Vol. 49 2020 No. 2 ISSN 0522-0815

THE BANARAS LAW JOURNAL

Faculty of Law
Banaras Hindu University, Varanasi-221005, India

THE BANARAS LAW JOURNAL
Faculty of Law
Banaras Hindu University

National Advisory Board

THE

BANARAS LAW JOURNAL

(A Peer-Reviewed Journal)

THE BANARAS LAW JOURNAL

Cite This Issue

as

Vol. 49 No. 2 *Ban.L.J.* (2020)

The *Banaras Law Journal* is published bi-annually by the Faculty of Law, Banaras Hindu University since 1965.Articles and other contributions for possible publication are welcomed and these as well as books for review should be addressed to the Editor-in-Chief, *Banaras Law Journal*, Faculty of Law, Banaras Hindu University, Varanasi - 221005, India, or e-mailed to <dean.lawschool.bhu@gmail.com>. Views expressed in the Articles, Notes & Comments, Book Reviews and all other contributions published in this Journal are those of the respective authors and do not necessarily reflect the views of the Board of Editors of the *Banaras Law Journal*.

In spite of our best care and caution, errors and omissions may creep in, for which our patrons will please bear with us and any discrepancy noticed may kindly be brought to our knowlede which will improve our Journal. Further, it is to be noted that the Journal is published with the understanding that Authors, Editors, Printers and Publishers are not responsible for any damages or loss accruing to any body.

In exchange for *the Banaras Law Journal*, the Law School, Banaras Hindu University would appreciate receiving Journals, Books and monographs, etc. which can be of interest to Indian specialists and readers.

Composed and Printed by Raj Kumar Jaiswal, Dee Gee Printers, Khojwan Bazar, Varanasi-221010, U.P., (India).

EDITORIAL COMMITTEE

THE BANARAS LAW JOURNAL

Pandit Madan Mohan Malaviya Ji

(The Founder of Banaras Hindu University)

(25.12.1861 - 12.11.1946)

"It is my earnest hope and prayer, that this centre of life and light, which is coming into existence, will produce students who will not only be intellectually equal to the best of their fellow students in other parts of the world, but will also live a noble life, love their country and be loyal to the Supreme Ruler."

- Madan Mohan Malaviya

Banaras Hindu University

Visitor	:	The President of the Republic of India *(ex-officio)*
Chancellor	:	Justice Giridhar Malviya
Vice-Chancellor	:	Prof. Rakesh Bhatnagar
Finance Officer	:	Sri Abhay Kumar Thakur
Registrar	:	Dr. Neeraj Tripathi
Librarian	:	Dr. D.K. Singh
Head of the Department and Dean, Faculty of Law	:	Prof. R.P. Rai

LAW SCHOOL

The Faculty Staff

Sl. No.	Name & Qualifications	Designation
1.	Baeraiya, Babita, B.A., LL.M., Ph.D. (Sagar)	Assistant Professor
2.	Barnwal, Ajay, LL.M. Ph.D (Rajasthan)	Assistant Professor
3.	Brijwal, K.S. LL.M., Ph.D. (Lucknow)	Assistant Professor
4.	Gupta, Shailendra Kumar, B.A., LL.M., Ph.D.(Banaras)	Professor
5.	Kumar, Anoop, LL.M., Ph.D. (Banaras)	Assistant Professor
6.	Kumar, Adesh, B.Sc., LL.M., LL.D. (Lucknow)	Assistant Professor
7.	Kumar, Ajay, LL.M., Ph.D.(Rohatak)	Professor
8.	Kumar, Pradeep, LL.M., Ph.D. (Lucknow)	Assistant Professor
9.	Majhi, Raju, B.Com., LL.M., Ph.D. (Banaras)	Assistant Professor
10.	Malaviya, M.K., B.A., LL.M., M.Phil. Ph.D. (Bhopal)	Assistant Professor
11	Maurya, Anil Kumar, LL.M. Ph.D. (RMLNLU, Lucknow)	Assistant Professor
12.	Mehdi, Ali, B.Sc., LL.M., Ph.D.(Delhi)	Professor
13.	Mehra, Surendra, LL.M., Ph.D.(Banaras) On Leave	Assistant Professor
14.	Mishra, Dharmendra Kumar, B.A., B.Ed., LL.M., Ph.D.(Banaras)	Professor
15.	Mishra, N. K., B.Sc., LL.M., Ph.D. (Sagar)	Assistant Professor
16.	Mishra, Vinod Shankar, B.Sc., LL.M., Ph.D.(Banaras)	Professor
17.	Murali, R. K., B.Sc., LL.M.(Andhra), Dip. In IRPM(Tirupati), Ph.D.	Professor
18.	Padhy, M. K., B.Sc., LL.M., Ph.D.(Banaras)	Professor
19.	Pandey, Akhilendra Kumar, B.Sc., LL.M., Ph.D.(Banaras)	Professor
20.	Patel, R. K., B.A.(Hons.), LL.M., Ph.D. (Gorakhpur)	Professor
21.	Pathak, V. K., B.Sc., LL.M., Ph.D. (Bareilly)	Assistant Professor
22	Pratap, Mayank, LL.M., Ph.D. (Banaras)	Assistant Professor
23.	Rai, J. P., B.A., LL.M., Ph.D.(Purvanchal)	Professor
24.	Rai, R. P., B.Sc., M.A., LL.M., Ph.D.(Rewa)	Professor
25.	Rawat, Laxman Singh., LL.M., Ph.D. (Banaras)	Assistant Professor
26	Saha, P.K., LL.M., Ph.D. (Banaras)	Assistant Professor
27.	Sahoo, G. P., B.A., LL.M., Ph.D. (Banaras)	Professor
28.	Saroj, V. K., B.A., LL.M. Ph.D. (Banaras)	Associate Professor
29.	Sharma, Gopal Krishna, LL.M. (Banaras) NET/JRF	Assistant Professor

30.	Sharma, K.N., LL.M., Ph.D. (Banaras)	Assistant Professor
31.	Singh, A. K., B.Sc., LL.M., LL.D. (Lucknow)	Assistant Professor
32.	Singh, Dolly, LL.M., NET/JRF	Assistant Professor
33.	Singh, Gurwinder, LL.M., Ph.D (Finland)	Assistant Professor
34.	Singh, P. K., LL.M., Ph.D.(Agra)	Professor
35.	Singh, R. K., LL.M., Ph.D.(Delhi)	Associate Professor
36.	Srivastava, Ajendra, B.A., LL.M., Ph.D.(Delhi)	Professor
37.	Srivastava, D. K., B.Sc., LL.M., Ph.D.(Banaras)	Professor
38.	Tripathi, Bibha, B.A., LL.M., Ph.D.(Banaras)	Professor
39.	Tripathi, K. M., B.A.(Hons.), LL.M., Ph.D. (Banaras)	Associate Professor
40.	Tripathy, Sibaram, LL.M., Ph.D. (Berhampur)	Professor
41.	Upadhyay, C. P., LL.M., Ph.D.(Agra)	Professor
	LIBRARY STAFF	
1.	Dangi, Ram Kumar, LL.B., M.Lib I Sc., M.Phil (Lib I Sc.), Ph.D.	Deputy Librarian
2.	Pal, Brij, M.A., M.Lib. & I. Sc.	Semi Prof. Asstt.
3.	Upadhyay, Dayalu Nath, B.A., C.Lib.	Semi Prof. Asstt.
4.	Mishra, Girish Chandra, M.A., M.Lib I.Sc.	Semi Prof. Asstt.

THE
BANARAS LAW JOURNAL

Vol. 49 No. 2 ISSN 0522-0815 July - Dec. 2020

ARTICLES

NOTES AND COMMENTS

BOOK-REVIEW

RULE OF LAW WITHOUT SECULARIZED CULTURE IS A MYTH : A CRITICAL ANALYSIS

MD. MORSHEDUL ISLAM*

ABSTRACT : Rule of law is the most uttered and cherished philosophy in present world as it is related to political democracy.[1] Each democratic or non-democratic regime reiterates her commitment for upholding rule of law in the process of governance. People of the developed and developing countries maintain a simple and honest belief that rule of law is truly practiced in the developed countries- USA, UK, France, etc. But reality is not so. Dicey innovated rule of law principle in 1885, when its total application was absent even in UK. Thereafter 1959 Delhi Declaration incorporated three more principles for making Dicey's rule of law workable. Immediately after Delhi Declaration, KC Davis clarified law for making it compatible with rule of law. Rule of law is not workable in a polluted society. Even in a democratic society rule of law is not fruitful if rationality, honesty and sincerity is not found in the action of the government and governed. If ethical values and personality integration are absent in the society rule of law cannot achieve its goal. This rationality, honesty, ethical values are nothing but the outcome of secularized culture. Only secularized culture ensures rule of law in the society. State is considered as having secularized character. Secularism denotes to combination of rationality, moral and ethical values, and at last the dictate of right reason of a rational human being. State is emerged to protect and preserve the right to life, liberty and property of the people. But government, the

---

* Professor, Department of Law, University of Rajshahi, Bangladesh, E-mail: p22042012@gmail.com

1. Shils Edward, *Political Development in the New States,* Mouton & Co., The Hague-Paris, 1966 pp.51-62

trustee of the state, if not imbibed with this character, rule of law will not be visible in the society. Secularized character of government only expedites the journey of rule of law smooth, free and fruitful and, thereby making democracy and development meaningful. USA, UK and Western European countries are spokespersons of rule of law. Bangladesh and China also propagate rule of law and die for ensuring rule of law. In reality none of these states practice it. The reason lies in the non practice of secularized culture. This paper is intended to find out whether rule of law works without practice of secularized culture or not.

KEY WORDS : Rule of Law, Supermacy of Law, Equality before Law, Independent of Judiciary.

I. INTRODUCTION

The government of People's Republic China is very much interested and enthusiastic in bringing about reforms in her judicial system with the object of ensuring rule of law for the common people.[2] In a totalitarian society like China administering rule of law is not only unthinkable but also ridiculous. Rule of law is the cardinal point of democracy. British political system is based on this principle. AV Dicey innovated this principle in 1885, and 1959 Delhi Conference added three other inevitable conditions for making as well as working of the principle smooth and fruitful. In a rotten society this concept is meaningless without the practice of secular culture by the ruler and ruled. Even in a democratic society this idea faces huge challenge in the absence of secularized culture.

II. RULE OF LAW AFTER A V DICEY

Rule of law is a political concept based on the teaching of A.V. Dicey. Its manifestation is of different types. Implementation of this idea depends upon the political will of the people of concerned system. Its application is visible in a democratic society where secularized culture is nourished and practiced both by the government and governed.

It is said that English Political System is based on rule of law. But till the publication of Dicey's theory in this regard it was not clear what is rule of law. However until the passage of the Act of Ministerial

2. BBC(English)News, October 23, 2014

Responsibility 1947 this innovation remained in paper not in practice. Dicey got this theory from the teaching of Chief Justice Cook and he just developed the idea in the following wards.

(i) Supremacy of Law

Dicey indicated the supremacy of ordinary law or in other words in English environment supremacy of common law. Since British Constitution is an unwritten one there is no distinction between ordinary law and constitutional law. The British legislature acts as constituent assembly and legislative assembly as well simultaneously. To him every deed of the government and the government should be carried out under the law existing at the time of discharge of those duties and responsibilities. It is evident that by sticking to only law, nothing else Dicey basically denounced the presence of discretionary power. However, one important thing he failed to mention regarding the nature of law i.e., what should be the feature of law Dicey advocated for. It is not obvious that he propounded for the supremacy of black law or ill law.

(ii) Equality before Law

After Dicey, all are equal in the eye of law whatever may be his/her rank/position in the society. Here he advocated for equal treatment on the basis of required qualification. Perhaps uniform and single set of judicial system was recommended for the application of this equality. That means Dicey expounded against the existence of dual or tripartite sets of judiciary-ordinary court and special court, or ordinary court, tribunal and military court.

(iii) Predominance of judicial decision

Rights and interests of the people shall not be jeopardized without the interference of court i.e., without court orders none should be deprived of his rights. Dicey by this principle speaks for judicial supremacy practiced in UK. In English society right to live, liberty, and property are all common law rights which are ensured and protected by the courts through their decisions individually on the basis of merit of each case. However these are fundamental rights in rest of the world. Constitutional court is established for preserving and protecting individual rights against the whims and caprices, and brutality of government. Dicey perhaps is for supremacy of judiciary i.e., what judiciary says that is constitution, not what the legislature passes/ makes. Perhaps he is in favour of primacy of

judiciary over other organs. But in England it is not possible because of parliamentary system of government. However in reality practice does not match with the theory in this regard.

(iv) Shortcomings of Dicey's Concept

Explanation of the concept rule of law by AV. Dicey in 1885, according to some, was thought to be the outcome of British political system. Its application was inconsistent even in Dicey's era. However his writing created enthusiastic approach not only among English people and people of British Empire but also among the democracy loving people all over the world regarding what was the approach of their governance and what would it be if total materialization of the idea happens. This effected not only in the marginalization of discretionary power of executive but also holding government liable for wrong doing to its subjects in British political culture. Dicey's innovation finds its footing inoperative elsewhere in the world where English style political culture has not been developed. The advocates for the rule of law theory felt the lacking of some cardinal elements whose existence is inevitably required prior to the working of Dicey's innovation. After years of thinking, debate and discussion the lawyers, judges and professors came to a consensus that rule of law can only be visible if following elements are ensured in a political society and those elements are proclaimed as the prerequisites of rule of law after Delhi Declaration, 1959.

(a) Ensure the enjoyment and protection of certain rights and freedoms by individuals

In English political culture these rights and freedoms are known as common law rights and freedoms. English polity not only provides her citizens with these rights but also employs mechanism for their redress in case of violation thereof. In the context of written constitution like USA these rights are termed as fundamental rights and in modern terms it falls within the ambit of civil liberty. US political culture is very much aware of the full enjoyment of these rights and liberties by the individuals and, state developed techniques in case of their breach. In the context of other countries got independence after 2nd world war from colonial powers though their constitutions put these rights and liberties in pages but in case of application the people got themselves deserted of that.

