of the national council for disaster management and the preparation of disaster management plans. Philippines National Disaster Risk Reduction Management Act of 2010 provides the disaster risk reduction and management system, providing for the national disaster risk reduction and management framework and institutionalizing the national disaster risk reduction and management plan. In the Netherlands legislation distinguishes between an emergency and a crisis. Both the emergency and the crisis should be considered as subtypes of a disaster. Dutch legislation relating to emergency management and crisis control is currently laid down in a number of separate laws and acts such as *Disasters and Major Accidents Act 1985 and Fire Department Act 1985.* Thailand Disaster Prevention and Mitigation Act 2007 provides for the policy for formulation of National Disaster Prevention and Mitigation plan. Natural Disaster Management Act, 1998 in Fiji provides for the development of suitable strategies and policies for disaster mitigation and emphasized on preparedness, and for training, management and public education in disaster management. Disaster management Act in Indonesia focused on framing guidelines and directions on disaster management, setting disaster management standardizatiou and requirements by virtue of Legislation; carrying out other obligations in

accordance with Legislation; and preparing guidelines on establishment of Regional

Disaster Management Agency. In India there is a paradigm shift from reactive approach of responding and calamity relief after the disaster to proactive approach of disaster prevention, preparedness, and mitigation. The enactment of Disaster Management Act, 2005, establishment of National Disaster Management Authority and other agencies at the state and local level will help in India becoming disaster resilient.

CONCLUSIONS

Disaster management is an important aspect in the present time. It occupies an important place in policy framework of the countries. Legal and regulatory frameworks are the set of rules that define the responsible and role of different officials and organization. There are number of countries giving due importance to the disaster management laws relating to their management. Still more efforts are needed to create awareness on the legal dimension of disaster management. There are nodal agencies for disaster management in every country like National Disaster Management Authority, National Disaster Prevention and Mitigating Committee, National Disaster Mauagement Conncils, etc. Good disaster response law can help in streamlining the process of disaster management and helps the stake holders in performing their respective task. It also helps relief agencies to save life. Inappropriate laws prevent aid from reaching those in needy. The Acts in different countries covers all the stakeholders in the disaster management from national level to local level. Every country has updated their disaster risk management legislation and relevant codes and standards regularly to ensure effective compliance. The institutional framework for disaster risk reduction to incorporate all relevant stakeholders at all levels, with roles, responsibilities and resources clearly identified and allocated in all the Acts and made public on a regular basis. It is hoped that India would be world leader in disaster management. Probably castiug legal duty on citizens for providing help during disasters would also make India leading the way.

Law Library: Importance & A Guide to using it

Dr. Chiranji Lal*

"The only thing that you absolutely have to know is the location of the library."

-- Albert Einstein

"Libraries are the mind and soul of their communities, and librarians are the mind and soul of the library."

-- American Library Association

LAW LIBRARY & ITS IMPORTANCE

A law library is a library designed to assist law students, attorneys, judges, and their law clerks and anyone else who finds it necessary to correctly determine the state of the law. Most law schools around the world will also have a law library, or in some universities, at least a section of the university library devoted to law. The law library provides law students a place to study, but it also provides law students an opportunity for important training. If the school has a legal research or writing class, the students will use the library to conduct problem-based research much as they would in a law firm setting. Learning the interrelation between the various reference and primary law materials in the library is vital to ensure success in the legal field. Law libraries are only next in importance to law schools, colleges and universities as means of educating the students and law professionals. A library is a store-house of books of all kinds and on all subjects under the sun. A good modern law library usually subscribes to practically all the important newspapers and periodicals. Books, newspapers and periodicals are the main features of a library and they represent the endeavors, achievements and glory of writers, statesmen, jurists, philosophers and saints.

For a student/professional of average means it is difficult to purchase more than one or two daily newspapers, but it is the keen desire of educated people to know all possible shades of opinion as expressed in various newspapers. The obvious course for them is to visit a library during their leisure and glance through the relevant pages of many newspapers which they think are worth the trouble. Generally a student/ professional does not subscribe to more than one or two

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1. Slinger, M. J. & Slinger, R. M., *"The law librarian's role in the scholarly enterprise:* Historical development of the librarian research partnership in American law schools."*Journal of Law & Education*, 39 (3), 2010,pp 387-410.

magazines or periodicals and yet in these days of abundant supply of illustrated and pictorial journals most of us would like to have a look at the most attractive and interesting among them. This can he done only in a library which usually subscribes to most of the popular periodicals. The best feature of a library is that it either makes no charge upon the readers or collects a negligible membership fee for making available to them newspapers and jouruals. This fact is immensely helpful to the ill-paid and poor students/members of society who, notwithstanding their poverty, are interested in the political, social and religious developments reported by newspapers. A library has always a studious atmosphere. As we enter a library, we find ourselves surrounded by books and readers. We see books of all kinds and sizes reposing iu their respective places, and earnest readers eagerly devouring the contents of the books they have picked up from the shelves. What is more, all possible facilities are provided to the readers. Comfortable chairs with tables in frout, adequate lighting arrangements, and a librarian to help and guide the reader all these factors make the place a veritable sauctuary fit for even the ruost serious and zealous students. A library is even more useful to research students.

A research scholar working on a difficult, obscure subject usually ueeds books that are very expensive and that are often not available in the market. Sometimes he/she may need to refer to original manuscripts not otherwise available. In all such cases he will find it very advantageous to visit the various libraries and collect his/her material. It is a stimulus to reading. It helps us develop a reading habit. Since its gates are open to all to rich and poor, to professors and students, to scholars and lay-a-taste in books. In short, a library is a standing invitation to the public to come and read books as well as newspapers and periodicals. There is a wido choice of books and the library helps its readers escape from the practical necessities of this world. And while there is a charge for traveling in a bus, for entering a cinema or a circus, for seeing a cricket match, there is no such charge for entering a library and becoming engrossed iu a book. A well- equipped law library is, indeed, the best friend, consultant, philosopher and guide.[2]

ACADEMIC LIBRARIES

An academic library is generally located at the campuses of eolleges/universities and serves primarily the students and faculty of that and other academic institutions. Some academic libraries, especially those at public institutions, are accessible to members of the general public in whole or in part. Academic libraries are libraries that are hosted in post-secondary educational institutions, such as eolleges and universities. The main functions of an academic library are to provide resources and research support for students and faculty of the educational institution. Specific course-related resources are usually provided

2. See<*http://www.law.umich. edu/quadrangle/spring2011/special features/Pages/Whither theLawLibrarian.aspx*>.

by the library, such as copies of textbooks and article readings held on 'reserve' (meaning that they are loaned out only on a short-term basis, usually a matter of hours).

Academic libraries offer workshops and courses outside of formal, graded coursework, which are meant to provide students with the tools necessary to succeed in their programs.[3] These workshops may include help with citations, effective search techniques, journal databases, and electronic citation software. These workshops provide students with skills that can help them achieve success in their academic careers (and often, in their future occupations), which they may not learn inside the classroom. The academic library provides a quiet study space for students on campus; it may also provide group study space, such as meeting rooms. In North America, Europe, and other parts of the world, academic libraries are becoming increasingly digitally oriented. The library provides a "gateway" for students and researchers to access various resources, both print/physical and digital.[4]Academic institutions are subscribing to electronic journals databases, providing research and scholarly writing software, and usually provide computer workstations or compnter labs for students to access journals, library search databases and portals, institutional electronic resources, internet access, and course- or task-related software (i.e. word processing and spreadsheet software). They are increasingly acting as an electronic repository for institutional scholarly research and academic knowledge, such as the collection and curation of digital copies of students' theses and dissertations.[5]

USING A LAW LIBRARY

There is a strong chance that when one enters a law library for the first time one will experience bewilderment and apprehension, possibly leading to panic. Bewilderment at the hundreds of shelves and numerous rows of books, apprehension at the thought of trying to find ones way round the stock and nice that one will never be able to find the information one wants in the time available. Relax! Libraries Are laid out in a logical way; there are catalogues to help one identify whether the library has the book one needs and, finally, but most important of all, there will usually be an enquiry desk or information point where library staff will be available to assist. Never be afraid to ask for help; it is an important part of their ability, that customer' information needs are satisfied, so that they are encouraged to use the collections again in the future.