(b) Independent judiciary and enriched bar for the protection of fundamental rights

Existence of judicial independence is a must for the operation of rule of law. Mere independence in theory but not in practice does not create any environment for nourishment of the same. Whether judiciary enjoys independence or not that depends upon the recognition of the common masses that have practical experience of judicial dealings. Only having of a people oriented free and enriched law practitioners who are satisfied with the smooth working of judiciary may be the evident of rule of law. However the working of a sound as well as enriched bar that advocate for the government is not a sign of rule of law.

(c) Establishment of social, economic and cultural conditions for allowing men to live in dignity and to fulfill their legitimate aspirations

Only people oriented political system where government guarantees normal death to its citizens and people express their views freely without interference of any body including the government can provide such type of atmosphere. Such environment is available only in a secularized political democracy. Only a hand pick of nation states in this modern era provide such condition where people live with dignity, and get their aspirations materialized.

The jurists attended Delhi Conference, 1959 framed these new principles of rule of law very cautiously and carefully. They emphasized on enjoyment of fundamental rights, existence of independent and rich judiciary, and economic, social and cultural development for meeting people's basic needs, and at the same time their living in with dignity and getting their desires realized.

Only securing these three conditions could not provide subjects with an honorable and wish fulfilling life in a polity without political freedom.

Keneeth Culp Davis, modern propounder of rule of law termed supremacy of law as rule of law. It is not conceivable how could one element of Dicey's principles uphold modern precept of the same i.e., supremacy of law. However in clarifying the concept Davis emphasized on seven aspects of the theory. These seven aspects[3] that Davis attributed

3. According to rule of law refers to (i)law and order, (ii) fixed rules, (iii) elimination of discretion, (iv) due process of law or fairness, (v) natural law, (vi) preference for judges and (vii) judicial review.

for melting his precept are basically spoken of praising a complete rational law. In the field of clarifying law (rule of law) all jurists are hiking behind Thomas Acquinas.[4]

The theme that the writing of Dicey carries with and the commitment as well as slogan made on Delhi Declaration are not realistic without political development. Only political development without nourishment of secularized political culture would not be enough for the establishment of rule of law in the society as well as statehood.

III. SECULARIZED POLITICAL CULTURE

Secularism refers to morality, rationality, impartiality of any one be he/she a government officer or common people in his/her action, behaviour and policy. Moral values and rationality is the guide of human actions and policies. Very often secularism is related to religion. Universally accepted rules, norms and values of ethics and morality is the basis of all actions of the government.[5] Usually secularism is identified with neutrality. Secularism has subtle relation with religion because in all religions, stress is laid upon the nourishment and practice of moral values for the positive progress of the society. However, in running state affairs secularized outlook, actions and behaviour are inevitable for making democracy meaningful. Perhaps for this reason Almond said that unless and until there is a secularized culture in a society, no political development is possible. Democracy is a multi-faceted idea. Only in political democracy civilian supremacy conducted by the elected representative (elected by a free, fair and neutral election) and existence of public liberty are at work.[6] In fact secularization means rationality (rationalism means- neutrality, impartiality and dictate of right reason). Under secularized environment achievement values are preferred over ascriptive values. The incumbents

4. After Acquinas a law must contain four features. Those features are-(i) dictate of reason, (ii) for common good, (iii) support of the people, and (iv) legitimacy of the law maker.

5. MacIver R.M., *The Web of Government*, Macmillan Company, New York, 1961, pp.73-81 , See also Pye Lucian W. & Verba Sidney, *Political Culture and Political Development* (Edited), Princeton University Press, New Jersey, 1965, pp.3-26, 133

6. Shils Edward , *Political Development in the New States*, Mouton & Co., The Hague-Paris, 1966, pp.51-52, 47-84

of any office are legally expected not to exercise their personal will in their official role. In some cases if the law is black the incumbents are expected to be guided by their reasoned judgment.

Mutual trust among the politicians is one of the criteria of secularized political culture.[7] Personality integration is a requisite element of secularized political culture. Political leaders fulfill their pledges made to the people before or after or at any time. Government officers and common people must accomplish the promises made to any person at any moment.[8] Of all democratic values honesty, sincerity and dedication are cardinal elements for democratic success.[9]

If majority members of the society are not accustomed to secularised political culture rule of law will remain only in theory not in practice. Secularism is nothing but a process of learning. It has to come from the beneath (family). It will not be imposed from above (government).

In exercise of power the officials will not bow its head to anybody except the law by which he is guided. And not be dictated by anybody else. Law must be the reflection of positive will of the society. Bureaucracy is a rational legal institution. The incumbent of any office is not allowed to use office furniture, office, fund etc for personal use. His official position will not be used in dealing with public.[10] That is why bureaucracy is termed as rational legal institution. If the above conditions are available in the society rule of law can be enjoyed. Only existence of structural institution does not guarantee the existence of secularized political culture (rule of law).

IV. PRESENT CONDITION OF SECULARIZED POLITICAL CULTURE IN UK

United Kingdom is the motherland of the concept of rule of law. All the three prerequisites of rule of law declared in Delhi Declaration are

---

7. Almond Gabriel A.& Jr. G. Bingham Powell, Comparative Politics A Developmental Approach, Little Brown & Company, Boston, USA, 1966, pp.43-63
8. Ibid
9. Jennings Sir Ivor, *Cabinet Government*, Cambridge University Press, UK, 1969, pp.13-19
10. Macridis C. Roy & Brown E. Bernard, *Comparative Politics Notes and Readings* (edited), The Dorsey Press, Homewood, Illinois, 1964, pp.415-423.

available in Britain. But some recent events give birth to some questions with regard to the practice of rule of law. In 2014 news revealed that some big fishes of British politics who were members of parliament did not pay off their telephone bill, they overdrew extra bill in the name of renovation of their government resident but used the same for personal use, and in some cases they turned official furniture into personal property. The speaker did not take any action against them nor asked them to realize their duties. Even law enforcing authority and income tax authority did ignore these wrong doings. If these misdeeds were committed by common people or government officials they would have been made subject to multiple corruption and criminal proceedings. In English political culture when any allegation is surfaced against any political leader whether from the treasury bench or opposition he/she resigns from their post for the urge of conscience. But in this case no member of parliament either from the treasury bench and opposition resigned. It is too violation of secularized political culture.

Liberal Democratic Party in her election manifesto pledged that tuition fee for higher education (fair taxes i.e., that put money back in pocket) would not be increased.[11] Liberal Democratic Party formed coalition government with Conservative Party under the leadership of David Cameron in May, 2010. In the same year government doubled tuition fee for higher education. Against the decision of the government London faced huge popular protest and the demonstrator voted for the Liberal Democrat demanded for the immediate resignation of their MPs for deceiving the people.[12] This u-turn is totally inconsistence with English political culture. People are to obey law but in a secularized society such type of government should not have any moral basis to stay in power for violating election manifesto. That means parliament has no authority to make any law going beyond the words of her election promises even in the name of national interest. If such events occur that is not just an appreciable in the society. The reason and ethical value do never teach dishonesty, deceiving and breach of trust. Thus lack of secularized culture denounces the existence of rule of law in the society.

---

11. See the Liberal Democrat Manifesto 2010
12. *The Guardian,* Wednesday, November 10, 2010

V. CONDITION OF SECULARIZED POLITICAL CULTURE IN USA

America is considered as a place where government and governed are habituated with the principles of rule of law. But sense for rule of law is stronger than that of temporary executive and judges. In spite of adherence of people to rule of law the government, and judiciary are seen not to comply with it because of shortcoming in the practice of secularized culture.

Detention centre as well as prison in present time set up on Cuban soil and carried on by US military from 2002, naked and horrible abuse of detainees without trial by Bush Administrative not only diminished America's image as the upholder of rule of law and free society but also questioned the supremacy of US Constitution. Democratic Party under the leadership of Barak Obama came into power in 2008 with the aim of bringing change in US policy and in its election manifesto it pledged to shut down the Guantanabay detention centre. It did not close the centre in its first tenure. Obama spends second term in office but till 2015 his government has not materialized the election promise. It continues to operate the Guantanamo Bay Detention center.[13] According to the secularized culture Obama should not stay in power because of not keeping its pledges made before the people in election. Under such atmosphere a sensible human being at least seeks pardon and feels sorry for failure. Democrat government did not admit her inability let alone repent for inaction. This is not rule of law let alone what secularized culture teaches us.

The character of state is nothing but a secular one. It must not behave in bias or irrational means. Its personality is as that of a rational human being free from human enmity and hatred. Secularized culture expects from the government i.e., trustee of the people to act rationally with all friend and foe equally based on reason. In spite of being advocate of political democracy no US government is seen to uphold spirit of secularism for the mankind particularly towards Palestine. US government supports the Israel blindly. Here the mankind is shattered. Secular character of US as state does not justify this act of her representative character. Even the US Constitution does not authorize the representative of the state USA to stand for killer of humanity. Very recently a group of US

13. U.S. Senator John McCain, Senator Kelly Ayotte , Senator Richard Burr and

Senators threatened to stop financial aid amounting to 400 million US Dollar per year to Palestinian people if Palestinian authority lodges criminal charge against Israel for committing massacre during Gaza War in 2014 in the International Court of Criminal Justice. This is truly violation of secular teaching by US legislators.[14] Though US Constitution authorizes the government to play the role of protector of human rights and free society yet her trustee ignores it which is not rule of law let alone the rational feature of USA as a state.

US Constitution advocates for the establishment and practice of democratic form of government. Since in mainland USA democratic form of government is at work it is presumed that it injects the same elsewhere in the world no doubt. In Atlantic Charter America, as one of the signatories, promised that democratic government and rule of law would be injected in other countries where USA provides financial aid and assistance. One important thing is that American Constitution empowers the government to take every step and measure for protecting her interest in the world. Secularism must not support nor teaches any interest which is achieved or gained in sacrifice of moral or ethical values. Governments in USA did or do not support democratic government in Latin America, Asia, Africa, European countries. When the people of those countries sacrifice and give blood for that cause US governments ignored and ignore their voice and directly supported and support the authoritarian rule. In the recent history in Egypt Muslim Brotherhood came into power under a free, fair and neutral election. USA supported and supports military coup and overthrow of democratically elected government there.[15] Not only that encouraged and praised brutal military rule in Algeria in lieu of supporting the democratically elected political party Islamic Salvation Front (FIS) there.[16] In Saudi Arab there is a dictatorial rule. People there are for greater political liberty. But US government did and does not stand for the people there.[17] US governments always patronise those regimes

---

Senator Lindsey Graham hold a news conference to talk about new legislation to restrict prisoner transfers from the detention center at Guantanamo Bay, at the U.S. Capitol in Washington January 13, 2015.

14. *Reuters*, UK Edition, Monday, 19 January, 2015
15. *The Daily Star*, 4 July, 2013
16. Entelis, John P., Democracy Denied: America's Authoritarian Approach Towards the Maghreb – Causes & Consequences, XVIIIth World Congress of the International Political Science Association, Quebec, 1-5 August 2000.
17. 5 dictators the U.S. still supports". The Week. Retrieved 2014-08-10

that are beneficial for her. But US as a state bears a secular ideology devoid of political or financial goals. Then why the trustees do not imbibe secularized character in them for the up lift of moral and ethical values. This is surely violation of US Constitution[18] or rule of law which secularized culture does not approve nor teach.

VI. RULE OF LAW IN CHINA

China is a strong economic power in present world. It dominates the political philosophy of third world countries. Some governments of democracy oriented countries like ours in the disguise of perpetuating state power are whispering to introduce so-called China Style democracy in their countries. That's why outlook of China regarding rule of law has been surfaced here.

Socialist political environment exists in People's Republic of China. Being a totalitarian society opposition voice is not tolerated and considered as the enemy of the society and state. None should expect the practice of rule of law in this style of political system. Right to life, liberty, and property the three cardinal elements of statehood is not recognized in this polity. However Chinese polity practices and recognizes state ownership over the property. Right to life and liberty is not recognized. Right to life is not observed in dissident voice. Liberty is not practiced, recognized and honoured in China. State China holds the character of a rational human being. A state should not make difference between her subjects. Being the trustee chinese government does not uphold the personality of rational being which obviously denounces the teaching of secularized culture.

Dictatorship of proletariat is established and practiced in China. This proletariat is composed of peasants and workers class. At the top there is a chairman. Under the socialist practice the means of production and distribution thereof shall be controlled by the state and it shall be distributed to the people according to the requirement of the individual and family members. It is not conceivable why beggars are seen begging in Shanghi streets. On the other hand family members of Party Chairman lead and enjoy luxurious life. According to recent report 90% China's super rich want to send their children abroad particularly to USA, UK, Germany.[19]

18. DeConde, Alexander et al., ed. (2001). "Dictatorships". *Encyclopedia of American Foreign Policy, Volume 1*. Simon & Schuster. p. 499. ISBN 9780684806570.
19. *International Business Times*, Friday, February 6, 2015

These children use BMW, Maseratis and other high-end autos as their personal transport. Their luxurious life-style is a mere dream for the peasants and beggars begging in the streets of Shanghi and Beijing.[20] This is not what socialism teaches and for which China adopted socialist economy. It is not rational and just. The practice of dual economic life styles by lower class and upper class of China exhibit the hollowness, mockery and practice of unethical value in the government level. This is not rule of law, let alone secularized culture of which Chinese polity and father of China's communist revolution thought.

Hong Kong returned back to China from UK after the end of 99 years lease. UK set up English political and economic systems in Hong Kong. Under Sino-British Joint Declaration of 1984 it was transferred to China in 1997. China agreed to continue British type democratic rule in Hong Kong. On September 22, 2014 it denied to continue the democratic rule agreed upon with UK in Hong Kong. This is irrational and blatant violation of Sina-British Joint Declaration. This definitely questions the honesty and sincerity of China leadership. One China two systems Principal is negated here and thus secularized culture is certainly absent in the governance of China.[21]

VII. SECULARISED POLITICAL CULTURE IN BANGLADESH

Bangladesh was born for the establishment and realization of democracy. Initially she introduced west-ministerial political system. Within a short span of time the founding father of Bangladesh Bangabandhu Sheikh Mujibur Rahman himself buried the democracy by fourth constitutional amendment by introducing one party authoritarian system of government.[22] Military ruler Major Ziaur Rahman exhumed the buried democracy by establishing people's supremacy in May, 1977.[23] With the assassination of President Ziaur Rahman Bangladesh was again dragged into autocratic rule. Second phase of so-called democracy began her journey from 1991. Living in the year 2015 Bangladesh once again is standing on the balance of embracing autocratic rule. In spite of lying on

---

20. Melissa Anders l manders@ mlive.com Fellow on Twitter- On April 21, 2014.
21. *BBC News*, September 22, 2014
22. *The Fourth Constitutional (Amendment) Act*, 1975
23. *The Ittefaq,* June 1, 1977, See also *the Bangladesh Observer*, June 1, 1077

the dead body of democracy the government in power asserts for the practice and exploration of rule of law, and consolidation of democratic rule in Bangladesh.[24] Before making any comment on the existence of rule of law and democratic government in Bangladesh light should be focused on certain aspects of rule of law and their operation in Bangladesh.

Since Bangladesh is a third world country Dicey's rule of law theory is impracticable without prior implementation of the principles of 1959 Delhi Declaration. According to the requirement Bangladesh Constitution contains a list of fundamental rights for all the people living within its boundary. But these rights are not for the common people let alone the opposition political parties or groups or individuals. It is only for the members of the ruling party and her die-hard followers. Machineries of the government are used not to create environment for the free and unfettered enjoyment of fundamental rights but to curb that. Government machineries protect and encourage the supporters of the ruling party to create bottlenecks to and violate the rights of others freely.

Bangladesh possesses a judiciary and a bar of eminent lawyers and barristers. The highest judiciary which is considered to be the guardian of the constitution and society, safeguard of fundamental rights of the people, is basically the spokesperson of and decriminalization organ of the government.[25] After 2007 the judiciary has been basically upholding and justifying all unconstitutional, illegal and political agenda of the ruling elite and party. Because of inaction of the judiciary fundamental rights of the people are not only snatched away and brutally destroyed but also vanished off for the dissenting voice in Bangladesh.

The legal professionals and practitioners are divided into two- one is pro-government and another pro-people. The pro-government faction does not see any wrong doing, unconstitutionality, caprice, illegality, or irrationality in the working of the government. These lawyers do never speak for the common masses. Another section of the bar standing by the masses and opposition is not allowed to carry out their professional duty.

Lower judiciary is also directly controlled and forced to materialize

---

24. *The Janakantho, ,* August 16, 2015, See also *the Bangladesh Pratidin*, , August 16, 2015, See also *the Ajker Kagoj*, August 16, 2015

25. Dr. Jaforullah, the founder of Gono Shastho, Contempt of Court case. *The Daily*

the dictation of the authority though government reiterates that mass people, lawyers, and members of judiciary are enjoying the fruits of independent judiciary.

It is the responsibility of the government to create social, economic and cultural atmosphere for providing people with a life with dignity and fulfilling the desires of the people i.e., government must make congenial environment where people must have the job opportunity and employment in other words economic stability. Society will run on the basis of ethics and moral values. Respect for opposition voice and openness in the actions of the government should exist there. In Bangladesh government promises for creating new jobs and eradicating corruption, in reality it is not seen. However jobs available are given on the basis of political affiliation of the candidates. After 2008 it is found that candidates holding opinion other than government view are disqualified for government jobs in spite of having better qualification and better performance in competitive examination. Government jobs are kept reserved for the supporter of ruling party. In this case qualification and efficiency are not required.[26] 'Sit for the BCS, we will take care of' the rest,' HT Imam, PM's political adviser, assured the activists of Chhatra League while addressing them at a function on November 12, 2014.[27]

Ethical and moral values are considered as the enemy of the government. Honesty, sincerity, dedication, and heard working are treated as disqualification if it goes against the policy and decision of the government. Only government recognized groups and individuals enjoy social benefits.

Democracy is a system where people live with dignity and, legitimate rights and desires are available. Unfortunately the features of democracy-freedom of speech, political rights, fundamental rights, transparency and legitimacy of the government and accountability of the government are not existed in Bangladesh. Government machineries distribute state privileges to the yes men of the ruling elite.

Government's first and utmost duty is to ensure normal death to

---

Star, August 31, 2015, See also the Janakantho Contempt of Court Case, *the Prothom Alo*, August 11, 2015

26. *The New Age*, November 13, 2014.

27. *Ibid*

each and every citizen of the country. Law enforcing agencies are considered as savior and protector of normal death. In Bangladesh killing of innocent people in the hands of law enforcing agencies is a normal matter. Law enforcing agencies and government justify these killings in the name of crossfire. From January 5, 2015 to February 26, 2015 fifty opposition political party men and twenty six neutral persons were killed in the hands of RAB and Police as well as ruling party men in the name of crossfire.[28] These are basically coolheaded murder. Bangladesh Prime Minister Sheikh Hasina and other members of her government ordered the law enforcing agencies to kill political opposition to quell the movement for restoration of democracy against her government.[29]

Legitimacy of the government is a must for running the administration in democratic system. Government gets this legitimacy from the people through a free, fair, neutral and peaceful election accepted by the people concerned. Where legitimacy is absent there remains no accountability of the government. Bangabandhu Sheikh Mujibur Rahman took over the office of President by fourth constitutional change on January 25, 1975 without seeking approval of the people. Since his government had no legitimacy removal of his government by coup was appreciated by the people of that time warmly.[30] Post coup governments of Khandaker Mushtak Ahmed, Abu Sadat Mohammad Sayeem, and Zia were welcomed with great enthusiasm and appreciation.

General Ershad took over state power ousting democratically elected legitimate government on March 24, 1982. Ershad was in power for eight years but he had no legitimacy because elections under his auspices were farce and not accepted by the people. Thus his removal was joyful to the people.[31]

The 15th February, 1996 election was not free, fair and genuine one. People's participation was not there.[32] The government formed on the basis of that election result lacked of legitimacy. That's why Begum Khaleda

28. *The Naya Diganta,* February 27, 2015
29. *BTV News*, January 28, 2015, *Bd News.com,* January 28, 2015, *The Daily Star*, January 29,2015, *The Prothom Alo*, January 29, 2015
30. *The Morning News*, August 20, 1975, *The Bangladesh Observer*, August 21, 1975
31. *The Daily Star*, December 7, 1990
32. *The New Nation*, February 13, 1996.

Zia's second termed government had to resign within a short span for allowing the people to express their voice in a free, fair, neutral and peaceful election on June 12, 1996.[33]

On 5th January, 2014 general election one hundred and fifty four Members of Parliament out of three hundred were made legislators without election. In rest of the seats where election was held voter turn-out there was actually less than one percent.[34] The people rejected the election and tenth parliament has no legitimacy to run the government. But the highest court upheld the election of tenth parliament as a legitimate one ignoring the voice of the people as well as norms and values of democracy.[35] Since there is lack of legitimacy the current government has accountability to none. The farce is that government asserts and claims her as a democratic government. Current government turns down any question of legitimacy and terms every attempt in this regard as treason and brands the voice as enemy of the state, society and independence of the state. This is the sign of autocratic system in which rule of law has no place.

Democratic government means government by the consent of the governed.[36] Media-electronic and print plays very significant role in creating and mobilizing public opinion (consent) in the society. In democracy where effective opposition is not available or where no opposition is present media not only creates and mobilizes public consent but also assumes the role of watch dog on the actions of the government as like as opposition. In Bangladesh current government is very much pro-active in curbing the democratic role of media. Not only that, it blocks all those media which explore the positive opinion of the society. It endeavors to create her positive image through this media. People as a whole are reluctant to digest the negative attempt of the media in this regard. Government stopped publication and circulation of several print media such as the Amar Desh, the Inqilab, and imposed ban on broadcasting news channels viz., Diganta TV, Peace TV. With the object of showing positive side of present government it drastically censored every news and views before reaching

33. *The Independent*, June 14, 1996
34. *The Rtv News*, *The Banglavision TV News*, *The ETV News*, *The Channel 24 News*, January 5, 2014
35. *The Daily Star*, June 20, 2014. See also *bdnews24.com*, August 14, 2015
36. Jennings Sir Ivor, *Cabinet Government*, Cambridge University Press, UK, 1969, pp.13-19

to common masses. Thus media as an active opposition is not available right now in Bangladesh. Rule of law does not support and advocate this type of media that stands by and upholds government decision and policy as the consent of the society.

Rule of law is the core and vital element of democracy. Democracy without political right is worthless. Meeting, conference, procession, public gathering, protest, human chain etc are the means of expressing political right. These means are enjoyed by the ruling party and its affiliated political parties. Opposition parties and other groups are not allowed to practice these within Dhaka. And elsewhere in the country, these are drastically curtailed by using law enforcing agencies and party men in the name of keeping law and order. Democracy without political right is autocracy and rule of law is unthinkable there.

VIII. CONCLUSION

Nowadays in the name of free society and rule of law political leaders in developed and under developing countries depict non observation of religion in their actions in materializing the concept of secularism. Even the western news medias viz., CNN, BBC and AL-JAZEERA condemn and question the secular status of state and government when any self-declared atheist is attacked for preaching dirty, abusive, defamatory, ugly statement and comment against religion and practicing unethical lifestyle.[37] Ignoring religion in the actions of government is branded as the sign of secularism in modern world. However the modern world some time is fumbled when something reverse is seen in their actions and policies. In UK the British Crown is restricted to the king/queen who holds protestant faith in case of religion. In English culture such type of religious belief and practice defies their concept of secularism, no doubt. Democracy and rule of law do not uphold and support this dual role.

In USA President George W. Bush on October 7, 2001 before the

37. Reporters affiliated to BBC, CNN, AL-JAZEERA termed Abhijit Roy who was stabbed to death at Ekushe Book fair on February 22, 2015 as the pioneer of secularized thought and culture in Bangladesh. They reported that the killing of Abhijit is a great loss for development and progress of secular political culture in Bangladesh. In reality he was a self-declared atheist and practice abnormal lifestyle subversive to Bangladesh values and culture. Not only that he operated a blog "Muktomona" which criticized religion, god fearing people, and sound moral norms and values practiced by Bangladeshi.

start of military mission known war against terror in Afganistan arranged a meeting of Christian religious leaders of US Churches at White House. President W. Bush sought their blessing and cooperation for the successful military mission in Afgan war.[38] It is not clear why President negated his secular position by arranging religious prayer in his official Palace in spite of being the spokesperson of secularism. It might have been a mistake or dual face of western political figure. It is against secularized culture.

Professor Salman Rushdie drew the attention of world community after publishing the novel 'the Satanic Verses' in 1988. In this book he terms the holy Quran as the verses of devil, and defamed Prophet (sm), Muslim and Islam using abusive words. The book received 1988 Booker Prize. Ayatollah Ruhollah Khomeni the Supreme leader of Iran pronounced death fatwa for Salman Rushdie on February 14, 1989. British Government defended Rushdie's stand and writing in the name of freedom of expression.[39] European Union and USA came forward to support Rushdie in name of freedom of thought and expression. In 2007 writer Rushdie was honoured with Knight Award by British Queen.

French weekly cartoon magazine Charlie Hebdo published caricature of our Prophet (sm) and depicted Him as the leader of Muslim terrorist in 2011. On January 7, 2015 home grown terrorists attacked the Head Office of Charlie Hebdo, weekly newspaper killing 14 people. Immediately after such attack Western Governments viz., USA, UK, Germany, Australia, EU portrayed this magazine the upholder and icon of freedom of speech, press, values of human dignity. Not only that they symbolized Charlie Hebdo the safeguard of free society.[40]

In Bangladesh left political parties, the leaders, and their disciples, and a small section of educated class as well as cultural activists practice and preach western style life such as free-mixing, taking wine, wearing short dresses. This section does not follow and practice Bangladeshi social and moral norms and values. A section of the class writes anti-Islamic comment in books, face books, web-sites, smearing our Prophet Mohammad (sm) and pious Muslims. Interesting thing is that these people follow religion. Two members-Ahmed Rajib Haider and Abhijit Roy of this class were murdered on February 15, 2013 and on February 22, 2015 respectively. Western governments in reaction to these killings said

38. *BBC News*, at 8 pm, October 6, 2001
39. *The Guardian*, February 15, 1989
40. *The Telegraph*, January 8 and 12, 2015.

that such incidents were a threat to the democracy and secularized politics in Bangladesh. Most of the news papers excepting two or three in Bangladesh reiterate the same view in their circulations. This behavior of western governments particularly USA, UK and EU are not just and sound, nor match with secularism. It may be their double standard or be the dark reality of their culture. Secularized culture does not mean dual role, deception, undue benefit and abusive use of freedom and free society. It is rational and the practice of reason which nourish values of human society for betterment of mankind. In this context the practice of abnormal sex ties i.e, lesbian marriage and gay marriage in the name of human rights are against the secularized culture because such type of bond or practice is a threat to the very existence of human society. Secularism is the combination of universally acceptable norms and values of morality and ethics emanating from the rationality and positive reason of human being. Thus as a naturalist if one imbibes the law of nature- practice of nudity in the social order will not fall within the term of secular culture.

Therefore practice of religion is a must for the learning of morality, ethics, just and unjust. Learning process begins in family or in other words at home. If a family does not practice and nourish moral and ethical norms and values, children of that family will never be secular in dealing with society and state affairs. Democracy and rule of law is a utopia in that society.

Rule of law is not a commodity easily procurable in each and every political society. Democratic polity assists in the creation of basic elements of rule of law. Democracy and rule of law cannot attain its goal unless the government and the governed nourish and practice secularized culture in their thinking, behavior, policy and action. Being a member of authoritarian system proclamation of rule of law is merely an imagination. Again in the motherlands of democracy assertion on the part of both the treasury bench and the opposition for complete realization of rule of law becomes farce when personality integration and reasons are not found in their actions and government policies. Form of government does not matter at all if society as a whole is guided by secularized culture and government is run on the dictate of right reason. Living on the peak of garbage of dead moral and ethical values exploration of rule of law is impossible. However if family imbibes and teaches its members morality and secularized culture the dream of Dicey may have a chance to get explored in the world.