3. See <. *http://main.library.utoronto.ca/workshops/*>.
4. Dowler, Lawrence *Gateways to knowledge: the role of academic libraries in teaching learning, and Research*, MIT Press Cambridge, MA, 1997.
5. Chinwe V. Anunobi, Ifeyinwa B. Okoye *"The Role of Academic Libraries in Universal Access to Print and Electronic Resources in the Developing Countries"*, available at <*http://unllib.unl.edu/LPP/anunobi-okoye.htm*> (viewed on 09-09-2014).

GENERAL ARRANGEMENT OF THE STOCK IN A LAW LIBRARY

If one is attending a course of study at a university, or college it is likely that during the early days of the first term one will be given a tour of the library. What follows in this chapter is meant to provide background information and a skeleton framework with-in which to set the details of the particular library one is to use. There is a checklist in appendix 1 which one can use to find out how well one knows how to use any law library. Libraries nsually contain two broad categories of material: books and periodicals (also called journals or, more popnlarly, magazines). They are usnally shelved separately from one another. One reason for this is that periodicals comprise titles which added to, more or less regularly, by the publication of new issues. So, space has to be left on the shelves between one title and the next to accommodate future issues. Some periodicals have new issues published as frequently as weekly and a few even daily. Therefore, in law libraries one will find documents which are published in the same way as periodicals, such as Acts of Parliament, law reports as well as law periodicals, shelved separately from books.

ARRANGEMENT OF MATERIAL ON THE SHELVES

Books are usually grouped according to their subject. This is achieved by means of a snbject classification scheme. Several different schemes are in use; each employs numbers or a combination of numbers and letters to indicate the subject of a book. The classification number or mark- often abbreviated to class number or class mark - is placed near the bottom of the spine of each book. If one is familiar with school or public libraries one may have noticed they mostly use a scheme of numbers, the third and fourth separated by a decimal point. This is the Dewey decimal classification scheme. It is also used in some universities, polytechnics and colleges. Another scheme one will find in academic libraries is the Library of Congress classification scheme which uses a combination of letters and numbers. Whichever scheme a library employs the purposes of the classification are the same: to bring together on the shelves books on the same subject, and to indicate where in the library a particular books is to be found.

Periodicals may be arranged in one of several different ways: either by subject then alphabetically by title within each subject, or jnst alphabetically by title. In some of the larger law libraries one may find periodicals arranged according to the jurisdiction (the geographical area over which the laws of a particular legislature or decision of the courts extend) to which they usually refer. So, for example, English law periodicals will be shelved separately from European Communities of French or United States periodicals. Libraries often have separate sequences for a number of specialized groups of publications: reference books, such as dictionaries, general encyclopedias, directories etc.; and bibliographic works - a large group of publications ranging from lists of the total publishing output of a particular country to lists of books and / or individual

articles contained in periodicals on a particnlar subject, such as law. Government publications or the publications of international organization such as the European Communities, sometimes form a separate collection depending, in part, on how much of this huge publishing output is collected by the particular library.

One may also find another distinction made in the stock of the library: very large books (called 'folios', or 'quartos' in some libraries, or 'oversize' in others) may be shelved separately from ordinary size books. At the other end of the scale, some libraries, especially universities, keep very thin books (pamphlets) in a separate sequence. Recent changes in photocopying law mean that some libraries will stock photocopies made under license of parts of books or articles from periodicals - these may be kept apart from the rest of the stock, perhaps in an area to which one will not have direct access so that one will need to ask staff to obtain the item one requires.

DISCOVERING WHETHER THE LIBRARY HAS THE BOOK ONE REQUIRES?

The key is the library catalogue. Many libraries now use computers on which to hold and display details of the stock, but in some libraries parts of the stock, frequently books purchased before the computers system was installed, will be recorded on microform or card catalogue. Microform catalogues comprise rolls or sheets of plastic film containing photo-reduced images of the details of books. The rolls or sheets of plastic are read using a piece of equipment called a microform reader. Card catalogue are contained in large banks of wooden drawers - the traditional image, along with leather-bound books, or a scholarly library!

No matter the medium m by which the stock of the library is recorded and displayed, one will usually find at least three separate parts to the catalogue or ways of finding details about the stock:

(A) The author section arranges details of the stock alphabetically by the authors' surnames. If no author's name is given in the book (perhaps it has been issued by t a large organization such as a government department) then an entry will be given under the name of the issuing body. Sometimes libraries also include for all books additional entries filed alphabetically by the title of the book, and this eombined author and tile catalogue may be referred to as a name catalogue.

(B) The subject section is arranged alphabetically by subject and provides class marks where books on each topic are shelved.

(C) The classified section arranges class marks in numerical or alphabetical order according to the classification scheme used, with details of the

authors and titles of books allocated to each subject. This section of the catalogue is usually consulted only after one has found the appropriate class mark in the subject section, for the topic in which one is interested.

WHAT IF THE LIBRARY APPEARS NOT TO HAVE THE BOOK OR PERIODICAL ONE REQUIRES?

First, one has to make sure used the correct section of the catalogue for ones search. For example, the following are three fairly common errors in catalogue use:

(A) Picking a word from the title of a book and searching the subject section of the catalogue, then the classified in the bope of finding an entry.

(B) Searching the author section of the book catalogue for an entry for the autbor of a periodical article one is trying to trace- no library catalogue indexes the contents of periodicals except where an article has been photocopied and added to stock, and this is not a common occurrenec.

(C) Searching the title section of the catalogue for the title of a periodical. This can be achieved successfully on some computerized catalogues, bnt if only microform or card catalogues are available, information about the periodicals stocked by the library is kept in a separate periodicals catalogue.

Secondly, one has to make sure that the correct spelling of the author's name or the title of the book or periodical is used and try some alternatives. If that fails, one can approach library staff for advice.

CONCLUSION

As the amount and types of legal information and information formats continue to grow, the importance of law libraries and law librarians as collectors, organizers, preservers, and disseminators of information will only grow as well. The "information overload" syndrome that followed quickly on the heels of the worldwide information explosion also affected the legal information envirounent. Ironically, although the growth of online legal resources may have increased general ease of individual access to electronically available legal information, this development has also served at times as an impediment to successful access. The vast number of legal resources suddenly available in multiple formats has given rise to many choices for achieving the same research goal, a situation that can result in general inefficiency, ineffectiveness and downright bewilderment on the part of the untrained or unassisted information-seeker. *The information-knowledge* action paradigm resolves this problem of information access as it always has done, by reliance on in remediation by an information facilitator which can evalnate, systematically organize and provide ordered access to information so that effective research may occur.

In the context of the legal academy, that information facilitator is, as it always has been, the law library. Because academic law libraries in the twenty-first century remain the only unit in the law school that is professionally equipped to handle law as information in any format, law schools remain dependent on law libraries, as they always have been. While the pure information aspects of the law library represent the core of its existence, its enduring position as the heart of the law school consists of intangible aspects as well. The academic law library as a physical space remains vitally important to the law school as a communal gathering place for research, study, reflection, and learning. The indefinable ambience of the law library as an environment for work of great consequence-as the 'laboratory of the law school'-is felt and understood by those who use the library, even in the information age. Were it otherwise, use of the law library would have rapidly diminished once technology made it unnecessary to be physically present in the library in order to use many of its resources. On the contrary, current law students continue to guard their library against incursion by 'outsiders,' even if there is plenty of seating space and access to most resources is limited to law students only. Prospective faculty dutifully tour the law library, even though most of them will generally work in their offices and access the library remotely via services provided by librarians and staff. Moreover, in many law schools the law library is considered its showplace, and the library is routinely shown to all who visit, whether they request a tour or not. The key role that continues to be played by the library as physical space is abundantly clear. From the earliest private office instruction to the most recent start-up academy, every law school throughout history has relied on a law library to serve at its fundamental core.