■

MEDICAL PRACTICE: LAW AND ETHICS

*R. P. RAI**

ABSTRACT : Medical ethics has developed into a well based discipline which acts as a bridge between theoretical bioethics and the bedside. One of the fundamental ethical obligations owed by all health professionals to their patients is that of confidentiality. This duty is also recognised in law, but the health professional's ethical and legal duty of confidentiality is not absolute since it is balanced by a duty of disclosure under certain circumstances, e.g. under compulsion of law and/or in the public interest. An assessment of what might be a public interest reason to break a confidence will often involve complex decisions and finely balanced judgments. It is now a universal consensus that legal and ethical considerations are inherent and inseparable parts of good medical practice across the whole spectrum. The disciplines of law and ethics in medical practice overlap in many areas and yet each has its unique parameters and distinct focus.

KEY WORDS : Medical Practics, Ethics, HIV, Genetic Research, Clinical Genetic Practics.

I. INTRODUCTION

It is now a firmly established belief that legal and ethical considerations are integral to medical practice in the planning for the care of the patient. With the advances in medical sciences and growing sophistication of the legal framework in modern society as well as increasing awareness of human rights and changing moral principles of the community at large, doctors and other healthcare workers alike are

* Professor, Head and Dean, Faculty of Law, Banaras Hindu University, Varanasi-221 005, India. E-mail: rprai010@gmail.com

now frequently caught in difficult dilemmas in many aspects arising from daily practice. Throughout the history of mankind, medical legislation has continuously evolved to regulate the practice of medicine. The fundamental objective is to safeguard the standards of the medical profession and to protect the public against unskilled vendors of medicine who would be as injurious to the community.

Confidentiality is central to trust between doctors and patients. Without assurances about confidentiality, patients may be reluctant to seek medical attention or to give doctors the information they need in order to provide good care. But appropriate information sharing is essential to the efficient provision of safe and effective care, both for the individual patient and for the wider community of patients. Confidential medical care is recognised in law as being in the public interest. However, there can also be a public interest in disclosing information: to protect individuals or society from risks of serious harm, such as serious communicable diseases or serious crime; or to enable medical research, education or other secondary uses of information that will benefit society over time. Personal information may, therefore, be disclosed in the public interest, without patients' consent, and in exceptional cases where patients have withheld consent, if the benefits to an individual or to society of the disclosure outweigh both the public and the patient's interest in keeping the information confidential. Health professionals must weigh the harms that are likely to arise from non-disclosure of information against the possible harm, both to the patient and to the overall trust between doctors and patients, arising from the release of that information.

Health professionals are under a duty to maintain the confidentiality of all information that comes to them in the course of their relationship with patients. The duty protects information created, disclosed or acquired directly or indirectly in the context of the patient and health care provider relationship. All persons, including administrative staff, who come into contact with the information as part of the health care process also have a duty to maintain the confidentiality of that information. The general principle is that the duty of confidence prevents the disclosure of the information to individuals and organisations not involved in providing the health care service. However, there are a number of exceptions where otherwise confidential information may be disclosed to third parties. The duty of confidence does not end when the professional relationship with

the patient has ceased. Nor does it end with the death of the patient. The duty of confidence can arise by statute, under the common law and in equity.

From an individual's point of view it is extremely important to maintain confidentiality. If confidentiality is not maintained the individual may be subjected to discrimination due to certain details of their past medical history, for example by insurers or employers. Aside from this confidentiality is at the heart of medical ethics and is essential in maintaining trust in the doctor patient relationship. If patients are able to trust their doctors they are more likely to seek medical help when they need it. Society's interest in maintaining confidentiality is mainly for the same reasons as for individuals. The courts have recognised the public need for confidentiality to be maintained in a number of cases.

II. FUNDAMENTAL PRINCIPLES OF MEDICAL ETHICS

Patients have a right to expect that doctors and their staff will hold information about them in confidence, unless release of information is required by law or public interest considerations. Good medical practice involves:

1. Treating information about patients as confidential
2. Appropriately sharing information about patients for their health care, consistent with privacy law and professional guidelines about confidentiality
3. Being aware that there are complex issues related to genetic information and seeking appropriate advice about disclosure of such information.

Medical ethics is a vital part of medical practice, and following an ethical code is an important part of doctors job. Ethics deals with general principles of right and wrong, as opposed to requirements of law. A professional is expected to act in ways that reflect society's ideas of right and wrong, even if such behavior is not enforced by law. Often, however, the law is based on ethical considerations.

The original source of a doctor's duty of confidentiality is the Hippocratic Oath. Regarding confidentiality Hippocrates said: 'Whatever, in connection with my professional practice or not in connection with it,

I see or hear in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret.' The obligation of confidentiality spoken of here is not absolute; it is up to the doctor to decide what information 'ought not to be spoken abroad.' The principles of medical ethics have developed over time. The Hippocratic Oath,[1] in which medical students pledge to practice medicine ethically, was developed in ancient Greece. It is still used today and is one of the original bases of modern medical ethics. Physicians are obliged to protect the confidentiality of patients including their personal and domestic lives,[2] unless the law requires their revelation, or if there is a serious and identified risk to a specific person and/or community; and notifiable diseases.[3] A contradictory clause requires physicians to ensure that the patient, his relatives or his responsible friends are aware of the patient's prognosis while serving the best interests of the patient and the family.[4] Disclosure of a patient's prognosis should rest with the patient and not the medical attendant.

Another Oath of confidentiality is the Declaration of Geneva which says: 'I will respect the secrets confided in me, even after the patient has died.'[5] Here, however, the obligation is absolute. These are two sources of a doctor's duty of confidentiality which, although they differ in extent, both highlight the importance of respecting the confidentiality of patients.[6] Not only do health-care professionals need to be concerned about how law and ethics impact their respective professions, they must also understand how legal and ethical issues affect patients. As medical technology advances and the use of computers increases, patients want to know more about their options and rights as well as more about the

---

1. Hippocrates, the fourth century- B.C. Greek physician commonly called the "father of medicine," is traditionally considered the author of this oath, but its authorship is actually unknown.
2. Code of Ethics Regulations (2002) (Part III, Section 4, Chapter 2, Section 2), Medical Council of India.
3. Code of Ethics Regulations (2002) (Part III, Section 4, Chapter 7, Section 14), Medical Council of India.
4. Code of Ethics Regulations (2002) (Part III, Section 4, Chapter 2, Section 3), Medical Council of India.
5. British Journal of Psychiatry (October I976), News and Notes: Confidentiality: A Report to Council, Royal College of Psychiatrists.
6. Journal and Proceedings of the Northern Ireland Ethics Forum, 2006, 3: 146-153.

responsibilities of health-care practitioners. Patients want to know who and how their information is used and the options they have regarding health-care treatments. Patients have come to expect favorable outcomes from medical treatment, and when these expectations are not met, lawsuits may result.

Confidentiality is 'the practice of keeping harmful, shameful, or embarrassing patient information within proper bounds.'[7] It differs from privacy in that it always entails a relationship. Confidentiality in medicine serves two purposes.[8] Firstly, it ensures respect for the patient's privacy and acknowledges the patient's feeling of vulnerability. Secondly, it improves the level of health care by permitting the patient to trust the health professional with very personal information. In 2006, Indian Council of Medical Research published the Ethical Guidelines for Biomedical Research on Human Subjects. The Guidelines outline general principles that should be followed when conducting research on human participants. Principles that protect patient privacy include: principle of informed consent, principle of privacy and confidentiality, principle of accountability and transparency and principle of compliance.

III. PRINCIPLES OF CONFIDENTIALITY AND DATA PROTECTION IN HEALTH SERVICES

The principles of confidentiality and data protection underpin health services and give patients the reassurance that their privacy is properly protected. However, these are not so straightforward in the genetics context where the result of a genetic test provides information not just about the patient but also about others.[9] As the scope of genetic testing increases, the management of that information may generate new challenges for both the patient and the healthcare professional. Patients

---

7. Purtilo, R., Ethical Dimensions in the Health Professions (3rd ed. Philadelphia: WB Saunders, 1999).
8. Siegler, M., Confidentiality in Medicine—A Decrepit Concept? New England Journal of Medicine, (1982) 307: 1518-21, Reprinted in Kuhse, H., Singer, P., Bioethics: An Anthology (Oxford: Blackwell, 2004), pp. 490-492.
9. Consent and Confidentiality in Clinical Genetic Practice: Guidance on Genetic Testing and Sharing Genetic Information, A Report of the Joint Committee on Medical Genetics, The British Society for Human Genetics (2011).

generally expect professionals to be able to access their health information and rely on their expertise and experience to interpret it so as to advise them wisely. Such information may be personal and private and intrusion into privacy is usually justified by the fact that the patient has authorised it, possibly explicitly but sometimes implicitly within a broader request for advice or treatment. However, the information obtained may enable inferences to be drawn about other family members, whose views may not be known. The information has been generated in circumstances of confidence to one person, but is also of significance to another. Clinical genetic services will often want to use that information to assist the other person but may be unsure whether this is acceptable within the rules of data protection and confidentiality.[10]

Patients have the right to expect that their physicians and other health-care professionals will hold all information about them in strict confidence and disclose it only to those who need, or have a legal right to, the information, such as other attending physicians, nurses, or other health-care workers who perform tasks related to the diagnosis and treatment of patients. A treating physician should not disclose any identifying information about patients to an investigator unless each patient has given consent to such disclosure and unless an ethical review committee has approved such disclosure.

Confidentiality in medicine ensures respect for the patient's privacy and improves health care by enabling the patient to trust the health professional with very personal information. Confidentiality may be breached if required in terms of the law, such as in the case of gunshot wounds, child or other abuse and communicable diseases. Other justifiable exceptions to the confidentiality rule are in an emergency situation, where the patient is incompetent or incapacitated, and in the case of psychiatrically ill patients who need to be committed to hospital. The final reason to breach confidentiality is to protect third parties, whether this is concern for the safety of a specific person or in the public interest. A practitioner shall divulge verbally or in writing information regarding a patient which he or she ought to divulge only—(a) in terms of a statutory provision; (b) at the instruction of a court of law; or (c) where justified in the public interest. Any information other than the information referred above shall

10. Ibid.

be divulged by a practitioner only—(a) with the express consent of the patient; (b) in the case of a minor under the age of 12 years, with the written consent of his or her parent or guardian; or (c) in the case of a deceased patient, with the written consent of his or her next-of-kin or the executor of such deceased patient's estate.

The physician is legally obligated to keep patient information confidential. Therefore, it is necessary that all patient information is discussed with the patient privately and shared with the staff only when appropriate. For example, the billing department will have to see patient records to code diagnoses and bill appropriately. Also, a staff member who has to make an appointment for a patient to get a herpes test at an outside location will need the patient record to do so. Doctors must avoid discussing cases with anyone outside the office, even if the patient's name is not mentioned. Only the patient can waive this confidentiality right. All patients' records must be kept out of sight of other patients or visitors as well as night staff, such as janitorial service employees. Confidentiality also is required in the handling of test results.

IV. THE TARASOFF CASE

Prosenjit Poddar was a student from India who enrolled at the University of California, Berkeley. In 1968 he met a fellow student, Tatiana Tarasoff, and began seeing her regularly. However, she told him there was no hope of a serious relationship, and he was shattered by this news. He was very upset and began to follow her around. He sought professional help and saw a psychologist, Dr Lawrence Moore, at the University. In August 1969 he confided to the psychologist that he intended to kill Tatiana. The psychologist informed the campus security who detained Poddar, but then released him as they thought he appeared to be rational. Moore failed to inform Tatiana or her parents that she was in danger. In October 1969 Tatiana returned to the University after a holiday in Brazil, and Poddar killed her. Initially he was convicted of second degree murder, but this ruling was subsequently overturned and he returned to India. Tatiana's parents sued Dr Moore and the University. The majority judicial opinion at the subsequent court case was, 'when a therapist determines ... that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against

such danger.' The judges believed that the therapists could not be exonerated on the grounds that Tatiana was not their patient. The rule of medical confidentiality in this case should be broken in the 'public interest in safety from violent assault.' A dissenting judge believed that violation of confidentiality would negatively impact psychiatric treatment of patients.

V. DISCLOSURE OF PATIENT'S HIV STATUS

As testing has become cheaper and more widely available, an increasing number of countries are supporting standalone HIV-testing programmes that are coercive or discriminatory, fail to confidentiality, and do not provide access to preventive information or treatment. Governments are also failing to address widespread stigma faced by those testing positive and are increasingly adopting or strengthening laws criminalizing HIV transmission. These laws are often arbitrarily applied and are ineffective at preventing HIV transmission.[11] Most HIV infected countries have established voluntary counseling and testing centres where persons may go to be tested for HIV after being counseled. For this intervention to be acceptable, it is necessary that persons seeking testing be assured of confidentiality and are advised appropriately. Today the big need is to make a harmonious balance between the AIDS patients' right to confidentiality and the social right to prevent this dreaded disease through mandatory testing policy. All HIV-related policies must reflect sensitivity to the specially confidential nature of HIV-related information The law strictly regulates disclosure of such information because of the powerful potential for social stigma of wrongful disclosure.[12] Such disclosure can result in violations of confidential rights, discrimination, invasion of privacy, and actions alleging intentional or negligent infliction of emotional distress. Significant consequential damage can result from wrongful disclosures because of the special capacity of HIV information

11. AIDS Conference: Drive for HIV Testing Must Respect Rights, Human Rights Watch, August 10, 2006.
12. For this, see especially the U.S. case, Doe v. Borough of Barrington, 729 F. Supp. 376 (D.N.J., 1990) (Wherein children were forced from school following disclosure by a police officer of their father's HIV status). See generally, Dunlap, AIDS Discrimination in the United States: Reflections on the Nature of Prejudice in a Virus, 34 Villanova Law Review, 909 (1989).

to lead to loss of job, loss of insurance, eviction from houses, and even the loss of friends and family.

Right to privacy is not an absolute right in India. In *Mr. 'X'* v. *Hospital 'Z'*,[13] in which the respondent hospital had disclosed the HIV positive status of the appellant, on which basis the marriage of the appellant which was settled, was called off after this revelation. The appellant challenged the disclosure before the National Human Rights Commission and after dismissal of his petition by the Commission, then before the Supreme Court. The appellant contended that the respondent hospital had violated the duty of confidentiality by disclosing his HIV-positive status. The Supreme Court observed that even the Code of medical ethics carved out an exception to the rule of confidentiality and permitted the disclosure in certain circumstances 'under which public interest would override the duty of confidentiality, if any, vested in the appellant was enforceable in the present situation, as the proposed marriage carried with it the health risk from being infected with the communicable disease from which the appellant suffered.' The Supreme Court observed that one of the basic human rights, the right to privacy was not treated as absolute and was subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others. The Court dismissed the appeal and observed:

> Since 'Right to Life' included right to lead a healthy life so as to enjoy all facilities of the human body in their prime condition, the respondents, by their disclosure that the appellant was HIV-positive, cannot be said to have in anyway, either violated the rule of confidentiality or the right of privacy. Moreover, where there is a clash of two fundamental rights, as in the instant case, namely, the appellant's right to privacy as part of right to life and *Ms*. "*Y's*" right to lead a healthy life which is her fundamental right under Article 21.

In *M. Vijaya* v. *Chairman and Managing Director, S.C.C. Ltd*.,[14] the Full Bench of the Andhra Pradesh High Court rightly observed:

> There is an apparent conflict between the right to privacy

13. (1998) 8 SCC 296.
14. AIR 2001 AP 502.

> of a person suspected of HIV not to submit him forcibly for medical examination and the power and duty of the state to identify HIV-infected persons for the purpose of stopping further transmission of the virus. In the interest of the general public, it is necessary for the state to identify HIV-positive cases and any action taken in that regard cannot be termed as unconstitutional as under Article 47 of the Constitution, the state was under an obligation to take all steps for the improvement of the public health. A law designated to achieve this object, if fair and reasonable, in our opinion, will not be in breach of Article 21 of the Constitution of India.

In the only case in South African law that examined the issue of disclosure by a doctor of a patient's HIV status without his consent, *Jansen van Vuuren and another* v. *Kruger*,[15] in which the Appellate Division of the Supreme Court ruled that a doctor may not disclose his patient's HIV status to other doctors without consent unless there is a clear legal duty to do so. The case revolved around Dr Kruger disclosing his patient's HIV-status to colleagues during a game of golf. None of the professionals to whom he disclosed the information was treating the patient at the time.

VI. ISSUES OF ETHICS IN GENETIC RESEARCH

One issue that arises is whether a physician or other health professional providing genetic testing services should be permitted without the patient's consent or over their objection to reveal test results (or even the fact that a patient has sought genetic counselling or testing) to third parties. The rule is no different than for medical information in general: confidential information that can be linked to an identifiable patient should be disclosed without the patient's authorisation only when necessary to protect third parties from harm or when disclosure is compelled by law (e.g., reporting HIV test results to public health officials). The question then is: When is disclosure of genetic information permitted in order to protect third parties from harm?

---

15. 1993 (4) SA 842 (SAA).

This section explores the issues involved in taking a family history and in the giving and sharing of genetic information and samples. Here we would outline and examine relevant recent changes in legislation, in particular the implementation and impact of two major pieces of legislation in the United Kingdom, the Human Tissue Act 2004 and the Mental Capacity Act 2005, as well as relevant aspects of the Data Protection Act 1998. The guidance also takes account of the revised General Medical Council (GMC) guidance on consent and confidentiality and the House of Lords Science and Technology Committee Inquiry on Genomic Medicine (2009).[16] Throughout this document, the underlying ethical and legal principles are illustrated using hypothetical (but based on real) clinical cases to highlight key points. Each case should be judged on its own facts, as the clinical scenarios are intended to guide rather than dictate practice.

A significant number of critics who maintain that genetic information should remain confidential point to historical abuses: involuntary sterilisation of people with mental retardation around the turn of the century, and Nazi abuse and misrepresentation in pursuit of eugenic goals.[17] Fear that knowledge of one's genetic make-up and predisposition will stigmatise the person affected and his/her family, causing diminished or lost employment opportunities and denial of insurance coverage as well as an undesirable invasion of privacy are frequently voiced concerns.[18] Moreover, many at-risk individuals may forego genetic testing because they fear denial of future employment opportunities.

The genetic technological revolution has been both a blessing and a curse. The technology can facilitate research, screening, and treatment of genetic conditions, but it may also permit a reduction in privacy through its capacity to inexpensively store and decipher unimaginable quantities of highly sensitive data.[19] The U.S. Congress has funded the Human

16. House of Lords—Science and Technology Committee. Genomic Medicine, volume 1: Report, Second Report of Session 2008–9 (HL Paper 107–1), London: The Stationery Office Limited, 2009.
17. S.M. Suter, "Whose Genes Are These Anyway? Familial Conflicts over Access to Genetic Information," Michigan Law Review, (1993) Vol. 91, 1854-1908.
18. L.B. Andrews, and A.S. Jaeger, "Confidentiality of Genetic Information in the Workplace," American Journal of Law and Medicine, (1991) Vol. 17, 75-108.
19. Ibid.

Genome Project: a three-billion-dollar initiative aimed at mapping and sequencing the entire human genome.[20] One of the Project's ultimate goals is to cure genetic disease. A broader objective is the use of that information to understand the disease process in general.[21] According to Gostin, "Science has the capacity to store a million fragments of DNA on a silicon microchip. Each DNA chip is loaded with information about human genes. When a component of a patient's blood is placed on the chip, it reveals specific information about the individual's health and genetic composition, potentially ranging from a carrier state or a future disease, to genetic relationships."[22]

An investigator who proposes to perform genetic tests of known clinical or predictive value on biological samples that can be linked to an identifiable individual must obtain the informed consent of the individual or, when indicated, the permission of a legally authorised representative. Conversely, before performing a genetic test that is of known predictive value or gives reliable information about a known heritable condition, and individual consent or permission has not been obtained, investigators must see that biological samples are fully anonymised and unlinked; this ensures that no information about specific individuals can be derived from such research or passed back to them.

VII. ISSUES OF CONSENT IN CLINICAL GENETIC PRACTICE

The process of seeking consent ensures that a person understands the nature and purpose of a procedure and the practice has its origins in the ethical principle that a person has a right to self-determination. In legal terms, consent is valid only if three questions are satisfied:

- Is the patient competent?
- Was the person giving consent appropriately informed beforehand?

---

20. "Genome" refers to the complete set of genetic information in its entirety. The genome is the pattern of deoxyribonucleic acid (DNA) that codes for proteins and physical processes. See, Watson, J.D., "The Human Genome Project: Past, Present, and Future," Science, vol. 248, 44 (1990).
21. Suter, S.M., "Whose Genes Are These Anyway? Familial Conflicts over Access to Genetic Information," Michigan Law Review, vol. 91, 1854-1908 (1993).
22. Gostin, L.O., "Health Information Privacy," Cornell Law Review, vol. 80, 451-528 (1995).

- Was the consent voluntarily given?

Consent is valid only if the implications of a procedure are disclosed and understood, but it is the complexity of these implications that poses a particular challenge in clinical genetic practice. Can such consent ever be fully informed? What constitutes sufficient information? How much can a patient be expected to weigh up the emotional consequences of a particular result, to the extent that they can be said to fully understand its implications? Genetic information can be upsetting to individuals and may have collateral consequences, for example, fear of discrimination or stigmatisation. In addition, results of genetic tests are frequently of significance to the patient's relatives, but the patient may not want others to know about their genetic make-up. Given these complexities, and the fact that competence is decision-specific, what is the bar for determining competence? Is it realistic to expect patients to weigh up all these issues before consenting to genetic testing? If insufficient consideration is given to such implications, then the validity of their consent becomes questionable. This tightrope must be carefully navigated based on the individual circumstances of the case.

In addition to consent for the test itself, it may be appropriate to include discussion of the following as part of the consent process, particularly since these additional aspects are often not routine for other types of tests or procedures:

- Consent to disclosure of relevant genetic information to relatives
- Consent to research
- Consent to the storage and future use of the sample.

VIII. DISCLOSING RECORDS FOR FINANCIAL AND ADMINISTRATIVE PURPOSES

As a general rule, the doctor should seek a patient's express consent before disclosing identifiable information for purposes other than the provision of their care or local clinical audit, such as financial audit and insurance or benefits claims. If doctors are asked to disclose information about patients for financial or administrative purposes they should, if practicable, provide it in anonymised or coded form, if that will serve the purpose. If identifiable information is needed, they should, if practicable, seek the patient's express consent before disclosing it. They must draw

attention to any system that prevents them from following this guidance, and recommend change. Until changes are made, they should make sure that information is readily available to patients explaining that their personal information may be disclosed for financial, administrative and similar purposes, and what they can do if they object. If a patient asks, the doctor should explain the nature and purpose of disclosures made for financial and administrative purposes. The doctors should do their best to act on any objections. If he is satisfied that it is not possible to comply with the patient's wishes, and still provide care, they should explain this to the patient and explain their options. The doctor should satisfy himself that anyone who will have access to the information is bound by a duty of confidentiality not to disclose it further.

IX. DISCLOSING INFORMATION ABOUT SERIOUS COMMUNICABLE DISEASES

In this guidance the term 'serious communicable disease' applies to any disease that can be transmitted from human to human and that can result in death or serious illness. It particularly applies to, but is not limited to, HIV, tuberculosis, and hepatitis B and C.

The doctors may disclose information to a known sexual contact of a patient with a sexually transmitted serious communicable disease if they have reason to think that they are at risk of infection and that the patient has not informed them and cannot be persuaded to do so. In such circumstances, the doctors should tell the patient before they make the disclosure, if it is practicable and safe to do so. They must be prepared to justify a decision to disclose personal information without consent.

There are many circumstances in which a doctor might be asked to disclose information, either following an examination of a patient or from existing records, and in which they face 'dual obligations'. Usually, dual obligations arise when a doctor works for, is contracted by, or otherwise provides services to:

(a) a patient's employer (as an occupational health doctor);

(b) an insurance company;

(c) an agency assessing a claimant's entitlement to benefits;

(d) the police (as a police surgeon);

(e) the armed forces;

(f) the prison service; or

(g) a sports team or association.

If any doctor is asked to provide information to third parties, such as a patient's insurer or employer or a government department or an agency assessing a claimant's entitlement to benefits, either following an examination or from existing records, the doctor should: (a) be satisfied that the patient has sufficient information about the scope, purpose and likely consequences of the examination and disclosure, and the fact that relevant information cannot be concealed or withheld; (b) obtain or have seen written consent to the disclosure from the patient or a person properly authorised to act on the patient's behalf, the doctor may accept an assurance from an officer of a government department or agency or a registered health professional acting on their behalf that the patient or a person properly authorised to act on their behalf has consented; (c) only disclose factual information the doctor can substantiate, presented in an unbiased manner, relevant to the request; so he should not usually disclose the whole record, although it may be relevant to some benefits paid by government departments and to other assessments of patients' entitlement to pensions or other health-related benefits; and (d) offer to show his patient, or give them a copy of, any report he writes about them for employment or insurance purposes before it is sent, unless: (i) they have already indicated they do not wish to see it (ii) disclosure would be likely to cause serious harm to the patient or anyone else (iii) disclosure would be likely to reveal information about another person who does not consent.

X. DISCLOSURES IN THE PUBLIC INTEREST

There is a clear public good in having a confidential medical service. The fact that people are encouraged to seek advice and treatment, including for communicable diseases, benefits society as a whole as well as the individual. Confidential medical care is recognised in law as being in the public interest. However, there can also be a public interest in disclosing information: to protect individuals or society from risks of serious harm, such as serious communicable diseases or serious crime; or to enable medical research, education or other secondary uses of information that will benefit society over time.

Before considering whether a disclosure of personal information would be justified in the public interest, the doctor must be satisfied that identifiable information is necessary for the purpose, or that it is not reasonably practicable to anonymise or code it. In such cases, the doctor should still seek the patient's consent unless it is not practicable to do so, for example because:

(a) the patient is not competent to give consent, in which case the doctor should consult the patient's welfare attorney, court-appointed deputy, guardian or the patient's relatives, friends or care takers,

(b) the doctor should have reason to believe that seeking consent would put him/her or others at risk of serious harm;

(c) seeking consent would be likely to undermine the purpose of the disclosure, for example, by prejudicing the prevention or detection of serious crime, or

(d) action must be taken quickly, for example, in the detection or control of outbreaks of some communicable diseases, and there is insufficient time to contact the patient.

The doctors should inform the patient that a disclosure will be made in the public interest, even if he/she has not sought consent, unless to do so is impracticable, would put him/her or others at risk of serious harm, or would prejudice the purpose of the disclosure. The doctors must document in the patient's record their reasons for disclosing information without consent and any steps they have taken to seek the patient's consent, to inform them about the disclosure, or their reasons for not doing so.

XI. FUNDAMENTAL PRINCIPLES OF INTERNATIONAL ETHICAL GUIDELINES

Medical law plays an important role in medical facility procedures and the way we care for patients. We live in a litigious society, where patients, relatives, and others are inclined to sue health-care practitioners, health-care facilities, manufacturers of medical equipment and products, and others when medical outcomes are not acceptable. It is important for a medical professional to understand medical law, ethics, and protected health information.

The World Medical Association (WMA) was founded in 1947 to

represent physicians and to promote medical ethics and professional freedom worldwide. In 1948, WMA issued the Declaration of Geneva the first international document stating the ethical duties of physicians to their patients. The Declaration consists of a physician's oath: 'Not to use my medical knowledge contrary to the laws of humanity and an undertaking to practice my profession with conscience and dignity; the health of my patient will be my first consideration'. The Declaration of Geneva was followed by the adoption of the first International Code of Medical Ethics in 1949.[23] The 1949 Code contains a brief statement of doctor's duties, which include an obligation among others to 'complete loyality to the patient', absolute secrecy on all he knows about his patient' and a list of practices relating to conflicts of interest. The international Code was amended twice in 1968 and 1983.[24] The 1983 revision of the Code also introduces a requirement that the rights of patients and colleagues shall be respected.

There are many international conventions that regulate medical practice globally and India being a member of the international community is a party to many of these conventions. In the last decades, however, it is the pace of scientific advances in the application of biotechnologies which has forced a global and international revision of ethical and legal controls in biomedicine, particularly in the field of research involving human subjects.[25] The evolution of the Declaration of Helsinki is set against the global growth of the bioethics movement, its impact on public policy and the emergence of national and international bioethics committees to regulate biomedical researches. Also, worthy of note are the Tokyo Declaration of 1975, the Sydney Declaration of 1968, and the Oslo Declaration of 1970. All these declarations basically deal with ethical issues in the practice of medicine, and provide ethical guidelines for medical practitioners.