Satish Kumar Kaushal v/s NAZ Foundation and others, 2014 (1) SCJ 1

Dr. Sanjay Gupta*

Sex has been an exposition of innate emotional feelings and a natural consequence for all animals to produce progeny. The instinct has been aptly classified hy the human beings as in the order of nature and against the order of nature. This classification seems to be based on the premise that human beings are far more snperior and rational to other animals and on the experience that societies unregulated in sexual impulses are visited with calamities. Ilowever the instincts force the persons to experience the forbidden.

Homosexuality is the resnlt of the same compelling instinct realization and often there has been a demand to legalise the same as human bonding is the reflection of the emotional personal relationships. Any regulation of it in an open society is considered an assault to the autonomy and privacy of the persons. Similar demands have surfaced in India in Naz *Foundation case*.[1] The apex court deliberated on the issue of determining the constitutionality of sec. 377 of IPC dealing with homosexuality. The impugned provision provides that whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. The provision carries the explanation that penetration is sufficient to constitute the carnal intercourse necessary to the offence.

The Delhi High court in this case has observed that the impugned provision is unconstitutional in so far as it criminalises the consensual sexual acts of adults in private. Initially the division bench and the review petition were dismissed by the High court as no cause of action has accrued to the Naz Foundation and the matter is only academic in nature; however the apex conrt remitted the case for the fresh decision by the High court. The High court opined that the sphere of privacy allows persons to develop human relations without the interference from the outside community or from the State. The exercise of antonomy enables an individual to attain fulfillment, grow in self-esteem, build relationships of his or her ehoice. Furthermore it denies gay persons of a sizable population (about 25

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1. 2014(1).*SCJ* 1.

lacs) a right to full personhood which is implicit in the notions of life.[2] The court pointed out that if the objective to achieve State interest is irrational, unjust and unfair, necessarily classification will be unreasonable.[3] The compelling State interest can be justified on the ground of constitutional morality and not on public morality.

Therefore the points of discussion involved the following;

1) Whether the whole section is unconstitutional,

2) Whether the statistics is wide enough to determine the misuse of the provision,

3) Whether it impedes the HIV/AIDS treatment,

4) Whether the contemporary Indian society permits homosexuality,

5) Whether the provision is unjust and irrational, and

6) Whether the provision invades privacy and dignity.

The Supreme Court opined that every legislation enacted by the Parliament or State legislature carries with it a presumption of constitutionality. This principle is founded on the premise that the legislature, being the representative body of the people is best judge of their needs and puts in the best efforts to attain that. Furthermore the courts are to give an interpretation which will further the constitutionality of the enactment. The declaration of the unconstitutionality is generally the last resort which is taken only in cases of gross violation of the rights of the individual or on ground of utter irrationality.[4] The apex court observed that the impugned provision applies irrespective of age and consent. It criminalises the act irrespective of the gender, identity or orientation; and such a prohibition regulates sexual conduct.[5] In relation to the data concerning the MSM, the court observed that the details are wholly insufficient for recording a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment by State or its agencies or the society.[6] On the point of unreasonable classification, the court observed that the carnal intercourse in the ordinary course and carnal intercourse against the order of nature constitute different classes and lience is reasonably classified.[7] Moreover the rate of conviction and prosecution of cases concerning homosexuals is dismally low.

However the court observed that the competent legislature shall be free to

2. *Supra n.* 1, p.9.
3. *Supra n.* 1, p 12.
4. *Supra n.* 1 p. 33 &35.
5. *Supra n.* 1 p. 53.
6. *Supra n.* 1.p. 54.
7. *Supra* n. 1p.56.

consider the desirability and propriety of deletion of the provision or amend it to exempt the consenting adult males as suggested by the Attorney General. The apex court has effectively dealt with the problem of homosexuality in India and has exhibited utmost judicial restraint by leaving it for the legislature to determine the propriety of the demands of recognition of the rights of the homosexuals.

The legislature has to tread with caution as the direction is the ratio *decidendi* of the case and any deliberation can evoke a controversy concerning the relevance of morals in the law making. Similar controversy erupted in England when the issue of determining legality of homosexuality was deliberated by the Wolfenden Committee which submitted for the legalization of homosexuality between the consenting adults. The submission was criticized by *Lord Devlin* and it sparked off a debate well supported by *Lon L.Fuller.* The rationale behind legalization was that just as the aspects of morality change, so does the criminal law. In 1967, the homosexuality between the consenting adults was legalized in Britain. Initially, the age was 21 years which was later reduced to 18 years n 1994.[8] The champions of the morality quoted the example of *Rudbruch* who initially favoured positivism, but later on shifted his stance to protect morality. This shift was occasioned by the misuse of the law by Hitler.[9]

Furthermore the deliberators have to keep in mind that the morality element is engrained in the Indian society and the morality of the urban culture cannot be a reflection of the morality of the masses. The regulation of homosexuality has existed in India from ancient times. In *Shaw v. DPP,*[10] it was pointed out that there remains in courts a residual power to enforce supreme and fundamental purpose of the law to conserve not only the safety and order but also the moral welfare of the State.

In the ancient times the idea of sin was bound up with the conception of *rta* which meant the course according to the course of nature. The sins were very well classified and the sins classified as *pataniya* included the intercourse with the persons with whom intercourse is forbidden and the category included the unnatural offences with a man or beast.[11] The *mahapatakisamsarapa* include the association of a person with a person guilty of *mahapatakas* including the sexual association or even sleeping with such person.[12] The rules were strict for the

8. Michael Jefferson, *Criminal law,* 4th ed, Pitman Publishing, London, 1999, p. 7.
9. H.L.A.Hart, *"Positivism and Seperation of law and morals"*, 71 *Harv. L. Rev.* 393 (1958). See also, Lon L. Fuller, "Positivism and Fidelity to law-a reply to Professor Hart", 71 *Harv.L.Rev.* 630 (1958).
10. (1962) AC 220.
11. P. V. Kane, *History of Dharamshastra,* vol. 4, 3rd Edition, Bandarkar Oriental Research Insitutue, Pune, 1991, pp. 12, 35.
12. P. V. Kane, *History of Dharamshastra,* vol. 4, 3rd Edition, Bandarkar Oriental Research Insitutue, Pune, 1991, p. 25-26.

vedic students in matters of sexual intercourse. However the oral sexual intercourse was not considered a grave sin and a simple penance was provided. In the Kali age women will engage in sexual intercourse against the order of nature. The same trend is reflected in the other religious texts.[15]

Furthermore it has to be kept in mind that the chances of abuse cannot be a ground for determining ultravitusness as opined by the court in *Ahmad Noor Mohd. Bhati.*[16] The recognition of homosexuality can also be viewed as a threat to the institution of marriage and will set a different trend amongst the future generations. The case can be made out for the eunuchs, who are naturally incapable for the performance of the marital ties, but the otherwise sexually capable persons require a treatment and it should be viewed as a psychological problem triggered of by multifarious sociological and psychological factors.

The assertion that the HIV/AIDS rate is higher amongst the homosexuals invariably warrants that it should be properly dealt in and by the State. The assertion that they will go underground is reflection of the fact that such attribution will lead to ostracization and stigmatization. However the scientific campaigning for the HIV/AIDS has changed the scenario significantly and now they will come forward for the treatment as life for everybody is more precious than stigmatization.

13. *Id.*, P 115.
14. *Id.*, p. 893.
15. J. Qadeeruddin Ahmad, *"The Relationship of Morality to Law"*, Morality and law, ed.Dr. Manzoor Ahmad, Royal Book Company, Karachi, 1986,p.20.
16. *Ahmad Noor Mohd. Bhativ. State of Gujrat, AIR* 2005 SC 2115; see also *Joginder Kumar v. U.P, AIR* 1994 SC 1341; D. K. Basu v. W.B., *AIR* 1997 SC 610.

Shabnam Hasbmi vs. Union of India and Others, Writ Petition © No. 470 of 2005 decided on February 19, 2014; (2014) 4 SCC 1

Dr. M. Asad Malik*

Shabnam Hashmi v. Union of India and others Writ Petition © No. 470 of 2005, decided on February 19, 2014 by Chief Justice of India, P. Sathasivam and RanjanGogoi and Sliiva Kirti Singh, JJ.

This is one of the important cases which must be contextually understood about the recognition of the right to adopt and to be adopted. A Public Interest Litigation was filed under Article 32 of the Constitution requesting the Supreme Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed etc. The petitioner, a Muslim and civil rights activist had approached the Supreme Court to be legally recognized as the parent of her adopted daughter. The petitioner had adopted daughter Seher Hashmi Raza way back in 1996 but under prevailing adoption laws applicable to Mnslims, the petitloner was called only a guardian and her daughter a ward.

The JJ Act, 2000, however did not define 'adoption'[1] and it is only by the amendment of 2006 that the meaning thereof came to be expressed in the following terms:

"2.(aa) 'adoption' means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship".

The petitioner in view of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000, as amended in 2006 (JJ Act, 2000) stated that the prayer made in the writ petition with regard to the guidelines was satisfactorily answered and admitted before the Supreme Court The JJ Act, 2000 is a secular law enabling any person, irrespective of the religion he professes, to take a child in adoption.

The All India Muslim Personal Law Board (hereinafter referred to as 'the Board')

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1. Adoption is the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all rights, privileges and responsibilities that are attached to the relationship.

which has been allowed to intervene in the present proceeding has filed a detailed written submission wherein it has been contended that under the JJ Act, 2000 adoption is only one of the methods contemplated for taking care of a child in need of care and protection.It is contended that Islamic Law does not recognize an adopted child to be at par with a biological child and instead professes what is known as the *"Kafala"* system under which the child is placed under a *'Kafil'* who provides for the wellbeing of the child including financial support and thus is legally allowed to take care of the child though the child remains the true descendant of his biological parents and not that of the "adoptive" parents.Rejecting the objection of the AIMPLB to the extent it questioned the applicability of JJ Act, 2000 to Muslims, the Supreme Court held:

> *The JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, Rules and the CARA guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the personal law applicable to him. To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date.*[2]

The petitioner has also prayed for a declaration that the right of a child to be adopted and that of the prospective parents to adopt be declared a fundamental right under Article 21 of the Constitotion. However the Court refused and said that the legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view, for the present, by the enactment of the JJ Act 2000 and the same must receive dne respect.

The Court further said thatconflicting viewpoints prevailing between different communities, as on date, on the subject makes the vision contemplated by

2. Juvenile Justice Act, 2000 para 13.

Article 44 of the Constitution i.e. a Uniform Civil Code a goal yet to be fully reached and the Court is reminded of the anxiety expressed by it earlier with regard to the necessity to maintain restraint. All these impel us to take the view that the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution.

Thus, the Juvenile Justice Act for the first time provides 'adoption'[3] as a means to rehabilitate and socially reintegrate a child. It has empowered the State Government and the Juvenile Justice Board to give a child for adoption. The provisions of the Act relating to adoption are not restricted to persons belonging to a particular religion.

So far as the concept of adoption in Islam is concerned it has no consequence.The child should not be attributed except to the natural father, and not to the one who has adopted him.Even in the matter of *hijab* adoption has no effect whatsoever.An adopted child can marry a daughter of his adoptive parents, because she is not his real sister. An adopted child cannot inherit from his adoptive father, but it is permissible, rather advisable, for him that he, in his lifetime, makes a will/gift in favour of his adopted son.[4]

As the *Qur'ân* says, calling adopted children by the names of their adoptive fathers is contrary to "the truth," and therefore, they must be called by the name of their real fathers.It means that adoption does not change the relationship of a person, adoption does not end the blood relationship between the child and his real parents and siblings, nor does it create a real relationship between him and his adoptive parents and their children.[5] The Holy *Qur'an* revealed the following verses:

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3. JJ Act, 2000 Para.41. Adoption-
1. The primary responsibility for providing care and protection to children shall be that of his family.
2. Adoption shall be resorted to for the rehabilitation of the children who are orphan, abandoned or surrendered through such mechanism as may be prescribed.
3. In keeping with the provisions of the various guidelines for adoption issued from time to time, by the State Government, or the Central Adoption Resource Agency and notified by the Central Government, children may be given in adoption by a court after satisfying itself regarding the investigations having been carried out, as are required for giving such children in adoption.
4. The State Government shall recognise one or more of its institutions or voluntary organisations in each district as specialised adoption agencies in such manner as may be prescribed for the placement of orphan, abandoned or surrendered children for adoption in accordance with the guidelines notified under sub-section (3):
Provided that the children's homes and the institutions run by the State Government or a voluntary organisation for children in need of care and protection, who are orphan, abandoned or surrendered, shall ensure that these children are declared free for adoption by the Committee and all such cases shall be referred to the adoption agency in that district for placement of such children in adoption in accordance with the guidelines notified under sub-section (3).

"And Allah did not make your adopted children your sons. That is only your words coming out from your tongues. And Allah says the truth and He guides you to the right path. Call them with reference to their (real) fathers. It is more just in the sight of Allah." (Quran 33:V4)

But Islam highly recommends the concept of helping the poor and the orphan in all types of charities, the orphan and the poor are mentioned as the prime eligible recipients for such help. In case of the rights of the orphan children, Allâh is very severe; for example, He says,[6]

"Those who 'swallow' the property of the orphans unjustly are actually devouring fire into their bellies and they shall enter the burning fire." (4:10)

Thus, adoption or legal adoption per se, is not allowed in Islam. It is to be said that the Muslim law has established a regulation to substitute the model of adoption: the *kafala*[7] which allows adults to take care of abandoned minors in accordance with Islamic law. Other than this in the Shariat Act also adoption has not been forbidden. Section 3 of *the Muslim Personal Law (SHARIAT) Application Act, 1937*, lays down that if a person belonging to a community whose customs regarding 'adoption, wills and legacies' prevail, makes a certain declaration, he will thereafter be governed in all respects by Muhammadan law. This section is applicable to certain communities in Punjab and Sind where adoption prevails; and to Khojas in Bombay, as regards wills. So adoption among certain sections of Muslims was prevalent also under their customary laws. If (among that class) this custom has been practiced, the system of adoption can be prevalent. It means Islam also allowed the adoption but as per Islamic Law.

To my mind this case was decided by the Apex Court in the light of Chapter IV of JJ Act, 2000 which is related to rehabilitation and social reintegration for a *"child*

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5. No child shall be offered for adoption -
a. Until two members of the Committee declare the child legally free for placement in the case of abandoned children,
b. till the two months period for reconsideration by the parent is over in the case of surrendered children, and
c. without his consent in the case of a child who can understand and express his consent.
6. The Court may allow a child to be given in adoption -
a. to a person irrespective of marital status; or
b. to parents to adopt a child of same sex irrespective of the number of living biological sons or daughters; or
c. to childless couples. And also see Rule 33 of Juvenile Justice (Care and Protection of Children) Rules, 2007.
4. See <http://www.muftitaqiusmani.com>.
5. See <http://www.al-islam.org>.
6. *Ibid.*

in need of care and protection".[10] The purpose of adoption according to JJ Act, 2000 is specific only for the children as defined under section 2 (d). It seems that the adoption under this law is not only for parents those are childless but if any couple has child they can also adopt as there is no restriction under the present law. It seems that the applicability of adoption under JJ Act, 2000 is not for the religious purpose nor it should be. This judgment should only be applied or adhered to from juvenile justice point of view. I think this judgment is not interfering with the personal laws of different religion in the country, because the court decided this case under specific law *i.e.* JJ Act and not making the application of this judgment mandatory for any religion but leaving such person with liberty of assessing the provisions of the Act, if he so desires. Suchperson is always free to adopt or choose not to do so and instead, follow what he comprehends to be the dictates of the Personal law applicable to him. Under section 40 of the JJ Act, 2000 adoption is only one of the methods contemplated for taking care of a child in need of care and protection among foster care, sponsorship and sending the child to an after-care organization. If any Muslim children are to be adopted by Muslim parents it can only be possible in the light of *Quran/Hadith* and in agreement with *Shariah*.