---

23. World Medical Association, International Code of Medical Ethics, 109-111 (1949).
24. WMA, International Code of Medical Ethics, adopted by the 3rd WMA General Assembly (London 1949) and amended by the 22nd WMA General Assembly (Sydney, Australia, 1968) and the 35th WMA General Assembly (Venice, Italy, 1983).
25. Taylor, A.L., "Globalisation and Biotechnology, UNESCO and an International Strategy to Advance Human Rights and Public Health", 25 American Journal of Law and Medicine 451-79 (1999).

The I974 BMA handbook on Medical Ethics boldly reaffirms the doctor's obligation to maintain secrecy in what appear to be most uncompromising terms:

> It is a doctor's duty strictly to observe the rule of professional secrecy by refraining from disclosing voluntarily to any third party, information which he has learned directly or indirectly in his professional relationship with the patient. The death of the patient does not absolve the doctor from the obligation to maintain secrecy.[26]

However, there immediately follow a list of five kinds of exception. The exceptions to the general principle are:

a) the patient or his legal adviser gives valid consent,

b) the information is required by law,

c) the information regarding a patient's health is given in confidence to a relative or other appropriate person, in circumstances where the doctor believes it undesirable on medical grounds to seek the patient's consent,

d) rarely, the public interest may persuade the doctor that his duty to the community may override his duty to maintain his patient's confidence;

e) information may be disclosed for the purposes of any medical research project specifically approved for such exception by the BMA including information on cancer registration.[27]

Therefore be it resolved that the 27th World Medical Assembly reaffirm the vital importance of maintaining medical secrecy not as a privilege for the doctor, but to protect the privacy of the individual as the basis for the confidential relationship between the patient and his doctor; and ask the United Nations, representing the people of the world, to give to the medical profession the needed help and to show ways for securing this fundamental right for the individual human being.[28]

Article 8 of the European Convention on Human Rights, recognises that the value of privacy needs to be balanced against the rights and

26. British Medical Association, Medical Ethics (1974), p I3.
27. Ibid.
28. Id. at I7-I8.

freedom of others. It may be acceptable to interfere with such privacy provided that the interference is proportional to the protection afforded to others. Such balancing acts may be difficult and healthcare professionals may be uncertain in which circumstances certain disclosure actions are legitimate. This report can only provide guidance, but aims to indicate what current acceptable practice might be.

XII. CONCLUSION

Ethical considerations are essential to all trusting relationships, such as that between patients and doctors. Moreover, in a healthcare context, patient confidentiality and the protection of privacy is the foundation of the doctor-patient relationship. Doctors are now expected to have knowledge and understanding of the principles of medical ethics and the legal responsibilities of the medical profession. They should also have the ability to recognize complex legal and ethical issues arising from clinical practice and sound decision-making skills to resolve them. It is therefore prudent for doctors to keep themselves informed about the current legal and ethical aspects, and when in doubt, be ready to consult their peers, lawyers and ethicists.

As one of the basic human rights, the right of confidentiality in medicine is not treated as absolute and is subject to such action as may be lawfully taken for the protection of health or morals or protection of rights and freedoms of others. As already discussed above, doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the right of privacy which may sometimes lead to the clash of person's "right to be let alone" with another person's right to be informed.

The ethical jurisprudence in India on medical privacy and confidentiality has primarily evolved, like many other areas of privacy law, through judicial pronouncements given in specific circumstances. The judiciary which not only talk about privacy rights in the medical arena but also juxtapose this right with others, such as the right to privacy of infected individuals vis-a-vis the right to protect non-infected persons. The right to privacy is considerably essential for persons living with HIV/

AIDS due to the potential stigmatizing and discriminatory impact. Consequently, lack of privacy rights fuels the spread and exacerbates the impact of the disease. Fears emanating from a privacy breach or of disclosure that deter people from getting tested, seeking medical care and treatment include: low self esteem, fear of loss of support from family/ peers, loss of earnings especially for female and transgender sex workers, fear of incrimination for illicit sex/drug use.

The responsibility of the healthcare professional involves both patient confidentiality and good communication with members of the healthcare team. It is important that patient confidentiality be respected and discretion exercised as to what information should be disclosed. All members of the healthcare team need to realise that this information should be used only for promoting patient care and that confidentiality should be breached only under exceptional circumstances.

■

A REFLECTION ON THE PLEA OF NON EST FACTUM UNDER NIGERIAN LAW OF CONTRACT

ANDREW E. ABUZA*

ABSTRACT : The Nigerian Government adopted the common-law plea of non est factum to address the problem of innocent Nigerians, including illiterate Nigerians being made to sign or thumbprint documents or contracts whose contents were fraudulently or wrongly misrepresented to them. This article reflects on the plea under Nigerian Law of Contract. The research methodology adopted is doctrinal analysis of applicable primary and secondary sources. It's the author's view that governmental efforts to address the problem, as represented by adoption of the plea have not yielded desired results, as the problem continues unabated. The author suggests eradication of illiteracy in Nigeria

KEY WORDS : Illiterate, Education, Common-law, Non est factum, Radical or fundamental difference.

I. INTRODUCTION

The general rule under the Nigerian Law of Contract, which is substantially predicated on the English Law of Contract, governed basically by the common-law[1], is that a person is bound by the contents of any document or contract he signs or appends his signature[2], whether or not

* Senior Lecturer, Acting Head of the Department of Private law, Faculty of Law, Delta State University, Oleh Campus, Oleh, Nigeria Email: andrewabuza@yahoo.com

1. Note that common-law means judges' made law based on the traditions and customs of the English people. By virtue of being colonised by Britain, Nigeria received English Law made-up of: (i) the statutes of general application in force in England on 1 January 1900; (ii) the doctrines of equity; and (iii) the common-law of England. See s 32(1) of the Interpretation Act Cap 192 Laws of the Federation of Nigeria (LFN) (now Cap 123 LFN 2004).
2. See *L' Estrange v Groucob* [1934] 2 KB 394.

he has read or understood the same. Nonetheless, in certain circumstances, a person who signs or appends his signature to a document or contract is not bound by the contents of the same. A very typical example is a situation where an illiterate contractor has a written document falsely read over to him, the reader misrepresenting to such a degree that the written document or contract is of a nature altogether different from the document or contract pretended to be read from the paper which the illiterate person afterwards signs.[3] Such an illiterate person can raise the common-law plea of *scriptum predictum*, *non est factum suum* or *non est factum* to nullify the document or contract. The Constitution of the Federal Republic of Nigeria 1999, as amended (the Constitution)[4] and the illiterates' protection legislations in Nigeria do not define the word 'illiterate'. An illiterate is defined as 'a person not knowing how to read or write'.[5] A literate, on the other hand, is defined as 'a person who can read and write'.[6] In the Nigerian case of *Patterson and Zochonis and Company Limited v Gusau and Kontoma*[7], the trial High Court Judge defined an illiterate as a person who is unable to read the document presented to the same in the language in which it was written, subject to the proviso that the expression includes a person who, though not completely illiterate, is not sufficiently literate to read and understand the contents of the document. *Non est factum,* on the other hand, is a Latin expression, meaning 'it is not my deed'. This common-law plea permits a person who has executed a written document in ignorance of its character to plead that, notwithstanding the execution, it is not his deed.[8] It properly applies to a deed but is equally applicable to other written documents or contracts.[9]

A plea of *non est factum* is one that the signer of the document

3. See *Wamadin Ejilemele v Belema HE Opara and Anor* [1998] 9 NWLR (pt 567) 587-633 Court of Appeal (CA).
4. Cap C 23 LFN 2004.
5. P Phillips et al (eds), *AS Hornsby's Oxford Advanced Learner's Dictionary of Current English* (Oxford: 8th edn, Oxford University Press, 2010) 747.
6. *Ibid.,* 869.
7. [1961] NRNLR 1.
8. B Roger, *Osborn's Concise Law Dictionary* (London: 7th edn, Sweet and Maxwell, 1983) 232.
9. J Beatson, *Anson's Law of Contract* (New York: 28th edn, Oxford University Press 2014) 332.

disclaims as his act by showing that there was not existing at the time of the plea any valid execution of the document on his part.[10] One thing which is very apparent is that the defendant's signature in such a document is invalid and of no effect. It must be noted that the protection offered by the law is to ensure that a person is not held bound by the terms of a document which the same should not have signed but had signed as a result of fraud or mistake.[11] The plea of *non est factum* applies to those persons who are unable to read, owing to blindness or illiteracy and who, therefore, had to trust someone to tell them what they were signing.[12] Also, it is applicable to those persons who are permanently or temporarily unable, through no fault of their own, to have without explanation and real understanding the purport of a particular document whether that may be due to defective education, illness or innate incapacity.[13] A significant point to bear in mind is that the plea belongs to the realm of civil law of contract and not to the realm of criminal law. [14] An important point to, also, bear in mind is that the plea of *non est factum* can be employed both as a sword and shield, as it can be the basis of an action[15] as well as a defence to an action.

It is rather sad that many innocent Nigerians, including illiterate Nigerians have been made to sign or thumbprint documents or contracts whose contents were fraudulently or wrongly misrepresented to the same. One cannot say with exactitude how and when this problem started in Nigeria. It suffices to state that the problem dates back to the period when Nigeria was under British colonial rule and the same continues till these days. The problem has adverse effect on victims. For example, it engenders loss of money, land and other properties by some victims contrary to the fundamental right of a citizen of Nigeria, including an illiterate Nigerian to own both movable and immovable properties, as guaranteed under sections 43 and 44(1) of the Constitution. Also, the problem engenders loss of lives of some victims following stroke or other

10. See n 3 above, 601.
11. See IE Sagay, *Nigerian Law of Contract* (Ibadan: 2nd edn, Spectrum Books Ltd., 1993) 291.
12. See n 10 above, 592.
13. *Ibid.,* 592-93.
14. See *Ogunleye v State* [1954] 91 Lagos State Law Review 423.
15. See n 13 above, 587-635.

ailments associated with shock which afflicted the same upon becoming aware that they have been defrauded or cheated by fraudsters or other persons through mistakenly-signed documents or contracts. This is contrary to the fundamental right of a citizen of Nigeria, including an illiterate Nigerian to life as enshrined in section 33(1) of the Constitution. Also, it is contrary to the right to life guaranteed to every person under Article 6(1) of the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR) 1966. This Covenant, which has not only been signed and ratified by Nigeria has the effect of a domesticated enactment as required under section 12(1) of the Constitution and, therefore, has force of law in Nigeria.[16] Furthermore, it is contrary to the right to life guaranteed to every individual under Article 4 of the African Union (AU) African Charter on Human and Peoples' Rights (ACHPR) 1981. Nigeria has, not only signed and ratified the ACHPR but has, made it a part of national law, as enjoined by its provisions and section 12(1) above. It is argued that since the African Charter has been incorporated into Nigerian law through the enactment of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,[17] it enjoys a status greater than a mere international instrument and the same is part of the Nigerian body of laws.[18] The Nigerian Government is largely to blame for allowing this problem to emerge, as it has not been able to reduce significantly illiteracy in the country.

This article reflects on the plea of *non est factum* under Nigerian Law of Contract. It analyses applicable laws. It discusses the major requirements for a successful plea of *non est factum*, consequences of a successful plea of *non est factum,* and factors responsible for the continuation of the problem above. It takes the position that the making of innocent Nigerians, including illiterate Nigerians sign or thumbprint documents or contracts whose contents were fraudulently misrepresented to them is criminal and contrary to the principle of contract law that there must be *consensus ad idem*, meaning meeting of the minds, in a contract and, therefore, Nigeria should faithfully enforce the Nigerian

16. See AE Abuza, 'Derogation from Fundamental Rights in Nigeria: A Contemporary Discourse' (2016) 1(1) *North Eastern Hill University (NEHU) Law Journal* 16-17.
17. Cap 10 LFN 1990 (now Cap A9 LFN 2004).
18. See *Sanni Abacha v Gani Fawehinmi* [2000] 6 NWLR (pt 660) 228.

Criminal Law and continue to retain the common-law plea of *non est factum*. It highlights the practice in other countries and offers suggestions and recommendations, which, if implemented, could effectively address the problem of innocent Nigerians, including illiterate Nigerians being made to sign or thumbprint documents or contracts whose contents were fraudulently or wrongly misrepresented to them.

II. BRIEF HISTORY OF THE PLEA OF *NON EST FACTUM*

What is of concern under the sub-heading above is the issue of when the plea of *non est factum* started. In this segment, the discussion shows that the plea of *non est factum* dates back to the 16th century. The expression *non est factum* is a Latin expression by origin or etymology.[19] It has been received into the English legal system in its original form. The origin of this expression is to be found in the medieval common-law, relating to deeds.[20]

It should be placed on record that as early as the 13th century a deed was regarded as being of a solemn nature that it remained binding upon the obligor until the same had been cancelled or returned to him.[21] The expression came to ameliorate the erstwhile absolute bindingness of a deed.[22] It originally appeared as a defence by a person, who could not read whether through blindness or illiteracy, to a claim based on a promise made under seal.[23] Needless to point out that the expression developed at a time when adult literacy was low.[24] Anyhow, by the 19th century, the plea of *non est factum* had been extended to normal and literate persons as well as to all kinds of signed documents.[25]

The English case of *Thoroughgood*[26] is the earliest reported case on

19. See Fifoot History and Sources of the Common-law, 231-33, 248-49, quoted in MP Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (London: 13th edn, Buttrerworths, 1996) 267.
20. *Ibid*.
21. *Ibid*.
22. Sagay, see n 11 above, 291.
23. Furmston, see n 21 above.
24. J Poole, *Textbook on Contract* (Oxford: 9th edn, Oxford University Press, 2014) 125.
25. Furmston, see n 23 above. See, also, Sagay n 22 above, 277.
26. *Thoroughgood v Cole* [1584] 2 Rep 5b9a or *Thoroughgood* [1582] 2 Co Rep 9b.

the point. In the case, an illiterate man signed a deed prepared by his tenant, after it had been explained to him by the tenant and his friend that the same was to waive arrears of rent owed to him by the tenant whereas its real purport was to waive the arrears of rent and give up the illiterate's property to the tenant. It was held by the English court that the deed was void, as the illiterate man never intended to make that contract contained in the deed. The plea of *non est factum*, as can be discerned from the case above, offers special protection to that easily-exploited and defrauded class of citizens, that is the illiterates.