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7. The *kafala* is a kind of delegation of parental authority by which the kafil (adoptive parent) agrees to support the makfoul (adopted child). The verb takafala in Arabic means to take care of an orphan by providing all his/her basic needs (food, clothing, education) and of the protection of a minor, in the same way a parent would do for a child.
8. Asaf A A Fyzee, *Outlines of Muhammadan Law*, Oxford University Press, New York, 2005, p 59.
9. V.P. Bhartiya, *Syed Khalid Rashid's Muslim Law*, Eastern Book Company, New Delhi, 2010, p 159.
10. Section 2 (d) of JJ Act, 2000 says that "child in need of care and protection" means a child:
    - i. who is found without any home or settled place or abode and without any ostensible means of subsistence,
    - ia. who is found begging, or who is either a street child or a working child,
    - ii. who resides with a person (whether a guardian of the child or not) and such person-
    - a. has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or
    - b. has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person.
    - iii. who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases having no one to support or look after,
    - iv. who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,
    - v. who does not have parent and no one is willing to take care of or whose parents have abandoned or surrendered him or who is missing and run away child and whose parents cannot be found after reasonable inquiry,
    - vi. who is being or is likely te be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,
    - vii. who is found vulnerable and is likely to be inducted into drug abuse or trafficking,
    - viii. who is being or is likely to be abused for unconscionable gains.
    - ix. who is victim of any armed conflict civil commotion or natural calamity.

Under the JJ Act, 2000 a person can adopt a child irrespective of his/her religion. The judgment in the present case has not created any new law for adoption in India but only interpreted the existing provisions relating to adoptionof child in need of care and protection. Here the Court clearly said it is up to the person whether he/she wants to adopt child according to Personal law or under the JJ Act. As we know adoption is one of the methods to rehabilitate and socially reintegrate a child under JJ Act, 2000. One important thing which is done through this judgment by the judiciary is the new dimensionsfor adopting a child because before this judgment people did not used to adopt child other than personal laws.

NamanMohnot, Law Relating to Ragging It's Crime..... Don't Risk it!!!, 2014 Edition, Universal Law Publishing Company Private Limited, New Delhi

Prof. (Dr.) B P Singh Sehgal*

1. Ragging has been the most dreaded menace which deters many upcoming and brilliant students from joining higher studies, especially in Professional colleges. This menace has been deep routed in the present educational set up. No comprehensive study has been taken up to highlight a serious issue like ragging.The present book written by Mr. NamanMohnot is the good attempt which brings the whole literature relating to ragging at one place. The author has attempted to highlight almost every aspect relating to ragging including psychological, legal and judicial. Very useful alarming statistics have been given in this work and highlighted the role of different machineries in this regard.

2. The present work has forwards by Justice A.K. Mathur, Former Judge, Supreme Court of India and Mr. Ram Jethmalani, Member of Parliament and Senior Advocate. Dr. Justice ArijitPasayat, Judge, Supreme Court (Retd.) has written a very comprehensive introduction to this work and appreciated the attempt made by Mr. NamanMohnot.

3. The maiu objective of this book, according to the author, is to spread a message that ragging is a crime; hence, indulging in it is an offence which is punishable under the law. The book has been written mainly from the perspective of the students who are undergoing or intend to seek admission in various educational institutions. It is subject which should be widely publicized on the social media as well as debated more frequently on the television and write ups be published in various newspapers/ magaziues.

4. The whole scope of ragging has been elaborated in about seventeen Chapters and every small issue pertaining to the topic has been elaborated. The author has highlighted the growth of the concept of ragging through the cannons of history and traced its existence from the *Gurukul* System to the medieval period to the present education.

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We cannot understand the concept of ragging without going into its history which tells us the causes and consequences leading to the practice of ragging in its worst scenario.

The authorhas made an attempt to projectragging as human rightabuse. The author has explained this concept with reference to the movies including the latest one *(3 Idiots)*. Some of the movies have glorified this menace which needs to be condemned.

According to the author, ragging is more of a psychological problem, through which the seniors and freshers get the chance to interact with each other. Seniors make every effort to ensure that these beliefs are well passed on to their juniors and mould their thought process in such a way to ensure the phenomenon of ragging to pass on from batch to batch. However, the irony is that for the sake of bonding, the destructive methods are being wrongly justified at the cost of the principle of dignity and personality of the freshers. It has commonly been noted that most often the freshers who drop out from college or commit suicide are the ones who were singled out from their batch and ragged severely sometime in the past.

In a Public Interest Litigation *VishwaJagruti Mission v. Central Government filed* in 1999 and decided in 2001, the Hon'ble Apex Court issued the directions to all the concerned authorities for the effective implementation of measures regarding curbing Raggiug in the Universities and Educational Institutions. University Grants Commission also in 1999 constituted a committee for framing the course of action to avoid the threat of ragging in the educational institutions. The recommendations of the committee as well as the directions given by the Hon'ble Apex Court have been discussed in detail in Chapter IV. These measures have checked the menace of ragging to some extent but failed to eradicate the ragging completely. The legislation enacted by various State Governments to deal with the issue of ragging have also been analysed in detail in Chapter V wherein a comparison of State Anti-Ragging legislations have also been made.

Media plays a very important role in any social system but it has not played its desired role in curbing this evil of ragging till the tragic death of *Aman Satya Kachroo*. Now the media has become proactive and highlighting its adverse effect on the standard of education. It is giving wide coverage of such events to sensitize the students, the teaching staff as well as the members of the society. The incidence of ragging wherever taking place should not only be suppressed but it is the duty of the Civil Society and NGOs to highlight the same. The author has highlighted some very important live case studies pertaining to ragging

which took place between the years 2000 to 2014 some of which have also been discussed by the *Raghavan* Committee constituted by the Supreme Court of India in 2006.

The procedures and various steps to be followed in case of ragging have been discussed in length for the information of students and parents which include the medicalcheck up in case of some injuries caused due to ragging, lodging of complaint with the institution, filing a complaint at the Police Station and obtaining First Information Report, approaching the Courts, etc. The appropriate sections of various statutes applicable in case of ragging have also been dealt with in detail. The appropriate steps to be taken for curbing the case of ragging at the start of the academic session have been mentioned in detail which include the Head of the Institution himself addressing at the commencement of new academic session to the students and their parents about the steps being taken for curbing the ragging and the reporting of any such incident to the appropriate authority.

5. Ragging started just for fun and establishing a bond between the freshers and seniors is being converted into vulgar and inhuman form resulting into the disorientation of the freshers leading to some extreme steps. Number of such cases is increasing day by day, despite lot of awareness programmes on media as well as by the educational institutions is being created. The statutory bodies have issued instructions in this regard by curbing this menace. Still it is being observed that under the garb of welcoming the freshers, this infamous practice is being followed.

6. The author has highlighted the cases relating to ragging decided by various High Courts as well as by Supreme Court separately in the book which is an eye opener and highlight the various dimensions of ragging.