Nigeria came into being on 1 January 1914, following the amalgamation of the Colony of Lagos and Protectorates of Southern and Northern Nigeria by Lord Fredrick Lugard. He was appointed the first Governor-General of the country by the British colonial master of Nigeria.[27] It was on 1 October 1960 that Nigeria was granted independence by Britain[28] under the Nigeria (Constitution) Order in Council [29]1960 promulgated by the British Government. On 1 October 1963, Nigeria became a Republic under the Constitution of the Federation of Nigeria 1963. The pith of the provisions of section 32(1) of the Nigerian Interpretation Act 2004 is that the complete English common-law, including the English Law of Contract together with its plea of *non est factum* and doctrines of equity as well as statutes of general application in force in England on 1 January 1900 form part of Nigerian Law.

A vital point to make at this juncture is that the common-law plea of *non est factum* is not peculiar to Nigeria. It is in consonance with what obtains in other countries which practice the common-law, including the United States of America (USA), the United Kingdom (UK), Australia, New Zealand, Pakistan, India, Bangladesh, South Africa, Canada, Kenya, Sierra Leone, Singapore, Grenada, Trinidad and Tobago and Zimbabwe.

III. ANALYSIS OF CASE LAW ON THE PLEA OF *NON EST FACTUM*

The courts have discussed the plea of *non est factum* in so many

---

27. See, for example, AE Abuza, 'A Reflection on Regulation of Strikes in Nigeria' (2016) 42(1) *Commonwealth Law Bulletin* 36.
28. *Ibid.,* 6 .
29. No 1652 of 1960.

cases. A discourse on a few selected cases would suffice in this segment. In the Nigerian case of *Oluwo and Another v Adewale*[30], a selected and important case in point, one Oluwo mortgaged his property to one Dada to secure a loan of £2,060. When Dada wanted to exercise his power to sell the property as a result of Oluwo's inability to pay back the loan, Adewale offered to take-over Dada's mortgage by advancing Oluwo a total sum of £3,200 and this was, as a matter of fact, done. Oluwo who was on his sick bed had signed a document prepared by Adewale, after it had been explained to him by the said Adewale that the same was the receipt for the loan of £3, 200 whereas it was a deed of assignment on an outright-sale of the property to the said Adewale.

After the death of Oluwo, the executors of his estate, that is the appellants/plaintiffs instituted a claim against Adewale, the defendant/ respondent in the Lagos High Court for an order setting-aside the deed on the ground of fraud, relying on the plea of *non est factum.* The trial High Court Judge dismissed the appellants/plaintiffs' claim but found that Exhibit '25', that is the deed of assignment was in fact signed by the deceased and Exhibit '30', that is the purchase agreement was procured by fraudulent misrepresentation. Being aggrieved by the judgment of the trial High Court, the appellants/plaintiffs appealed to the Federal Supreme Court which allowed the appeal. The Federal Supreme Court (per Taylor, FJ) rejected the plea of *non est factum* raised by the appellants/plaintiffs, on the ground that although there was misrepresentation of the contents of the deed to the deceased, there was no difference in class or character between the document Oluwo thought he was signing and what he actually signed. According to the Court above, the deceased actually:

> …intended to transfer the legal estate in the property to the defendant by way of Legal mortgage with an equity of redemption in himself. The deed did transfer the legal estate in the property to the defendant but without an equity of redemption. It created an absolute transfer. In our view, *non est factum* does not avail the appellants.[31]

It is crystal clear that the Federal Supreme Court in the case above was applying the test laid-out in the English case of *Foster v Mackinnon*[32],

30. [1964] NMLR 17 Federal Supreme Court (FSC).
31. *Ibid.,* 21.

where the requirements that must be satisfied before the plea of non *est factum* can be raised successfully were first laid-down fully. In the case, the defendant a man of advanced-age was fraudulently induced to endorse a bill of exchange for £3, 000 on the assurance that the same was a guarantee of a similar nature to one which he previously signed. Subsequently, the bill was endorsed for value to Foster-the plaintiff who took it in good faith. The plaintiff, the endorsee subsequently instituted a claim against the defendant in the Court of Common Pleas for £3, 000 who raised the defence of *non est factum*. The Court above, in considering the defendant's defence of *non est facum*, laid-down the applicable principle thus:

> 'It seems plain, on principle and on authority that if a blind man or a man who cannot read or who for some reason (not implying negligence) forbears to read, have a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of such a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, then, at least, if there be no negligence, the signature so obtained is of no force'.[33]

The foregoing decision of the Court, reveals that a person making a plea of *non est factum* must fulfill two essential requirements, that is: (a) the document which he actually-signed must be of a different class or nature from the one he had intended to sign; and (b) he must not have been negligent in signing the document. The requirements implicate that where the person signing a document was misled, merely as to the contents of the document signed and not as to its character, class or nature, a plea of *non est factum* would not succeed. In this way, a difference of character or class was contrasted with a mere difference in contents.

A significant point to bear in mind is that the distinction between character and class, on the one hand, and contents, on the other hand, no longer represents the law on the plea of *non est factum*. In actuality, it was strongly established in the English case of *Saunders v Anglia Building*

---

32. [1869] LR 4 CP 704.
33. *Ibid.,* per Byles, J 711.

Society,[34] where the distinction above was rejected by the House of Lords. The Court above, stated that the test of character as against contents is irrational and invalid. Lord Denning's criticism of the test above in the same case at the level of the Court of Appeal[35] was adopted by the House of Lords in coming to this conclusion.

In Lord Denning's view, a mistake as to contents may be no less fundamental or radical than one relating to the character of the contract. It is argued that if a person is fraudulently induced into signing a bill of exchange for 10, 000 naira (₦) under the guise or subterfuge that it is one for ₦100, the difference between the document he signed and the one he thought he was signing is as radical and fundamental as the case of a person who signs a document of guarantee for ₦1, 000 thinking that it is a bill of exchange for ₦100.

It must be noted that Lord Denning's criticism was fully-endorsed by the other Lord Justices in that case and confirmed by the House of Lords. The latter actually formulated a more flexible test, that is there must be a 'radical' or 'essential' or 'fundamental' or 'serious' or 'very substantial' difference between the document signed and that which the person signing intended to sign.[36] This is the modern test applicable to the plea of *non est factum*.

Arguably, if the modern test above had been applied to *Oluwo's* case, which was, in actuality, decided about six years before the *Saunders* case, the plea of *non est factum* would have been upheld. This is so, because the deceased thought he was signing a document under which he utilised his property as security for a loan whereas the document, he was induced to sign, transferred his property to another man.

Also, the *Saunders* case is another selected and important case in point. In the case, Rose Maude Gallie, the plaintiff- widow of 78 years wanted to help her nephew to raise money on the security of her leasehold house, provided that she could continue to live there rent-free for the rest of her life. She was subsequently requested by a friend of her nephew called 'Lee', whom she knew to be assisting him to obtain a loan, to sign a document. It was, in fact, a deed of assignment on sale of the house to

34. [1971] AC 1004, 1017, 1034-1037 or [1970] 3 AER 961, 978.
35. See *Gallie v Lee* [1967] 2 Ch 31-2.
36. Beatson, see n 9 above, 334.

Lee for £3, 000 with an acknowledgement clause for the receipt of the purchase price. The plaintiff could not read this document, as her eye glasses were broken, but she signed it after being told by Lee and the nephew that it was a deed of gift of the leasehold house in favour of the nephew and that she would continue to live in the house rent-free for the rest of her life, as agreed with her nephew. The deed was witnessed by the nephew. Lee raised money, that is £2,000 by mortgaging the house to the Anglia Building Society, the respondent, but he made no payment to either the nephew or the plaintiff. When Lee defaulted on the mortgage payments, the respondent- Building Society brought an action for the ownership and sale of the house. The plaintiff resisted this move and brought an action in the High Court against Lee, the defendant, seeking a declaration that the deed was void, relying on *non est factum*. Stamp, J held that a deed of gift to the nephew, which the plaintiff thought she was signing, was something completely different in character from a deed of sale to the defendant, which she actually signed. She was, therefore, according to the trial High Court, entitled to the plea of *non est factum*.

Being aggrieved by the judgment of the trial High Court, the defendant appealed to the Court of Appeal which unanimously reversed the judgment of the trial High Court. Lord Denning, MR, as disclosed already, rejected the distinction between the character or nature and contents of documents and, instead, proposed the test of radical or fundamental difference between what a party signed and what he thought he was signing. Being dis-satisfied with the judgment of the Court of Appeal, the executrix of the plaintiff appealed to the House of Lords,[37] where the Court of Appeal's judgment above was confirmed.

Applying the modern test, as indicated before, to the facts of the case above, the House of Lords held that Gallie had not been negligent in signing the deed, because not only had she broken her glasses, she had little capacity for understanding documents of law and transactions involving property.

Nevertheless, the House of Lords held that the plea of *non est factum*

37. This case became known as *Saunders v Anglia Building Society* at the House of Lords hearing, as Gallie died before the case got to the House of Lords. Saunders who became her executrix was therefore substituted for her in the case.

raised by Gallie failed, because the document she had signed was not of a fundamentally-different nature from the document which she believed she was signing to enable her nephew raise money on the security of the house. According to the Court above, she knew the object of the transaction was to divest her of interest in the property in pursuance to a joint project of her nephew and Lee to raise money on the security of the leasehold land and house on the same. It stated that the document she signed carried-out the object which she intended it to carry-out. Put in another words, the intention she had was ful-filled by signing the document in question, that is divesting her of her interest in the leasehold land and house on the same. The appeal was, therefore, dismissed. In lending credence to the imperative of the mistake to be fundamental, Lord Reid in the case above employed an analogy thus:

> 'But what amounts to a radical difference will depend on all the circumstances. If he thinks he is giving property to A whereas the document gives it to B the difference may often be of vital importance, but on the circumstances of the present case, I do not think that it is. I think that it must be left to the courts to determine in each case in the light of all the facts whether there was or was not a sufficient great difference'.

His Lordship's dictum above is a pointer to the fact that the courts, often times, are not in one accord, as to the specific semantic implication of the word 'radical' or 'fundamental' in mistakenly-signed documents. The test, as can be discerned from the decision of the House of Lords in the case above, is subjective, nebulous, imprecise, and subject to the whims and caprices of a judge. A vital question to ask is: can the decision of the Court above be of assistance in determining whether there is a radical or fundamental difference between what a signer signed and what he thought he was signing? The answer is in the negative. What can be safely postulated is that the decision of the Court above is tantamount to the conferment of dictatorial and wide-discretionary powers on the judicial authorities, as the definition of what is a radical or fundamental difference between what a signer signed and what he thought he was signing can only be provided by the court. The test is susceptible to abuse, since there is no clear yardstick in the decision above to determine whether there is a radical or fundamental difference between what a signer signed

and what he thought he was signing. Akanle rightly criticises the conferment of wide-discretionary powers on public officers.[38] It is argued that the House of Lords misused the test in the *Saunders* case.

Of course, the *Gallie* case is a very pathetic one. The plaintiff-widow was entitled to the plea of *non est factum*, as decided by the learned trial judge. It is argued that the document she signed can be considered to be 'essentially' or 'seriously' or 'radically' or 'fundamentally' different from the document she thought she was signing. This is so, because she signed a deed of assignment of her leasehold interest in her land and house on the same for a consideration of £3,000 in favour of Lee a third party to the transaction with her nephew. It was purely a sale agreement. Whereas, she thought she was signing a deed of gift of her leasehold interest in her land and house on the same to her nephew- a blood relation, to enable the latter raise money on the security of her leasehold house with the proviso that she would continue to live in the house rent-free for the rest of her life. This was certainly not a sale agreement. The intention of making a gift of her leasehold property to her nephew was to enable the same secure loan with the leasehold property. Of course, upon payment of the loan to the creditor, the nephew's ownership and possession of the leasehold house would remain intact. The plaintiff-widow never contemplated that one day, possession of her apartment or house would be taken from her or she would be asked to pay rents, as a tenant to anybody for the occupation of her apartment or house. This was assured to her by both the nephew and defendant. As it turned out, the defendant had mortgaged the leasehold house to the respondent-building society to raise a loan of £2, 000. He never made payment or gave the money to the plaintiff-widow or her nephew. The respondent-building society had gone to court, seeking to sell the leasehold house and or recover possession of the leasehold house from the plaintiff-widow. These were certainly different scenarios from what the plaintiff-widow had in mind. In the language of the trial High Court Judge in the Nigerian case of *Sylvester Egbase v Augustine Oriareghan*[39], the defendant was a crook. He had apparently perpetrated fraud a crime against the

38. O Akanle, 'Pollution Control Regulation in Nigerian Oil Industry', published as *Occasional Paper 16* by the Nigerian Institute of Advanced Legal Studies, Lagos 1991 14.

39. [1985] 2 NWLR (pt 10) 884, 896 Supreme Court of Nigeria (SCN).

plaintiff-widow and her nephew.