The reports of various Committees including K.P.S. Unni Committee, Dr. R.K. Raghavan Committee, UGC Regulations on Curbing the Menace of Ragging in Higher Educational Institutions 2009, All India Council for Technical Education Regulations, Medical Council of India Regulations have been highlighted in Annexure II.

Some of the legislations on prevention of ragging enacted by the States including Tripura, Andhra Pradesh, Tamil Nadu, Kerala, Maharashtra, West Bengal, Chhattisgarh, Goa, Himachal Pradesh, Jammu& Kashmir have been mentioned in Annexnre III.

The Bills relating to Prevention of Ragging in colleges and institutions being introduced in various forms in the year 2005, 2011 and 2012 have also been highlighted in Annexure IV.

7. The Book provides a good material on the subject of ragging and will be very useful for the students, faculty, and legal practitioners as well as for the common man.

Tahir Mahmood, Introduction to Hindu Law: Personal Law of Hindns, Bnddhists, Jains & Sikhs, 2014 Edition, Universal Law Pnblishing Co. Pvt. Ltd. New Delhi, pp. xlii + 285

Professor A. S. Bhat*

1. Prof Tahir Mahmood an accredited erudite and prolific scholar of international repute has worked out a concise edition, "Introduction to Hindu Law" of his original book Principles of Hindu Law: Personal Law of Hindus, Buddhists, Jains & Sikhs (Hereinafter referred to as the book under review only). Prof Tahir Mahmood has in the book under review put in all his experience as an academician, Member Law Commission of India and Chairman National Law Commission. The book is a critical analytical study of statutory provisions of the four Hindu Law Acts, namely, Hindu Marriage Act, 1955; Hindu Succession Act, 1956; Hindu Minority and Guardianship Act, 1956 & Hindu Adoption and Maintenance Act, 1956. The book contains the recent cases decided by the Supreme Court and High Courts as reported till April, 2014 covering the provisions of the four Hindu Law Acts of 1955-56.

2. The post-independence period in India witnessed a large number of social welfare measures including the reformation of personal Laws of various communities. Hindu personal Law popularly called Hindu Law representing the Law of Hindus, Buddhists, Jains and Sikhs is a personal Law of four religious communities who together constitute over 80% of the national population and hence is the most important constituent of the family and succession Laws of modern India.

3. The book under review is spread over 8 chapters. There is a very brief and interesting discnssion of eaeh Chapter under various sub headings. The author of the book under review has like other authors discussed the history, sourees and schools of Hindu Law with the addition of a description of the development of Hindu Law during Muslim and British periods. The misconception that the Acts of 1955-56 regard the Bnddhists, Jains and Sikhs as part and parcel of Hindu community has in the opinion of the author no room as each of the four Acts specify which

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communities and individuals will be governed by their provisions. An account of UN Convention and UN Declaration for the protection of women from the human rights perspective and their incorporation in the Indian Constitution is a special feature of the chapter. However, in the opinion of the author of the book in spite of some amendments to eliminate gender based discrimination, the discriminatory provisions still exist under the four Acts of 1955-56. At the end of the chapter of the book there is a brief discussion on supplemental Laws and an account of menace of child marriage, evil of marital dowry, domestic violence trends and Sati & Devadasi Customs.

Marriage under Hindu Law is regarded as a *Sanskar* (Sacrament). Hindu Law mandates for monogamy and there is a statutory ban on bigamy. One finds an interesting discussion on the remedies for unlawful marriages, Incestuous & Endogamous Marriages, Marriage without Necessary Capacity, Marriage by Force & Fraud and Marriage in Violation of Age Rules. The status of children of unlawful marriages and the right to inherit property of their parents and other persons is an important feature of the chapter. The marital rights in lawful marriages have been discussed along with the claim of maintenance by wife under Hindu Law and CrPC. The remedy in case of rupture & restoration of cohabitation and suspension of cohabitation by court order has also been discussed. The wife's entitlement to live separately under Hindu Law & CrPC Law has also been discussed. At the end of the Chapter the author has discussed the reliefs ripening into divorce grounds.

4. The concept of divorce was unknown in the ancient Indian Law which rested on the rule of 'Once a Marriage always a Marriage'- even death of either party did not dissolve a marriage. However, some modern writers have taken pains to trace in some *Smritis* and Kautilya's *Arthshastra* exceptional situations in which a married woman could marry again. Polyandry, like Polygyny, was after all not together unknown to ancient India. In ancient religious Laws of India divorce was not prohibited, it was an unknown and unimaginable concept. There is now a well amended Law on divorce contained in the Hindu Marriage Act, 1955. The Act has saved the civil marriage laws, Special laws and Divorce by custom. In spite of the liberalization of divorce policy, the courts have taken a very strict view and demand meticulous compliance with statutory provisions on divorce and the applicable rules of evidence and judicial procedure. The cooling off period and long wait for remarriage are the instances aimed at delaying the final termination of marriage as far as possible.

5. With respect to the settlement of matrimonial disputes the author of the book under review has discussed the bars to the grant of relief by

prescribing limitations for courts, taking advantage of one's own wrong, condoned and abetted wrongs, collusive and delayed legal action and bars to consensual divorce. The bars are supported by the court decisions and the relevant provisions of the Hindu Marriage Act, 1955. There is a discussion on pre-decision reliefs under the relevaut statutory provisions of Hindu Marriage Act, 1955 and the Family Courts Act, 1984.

6. The subject Child & Law under the heading of natural family relations makes a mention of the special provisions contained in the Fundamental Rights and Directive Principles of the Indian Constitution for the protection and betterment of the children. Pursuant to the United Nations Declaration on the Rights of the Child, 1979 and the United Nations Convention on the Rights of the Child, 1989, the Juvenile Justice (Protection and Care of Children) Act, 2000 which was amended in 2006 and 2011. The author of the book under review has made a critical analysis of Indian Majority Act, 1875, Guardian and Wards, 1890 and the Hindn Adoptiou and Maintenance Act, 1956. To determine the legitimacy of the children, an analysis of the relevant provisions of the Indian Evidence Act, 1872, Birth Registration Laws and DNA Test Technology supported by the decided cases has been made. The autbor of the book under review is of the opinion that all religion based personal laws do contain their own rules on gestation and legitimation of children. However, section 112 of the Indian evidence Act, 1872 overrides the contrary provisions of all such laws. It is said that this provision of 1872 Act though a part of procedural law has passed iuto the realm of substantive law. In respect of the DNA test technology the author has referred to the recommendation of the Law Commission of India that the Indian Evidence Act be amended to make provisions for DNA Tests in paternity disputes. The Supreme Court in the case of *Nandlal Wasudeo Badwaik v Lata Nandlal Badwaik* decided on 6 January, 2014 and reported in 2014 STPL (Web) 6 SC, has reviewed its earlier decisions on DNA test technology referred to above and decided that the finding of sucb a test will override the provision of the Evidence Act on the presumption of legitimacy of children. In the case cited the Supreme Court has observed that:

When there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.

7. Termination of Pregnancy and Surrogate Motherhood is an interesting part of the study made by the author of the book under review. There is a reference of Medical Termination of Pregnancy Act, 1971 as amended from time to time and Medical Termination of Pregnancy Rules

regulating professional aspects of abortion. To control the growing practice of female foeticide the Preconception and Prenatal Diagnostic Techniques Prohibition of Sex Selection) Act, 1994 was enacted to prohibit sex selection, before or after conception, and to regulate use of prenatal diagnostic techniques. In respect of the surrogate motherhood there is no legislation in India excepting the 2005 guidelines of the Indian Council for Medical Research which regulates Assisted Reproductive Technology procedures. A draft bill based on the above guidelines on the subject is under consideration.

8. The author has made an analysis of the Indian Majority Act, 1875; Guardians and Wards Act, 1890; 1976 amendment of the Code of Civil Procedure of 1908 and the Hindu Minority and Guardianship Act. Under the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956 a 'minor' is defined as a person who has not completed the age of 18 years. Under the Hindu Adoption and Maintenance Act, 1956 a child above the age of fifteen cannot be adopted and the minimum age for adopting is eighteen. The author of the book under review at page 142 has made a critical appraisal of the above law of adoption as follows:

Theoretically therefore an eighteen year old boy can adopt a fifteen year old boy as his son. It seems rather ironical that a boy who cannot marry before turning 21 [so as to have a natural child not before his 22nd birthday] should be enabled by the law to have an adopted child at age 18. For adopting a child of the opposite sex however the person adopting it should be at least 21 years older than the proposed adoptee, which means that a 21 year old boy can adopt only a newly born girl, and a 21 year old girl a newly born boy.

9. Under the Juvenile Justice Act (Care and Protection of Children) Act 2000 persons below the age of 18 are entitled to special protection and 'juveniles in conflict with law' are exempt from the general criminal law of the land. The author of the book under review is of the opinion that "it is very unreasonable that eighteen-year old boys and girls, who are quite mature, should be enjoying this blanket exemption. The growing rate of sex crimes in recent years has now led to some rethinking on this issue.

10. Part 2nd of the chapter deals with Guardianship & Custody, which focuses on the definition of guardian, termination of guardianship and on the personal laws (Amendment) Act, 2010, which amended the Guardians & Wards Act, 1890 & the Hindu Adoption & Maintenance Act, 1956 to give effect to gender equality. These provisions did not for inexplicable reasons amend the Hindu Minority & Guardianship Aet, 1956. The third part of the chaprer deals with general principles on maintenance Rights

& Liabilities. Under Hindu Law Act 1955-56 both father & mother have equal responsibility to maintain their children, both legitimate & illegitimate. Legal heirs of a deceased person are liable to maintain, out of & to the exteut of their shares in his or her estate, those of his dependents who have themselves not received any share from it by inheritance or will.

11. Chapter 6 deals with Family Relations by Adoption. Part I relates to concept & general principles like Statutory recognition, Traditional Hindu Law & Modern Law of 1956 & Eligibility to be adopted which focuses on a) Religion, Gender & Status b) Age & Marital Status c) Custom & usage and Adoptee's Rights & Duties. Part II of the chapter focuses on taking & giving a child in Adoption, which covers tbe provisions like legal capacity to adopt a child, Adoption by Married persons & adoption by single persons. The third part of the chapter deals with Adoption Process & Procedures. The author is of the opinion that as per the amended law of Pre-2010 either of the parents of a child can give a child in adoption with the consent of the other parent, emphasizing the equality of both the parents for this purpose.

12. The 7th chapter titled Succession Rights & Liabilities is divided into four parts. Part 1st deals with conecpts & kinds of property. The author has discussed in detail various legislations like Caste Disabilities Removal Act, 1850, Married Women's Property Act, 1874, Hindu-Specific laws & New Succession Law of 1956. Section 6 of the Hindu Succession Act has also come for interpretation. In *Ganduri Koteshwaramma v. Chakiri Yanadi (2012 SC 169)* it was observed that this amendment gives parity of rights in coparcenary property between Hindu male & female on & from 09.09.2005. Part second deals with the provisions of properties governed by 1956 Act. Part 3rd of the chapter focuses on law of inheritance to men's property & inheritance to women's property including the Amendment Bill of 2013. The proposed Bill seeks to make changes in Sections 3 & 15 of the Hindu Succession Act, 1956 with a view to change the course of succession to deceased women's "self - acquired property" defined as any property including both movable & immovable property acquired by a female Hindu by her own skill or exertion. The proposal was that such property would be inherited by the deceased woman's parents or either of them. Part 4th of the chapter deals with law for gifts & wills covering various legislations on wills (1870 - 1975), & legislation for unborn persons 1916, Indian Succession Act, 1925 & Hindu Succession Act, 1956.

13. The last chapter "Joint Families & Impartible Estates" has been divided into four parts like, Traditional Law, Modern Law, South India's

Traditional Institutions & Revolutionary changes. This chapter contains a detailed discussion of old as well as enacted law with its up to date amendments & case laws i.e. the provisions relating to Joint families & Impartible estates has been discussed in the light of the changed circumstances through Judicial decisions & new social thinking.

14. At the end of the book under review the author has appended edited texts of Hindu Law Acts in two parts. Part one refers to Old Hindu Law Acts like Anand Marriage Act, 1909; Hindu Disposition of Property Act, 1916; Hindu Inheritance (Removal of Disabilities) Act, 1928; Hindu Gains of Learning Act, 1930 and Arya Marriage Validation Act, 1937. Part second refers to the texts of up to date amended new Hindu Law Acts like Hindu Marriage Act, 1955; Hindu Minority and Guardianship Act, 1956; Hindu Adoption and Maintenance Act, 1956 and Hindu Succession Act, 1956.

15. There is no doubt that the concise edition of the book as claimed by the author in its preface will be handy and useful to the law teachers, students and busy lawyers. There are very negligible spelling mistakes in the book under review. The price of the book is very reasonable. At the end the reviewer will be justified in making an observation that the author of the book has made a strenuous effort in writing the present book which contains all relevant case law and up to date amendments.

Anujaya Krishna, Sports and the Law, 2014 Edition, Universal law Publishing Co. Pvt. Ltd., New Delhi, pp. XIX + 180

Prof. Kalpana Sharma*

1. The book under the review, Sports and the Law, by Anujaya Krishna has professionally attempted to examine the evolution of sports law in India and emphasized the importance of sports as part of legal studies for effective promotion of sports and providing better governance to the bodies, agencies and institutions associated to sports with better facilitation of players without discrimination with guidelines for support and guidance.

2. For the convenience of the reader, the book has been framed in six logical chapters by its author Anujaya Krishna which creates interest to understand the sports law and its related concept in depth. The foreword has been presented by Prof. (Dr.) Ghayur Alam of the National Law Institute University.

3. The author has initiated the book by introducing the concept of sports law among the population interested, involved and associated with sports through identification of need for sports law and its crises associated with it. Even before setting up the discussion on the laws of sports, the concept of sports and its definitions adopted by various agencies, institutions and organizations across the world has a great relevance towards bringing people under a common thought process in respect to the understanding of what "Sports" is. Special emphasis can be given to the definition of 'sports' mentioned by the author in Indian context by Mukul Mudgal, as "a non-scripted activity, involving human being requiring some mental and / or physical exertion on his part, towards achieving a specific aim under the supervision of a pre-assigned person, while being governed by a defined set of rules in conformity with public morality". The definitions adopted by Kerala Sports Act, 2000; British Council; European Sports Charter, 1993 and different bodies are mentioned by the author for the readers to have a wider dimension of understanding sports and its working dimensions.

**Dean Faculty of Education & Director (ASPESS), AUUP, Noida*

4. The second part of Chapter two focusing on 'Sports and the Law' has debated on the ideologies of orthodox view, moderate position and radical approaches propagated through various proponents of sports law. Part one of the Chapter related to international scenario of sports law is worth compilation of different international treaties and conventions dealing with sports across the world. The author has mentioned on the treaties related to doping, human rights issues in sports recognized by UNESCO, the Council of Europe and Commonwealth Federation which enact and enforce international sports law. The book has worth mentioned about highlights of Olympic Charter, European Sport for All charter of Physical Education and its role in general prohibition against discrimination. Part II of the chapter focuses on emergence of sports law in India as a key area of practice with large emphasizes on its need being addressed in various conferences and due to the growth of sports industry in India with launch of private sports companies and organization associated with sports leagues in different sports. The important highlight of the book is the features of national sports development bill, 2011. The present book analyzed key provisions of the bill including preliminary features dealing with Athletic Advisory Council', discussion on role of coach mentioned in section 2(e) of the bill with its highlights and scope of clarifications required in context to various ruling of councils and courts regarding abuses and misuse of powers and fixation of responsibilities on negligence and accidents caused during training. The author have successfully places the importance of traditional sports given in the bill and have also explained how NOC's recognized by IOC which deals with 'public authority' have adopted definitions to determine the scope and extent of application of the RTI act, 2005. Mentioning about development and promotion of sports by central government in the bill, reports and cases of private sports agencies, sports federations including ICC, IPL, BCCI have been discussed in detail to determine the importance and need of including the role of centre in the sports bill for development of sports in India. Eradication of doping, age-fraud, sexual harassment have been mentioned with reference to various cases and reports associated with AIFF, DDCA where in over-age players were selected and petitioners have suggested for various methods including MRI as age verification process remains complicated that plagues all sports and age groups. Case in reference to sexual harassment of a tennis player and court convictions in such situation have been places to justify the section 17 of the Bill towards listing measures to curb and prevent sexual harassment of women of women in sports. Need for democratic support towards chapter vi of the Bill related to procedures for election, age limit and tenure of office bearers of NSF and NOC have been

illustrated citing the conflicts appraised IOC in suspending various NOC's due to excessive government interventions in its functioning, FIFA issuing caution to governments for contemplating with creation of commissions that would conflict with both IOC and FIFA. The book highlights the need for such regulations in our present bill as it is also existing in IOC and other international federations and not adopting to age criteria's, tenures and election procedures of office bearers will lead to non compliance of Olympic charter. The book also revealed concerns of the association members who visualize such clauses present in the sports bill as government interference with the functioning of NOC. Part II of the chapter have discussed in detail about the major drawbacks in the bill along with arguments advanced against the bill in-terms of competence of parliament to legislate on sports, excessive government interference, violation of international standards detailed in part three.

5. The author have increased the worth of the book by placing important bills, rules, regulations, laws and reports in its appendices, which can be used for future reference point related to various activities of sports functioning and management. The detailed list of sports equipments enlisted in income tax act, 1961 related to duty of customs levy on various sports items is worth mentioning.

6. The book may be a welcome addition to the sports professionals, physical educators, and law professionals as well as will enrich institutional libraries.

Natwar Singh, One Life Is Not Enough, 2014 Edition, Rupa Books, New Delhi, pp. XIII+410

Prof. (Dr.) Isheeta Rutabhasini*

1. The year 2014 in Indian Politics is attributed to a colossal change in domestic pohtics where a 125 year old party was struggling for existence in the recently concluded Parliamentary elections. Thc world watchcd with bated breath as the fourth generation Nehru-Gandhi clan was not ahle to consolidate their hold in domestic politics. The year also belonged to a lot of biographies being written by bureaucrats and onc such was written by Natwar Singh, a former diplomat and later a seasoned politician. The book comprises of 410 pages of gripping anecdotes from various parts of his life spread over 22 Chapters.

2. Thc early years of his life give a glimpse of his princely background which gives him an exposure of British Raj but at the same time this affluent upbringing also provides him the best exposurc of intellectual capital. The Mayo, Scindia schooling coupled with St. Stephen's and Cambridge education had already exposed him to the company of great Indian leaders and their childien. His first twist in life comes when he is selected for IFS and lias to return to India. Within days of joining diplomacy the first challenge was working out with Jawahar Lal Nehru on a concrete policy plan for friendly relation with China. Besides diplomacy he has had a keen interest in reviewing books and was a regular contributor to New York Times and Sunday Review. He struck friendship with eminent writers and poople from varied fields like E. M. Foster, Nirad C. Chaudhari, R.K. Narayan, Shri Raj Gopalachari (to whom he attributes a special chapter), M.F. Hussain and many others.\

3. His job profile gets him closer to the PMO and his princely background along with his marriage to the Royal family of Punjab makes him assay different roles. One gets to know the role of bureaueracy and its iufinite hold on the PMO. His sketch of events introduces us to the great team work involved in policy making but it also gives us an insight into the global politics particularly his narration of tenure as a diplomat in

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Zambia. The African politics and India's role as a leading member of NAM and CHOGM is well highlighted. It was during the tenure of Mrs. Gandhi that he decided to join politics. But by then he was witnessing the turmoil in domestic politics with two bad decisions of Mrs. Gandhi's tenure. As a diplomat he recounts the trouble in engaging with world leaders to convince them of the need of declaring emergency in India and the second was *'Operation Bluestar'* which not only cast its dark shadow in inciting communal violence but the world also lost a great leader.

4. He also recounts serving Rajiv Gandhi, The third generation Nehru-Gandhi to be occupying office immediately after his mother's assassination and received a handsome majority in the people's court on the basis of the goodwill created by his mother. This was despite the world criticism she had invoked after declaring emergency. He had a lot to deliver and the shift was clear that the old generation Congressmen had been now replaced by "Doon School Boys', who genuinely wanted their friend to succeed. The book is candid about Rajiv's popularity in sealing a good foreign policy upswing with USA and China which was lying low during Mrs. Gandhi's tenure. Though Rajiv relied a lot on him for advice on external affairs it was apparent that he was a 'man in hurry' to bring about changes. It is here he recounts the inexperience of Rajiv Gandhi in dealing with various domestic issues. Two most important crises gone wrong was the handling of Sri Lankan crisis and the Shah Bano case. The book goes into the objective details of wrong advisory issued to the PMO which escalated the crisis and one of them was so fatal that it jeopardized the life of Rajiv, then Ex-PM but was very sure of making an emphatic come-back but was assassinated in the campaign trail.

5. The last part of the book talks about the UPA years and his closeness to Sonia Gandhi. He eloquently describes this period as the best years of service as he was termed to be closest to 10, Janpath after having successfully served three generations of Gandhi's and very comfortably shared a good personal equation with all of them. People used to flood him with requests for favours in appointment and since he struck a good chord with almost all world leaders in his diplomacy days he became the most sought after man in the Congress Party. The anecdote of only two Italians denying to be crowned after victory (namely Sonia and Julius Caesar in history) reflects his closeness to the family and throws useful insight into the real reason for Sonia's abdication of Prime Ministership in favour of Manmohan Singh by-passing various other senior leaders. He beautifully describes the two consecutive terms of UPA with Manmohan Singh as the Prime Minister as' the morning was gold, the

afternoon was silver, the evening lead'. But history would stand testimony to this unique system of diarchy which converted a politically reticent Sonia into a leader with Machiavellian traits.

6. The twist in narration gets interesting when he describes his sense of hurt by being named in the Volcker committee Report (Oil-for-Food) program me. In the factual narratiou of events and subsequent inquiries being conducted botb by the Government of India and the United Nations, he goes ou to explain the position of him being the 'fall guy' in Congress politics. He explains as to how the Congress party was named in the report too but all investigations according to him were under strict political pressure to absolve the Cougress and book Natwar and his son Jagat. There is nothing permanent in politics and he has seen the sky-high in his reputation and profession and he also experienced the nose-dive where everyone in the party gatherings who once sought favour were now avoiding even an eye contact. A very well said statement in the book 'Politics is a blood sport where there are no friends at the top'. What one experiences is harassment, innuendoes and character assassination but what keeps you going are strong nerves and a sense of honour.

7. I would strongly recommend the book to all academicians and students who would want to understand the fine nuances of policy-making. Natwar Singh's book offers a wouderful insight into his world of friends and acquaintances with whom be always stayed connected. His great sense of humour, strong family bonding kept him going. It is a pleasure to learn from his experiences and bis book will explain the fine-craft of diplomacy to all who iutend having a career in policy-making be it as a lawyer or as a bureaucrat. He has had the pleasure of serving generation of politicians across the globe (India, Pakistan, Sri Lanka) both at a personal and professional level. This book definitely opened a new dimension of a bureaucrat's life that they need not be necessarily men with files but could be erudite par excellence.

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