Good enough, the House of Lords found that the plaintiff-widow was not negligent in signing the deed presented to her by the defendant, as disclosed before. It is settled law that where a person is induced by the fraud of another person to sign a document containing a contract radically-different from that which he contemplated, he is allowed to deny the validity of the contract by pleading *non est factum* in any action brought against him to enforce the contract.[40] According to Byles, J in the *Foster* case[41], such a contract is invalid:

> 'Not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in the contemplation of the law never did sign the contract to which his name is appended'.[42]

In short, there was no consent in the circumstances of the *Saunders* case. Thus, there was contravention of the principle of contract law that there must be *consensus ad idem* in a contract.[43] It should be noted that a lack of consent is the basis for a plea of *non est factum*. Assuming, it is conceded that the plaintiff-widow's mistake was as to the contents of the document and not to the character or nature of the document, as the House of Lords seemingly wanted the whole world to believe, Lord Denning's criticism in the *Gallie* case is instructive. Put in another words, it is agreed that she was assigning her leasehold interest in her land and house on the same to someone else through the document she signed but she had thought that the document she signed gave her leasehold interest in her land and house on the same to her nephew which provided that she would live in her house rent-free for the rest of her life. As disclosed already, Lord Denning, MR had rejected the distinction between character or nature and contents. It has also been disclosed already that His Lordship

---

40. Sagay, see n 25 above, 277.
41. This case is similar to the *Gallie* case.
42. See, also, n 15 above, 592.
43. See the Nigerian case of *PT Adedeji v Moses Obajimi* [2018] 16 NWLR (pt 1644) 146, 149 where the Supreme Court held that for a contract to be regarded as legally-binding and enforceable, parties must reach a *consensus ad idem* in respect of its terms.

correctly pointed out in the *Gallie* case that a mistake as to contents may be no less fundamental or radical than one relating to the nature or character of the contract.

Again, the Singaporean case of *First National Bank of Chicago v Howlee Realty Private (Pte) Limited and Another,*[44] is another selected and important case in point. In the case, which the plaintiff instituted against the defendants in the High Court of Singapore, an illiterate lady-second defendant had signed a deed of guarantee. She was oblivious that the guarantee was for an unlimited amount. Evidence was adduced that the contents of the deed were never explained to her by either the attesting lawyer or the plaintiff-bank. She relied on the defence of *non est factum*. The trial High Court, D'cotta, J held that the signer of the document succeeded in establishing *non est factum*. Consequently, the Court above dismissed the plaintiff's claim against the illiterate-second defendant. The Court above seemed to have upheld the defence of *non est factum* of the illiterate-second defendant, because the contents of the deed were never explained to her by either the attesting lawyer or the plaintiff-bank. This smacks of fraud on the part of the plaintiff-bank. In the circumstances, it can be argued that there was no *consensus ad idem*. Also, the Court above seemingly upheld the defence above, because the document she signed, that is a deed of guarantee for an unlimited amount, was considered to be radically-different from the document she thought she was signing. The decision of the court above is acceptable, because it represents the position of the law on the plea of *non est factum.*

Furthermore, in the *Egbase* case, another selected and important case in point, the respondent/defendant was in dire need of money. He approached the appellant/plaintiff for a loan of ₦500.00. He utilised his house, that is Number Five Okoduwa Street, Idumu-Okojie, Uromi, as security for the Loan. In furtherance of the loan, an agreement, Exhibit 'B' was signed between the respondent/defendant and appellant/plaintiff. A clause in the agreement stipulated that the respondent/defendant could re-purchase the house from the appellant/plaintiff within six months from the date of the agreement. The respondent/defendant could not re-purchase the house within the stipulated period. Thereafter, the respondent/defendant and appellant/plaintiff mutually-agreed that the respondent/defendant could

44. [1981] 1 MLJ 183.

continue to occupy the premises as appellant/plaintiff's tenant at the rent of ₦15.00 monthly. The respondent/defendant paid the rent for three months and then defaulted in further payment.

The appellant/plaintiff instituted a claim against the respondent/ defendent in the High Court of Bendel State, Ubiaja for a declaration that he was entitled to a grant of statutory right of occupancy to the land and house on the same in dispute. The respondent/defendant alleged that the transaction between him and the appellant/plaintiff was one of pledge of the house for the loan and not one of out-right sale. He pleaded that, he being an illiterate, he did not understand that the import of the agreement was that he had sold his house for only ₦500.00.

However, the respondent/defendant admitted during cross-examination that prior to his signing the agreement, it was read and interpreted to him by his solicitor, Ambrose Okowu Okpere who also testified as the first defence witness. Also, he admitted that before he signed the agreement, he understood that the house would become the property of the appellant/plaintiff if he failed to pay the loan within six months of obtaining the same. His explanation was that he could not help signing the agreement, because being in dire need of the money his refusal to sign may mean that he would not get the money he so badly needed. Okpere, the respondent/defendant's own witness, testified to the effect that he drafted Exhibit 'B' in line with the terms agreed upon by both the respondent/defendant and appellant/plaintiff. He stated that he was not aware that the respondent/defendant was an illiterate person, since they had spoken in both English and Ishan Languages during the transaction. According to him, he had also read and interpreted the contents of Exhibit 'B' to the respondent/defendant.

On the totality of the evidence adduced at the trial, the trial High Court, Aluyi, J accepted the testimony of the appellant/plaintiff, Okpere, and that of one Vincent Okoebor who acted as middleman between the appellant/plaintiff and respondent/defendant. It held in its judgment delivered on 18 January 1980 that the defence of *non est factum* did not avail the respondent/defendant whom it described as a crook, as he was not mistaken as to the document he signed. The trial High Court, accordingly, gave judgment in favour of the appellant/plaintiff. Being aggrieved by the decision of the trial High Court, the respondent/defendant appealed to the Court of Appeal which reversed the decision of the trial

High Court in its judgment delivered on 26 January 1983, disagreeing with the learned trial judge on his application of the *non est factum* rule and on his findings of fact.

Being dis-satisfied with the judgment of the Court of Appeal, the appellant/plaintiff appealed to the Supreme Court of Nigeria. Justice Dahunsi Olugbemi Coker, JSC delivering the leading judgment of the Supreme Court on 18 October 1985 with which the other four Justices of the Court concurred, allowed the appeal of the appellant/plaintiff, set-aside the decision of the Court of Appeal and restored the judgment of the trial High Court. The learned Justice Coker held as follows:

> 'He (respondent/defendant) failed to prove that the agreement was different in content with what he agreed with the plaintiff (appellant/plaintiff)… Before signing the agreement he knew the effect of the document. He explained 'I could not help signing the agreement because I was in dire need of it and if I refused to sign the agreement as read, I might not get the money I so badly needed'.

His Lordship believed the trial High Court Judge that the respondent/ defendant was a crook and a person who was determined to deceive and mislead the court. Justice Coker stated that there was no reasonable or legitimate basis on which the Court of Appeal could have reversed the decision of the trial High Court.

In conclusion, His Lordship drew attention to the admonition given by Lord Pearson in the *Saunders* case to the effect that there was danger in giving undue extension to the plea of *non est factum* and the plea must necessarily be kept within narrow limits. The learned law Lord had stated that much confusion and uncertainty would be the result in the contract field and elsewhere when a man was allowed to disown his signature in a document merely by averring that he did not understand the document which he had signed.

The learned Justice Coker declared that the evidence of the respondent/defendant fell very short of making a clear and satisfactory defence of *non est factum* and the trial High Court was, therefore, right in rejecting his plea of *non est factum*.

A significant point to bear in mind is that the apex Court in the case above unanimously allowed the appeal, mainly on the ground that since

the evidence clearly established that the agreement was read and interpreted to the respondent/defendant, who understood and accepted the terms, there could be no room for his plea of *non est factum*. This reasoning of the Court above is acceptable, because the basis of the plea of *non est factum* is a lack of consent on the part of the signer of a document, as indicated already.

It is rather sad that counsel to the respondent/defendant had placed reliance solely on the plea of *non est factum* in the case above. The argument can be postulated that if he had predicated his client's case on duress and undue influence he probably would have been successful in having the agreement set-aside.[45] It should be noted that it was established in the English case of *Lloyds Bank v Bundy*[46] that the formerly narrow doctrines of duress under the common-law and undue influence under equity have been considerably widened into the flexible doctrine of 'inequality of bargaining power'.

Without doubt, the *Egbase* case was one of inequality of bargaining power.[47] It is argued that the terms of the agreement were unfair, and the property of the respondent/defendant was transferred for an amount which was grossly-inadequate when his bargaining power was grievously impaired by reason of his needs.[48] As disclosed before, the respondent/ defendant had testified that he could not help signing the agreement, as he was in dire need of money. According to him, if he had refused to sign the agreement as read, he would not have got the money he so badly needed. It is pel-lucid that the case above was a classic one, not only of inequality of bargaining power, as indicated above but also, of an unconscionable bargain.[49]

Admittedly, the subsequent agreement between the respondent/ defendant and appellant/plaintiff that the former should become a tenant to the latter and the implementation of the same by the respondent/ defendant in his actually paying rent to the appellant/plaintiff for three months could be regarded as acquiescence or affirmation which may

45. Sagay, see n 40 above, 293.
46. [1975] QB 326.
47. Sagay, see n 45 above.
48. *Ibid*.
49. *Ibid*.

preclude him from obtaining a remedy.[50] This is so, because it is a well-settled principle that relief against unconscionable contracts is barred by express affirmation, acquiescence, or delay after the influence or pressure has come to an end.[51]

The judgment of the Supreme Court of Nigeria in the *Egbase* case is commendable. Nonetheless, it can be criticised on the ground that the learned Justice Coker held that the respondent/defendant failed to prove that the agreement was different in content with what he agreed with the appellant/plaintiff, as disclosed above. In addition to this, Eso JSC, another Justice of the Supreme Court in the case above, stressed that a mistake as to contents as against the nature of a document cannot entitle a person to a plea of *non est factum*.[52] In His Lordship's view, even though the agreement did not utilise the word 'sale', the utilisation of the words 'vendor' and 'purchaser' clearly showed that a sale of the house of the respondent/defendant was intended, and the difference was, therefore, one of 'contents' only and not one affecting the nature of the transaction. This can be considered to be a plausible argument.

Be that as it may, it should be noted that the terminology of 'content' versus 'nature' or 'character' has now been abandoned completely.[53] As disclosed before, the modern and appropriate terms are whether the agreement signed is 'radically' or 'essentially' or 'fundamentally' or 'seriously' or 'very substantially' different from the one intended by the party pleading *non est factum.* In any event, either the difference in character or nature test or radical or fundamental difference test would have led to the same conclusion, that is the respondent/defendant was not entitled to the defence of *non est factum*.

Besides, the Indian case of *Selvaraju Kounder v Sahadeva Kounder*[54] is still another selected and important case in point. In the case, the plaintiff instituted a claim against the defendant-his only son in the Madras High Court, seeking declaration of ownership, title and possession over properties he claimed belonged to him. The plaintiff-an 80 years-old illiterate

50. *Ibid*.
51. *Ibid*.
52. See n 39 above, 898.
53. See n 34 above.
54. AIR 1998 Mad 58.

man signed an already-written document prepared by the defendant, after it had been explained to him by the defendant whom he had absolute faith and confidence in that the same was a will to come into effect after his death whereas the document was a deed of partition of his properties in favour of the defendant. The plaintiff relied on the plea of *non est factum*. The trial High Court held that the plaintiff succeeded in establishing *non est factum*. Consequently, it declared the execution of the deed of partition void. The Court above seemingly came to the conclusion that the plaintiff had established that the document he signed was radically or fundamentally-different from the document he thought he was signing. The decision of the Court above is acceptable, because it represents the position of the law on the plea of *non est factum*.

Finally, in the Nigerian case of *Ejilemele*, another selected and important case in point, the appellant/defendant and the first respondent/ plaintiff were members of the Wopara family of Rumubiakemi, Obia, Rivers State while the second respondent/plaintiff was the widow of Oke Ejilemele, whose mother was a member of the Wopara family. The respondents/plaintiffs instituted a claim against the appellant/defendant in the High Court of Rivers State, Port Harcourt, seeking to annul the conveyance purportedly made between members of the Wopara family and the appellant/defendant, covering a piece of family land in that it was obtained by fraudulent misrepresentation of the appellant/defendant, a declaration that the respondents/plaintiffs were the rightful owners in possession of the customary right of occupancy over the said land, damages for trespass and a perpetual injunction. The PW1, Christopher Ogbenda Ejima Wopara an illiterate man and head of Wopara Family signed a paper in the night presented to him by the appellant/defendant, after the latter had explained that he wanted the PW1 to sign the paper for him as a witness to enable him go to Lagos so as to claim compensation or rent from the Federal Government of Nigeria (FGN) for the use of his house by soldiers whereas the paper was a deed of conveyance transferring Wopara Family land to the appellant/defendant. The PW1 relied on the plea of *non est factum*.

In a reserved judgment delivered on 29 September 1988, the trial High Court held that the plea of *non est factum* was available to PWI and stated that had the PW1 known that it was a document meant to transfer land, he would not have signed. It declared the deed of conveyance void,

made a declaration that the respondents/plaintiffs were not the rightful owners of the land but were in exclusive possession of the same, awarded ₦1,000.00 as damages for trespass and granted a perpetual injunction restraining the appellant/defendant from further staying in wrongful occupation of the land. The trial High Court ordered the appellant/defendant to deliver-up possession of the area of land occupied as his house to the respondents/plaintiffs. Also, the Court above ordered the appellant/defendant to deliver-up the original of the deed of conveyance to the Deeds Registrar for cancellation.

Being aggrieved by the judgment of the trial High Court, the appellant/defendant appealed to the Court of Appeal. Justice Sylvanus Adewere Nsofor, JCA delivering the leading judgment of the Court of Appeal on 6 March 1998 with which Justice Aloysious Iyorgyer Katsina Alu, JCA (as he then was) concurred dismissed the appeal of the appellant/defendant. His Lordship held that the finding made by the trial High Court that the plea of *non est factum* availed the PWI was unimpeachable. The learned Justice Nsofor further held that the plea of *non est factum* cannot be available to a person whose mistake was actually a mistake as to the legal effect of the document whether that was his own mistake or that of his adviser. Justice Nsofor emphasised that there must be a radical or fundamental difference between what the signer signed and what he thought he was signing. His lordship, nonetheless, declared that:

> 'Where a person executes a formal deed in full-knowledge of the nature of the document, it will not avail him to seek to nullify the contract by complaining that he did not know the contents of the deed. What is necessary is full knowledge of the nature and not knowledge of the contents of the document'.

The decision of the Court of Appeal in the case above with respect to the availability of the plea of *non est factum* to the PWI is acceptable, on the ground that there was a radical or fundamental difference between what the PW1 signed and what he thought he was signing.

Regardless, the Court of Appeal above (per Nsofor, JCA) can be criticised for stressing that a mistake as to contents as against the nature of a document cannot entitle a person to the plea of *non est factum*. In this way, the Court above committed the same error as, for example,

Eso, JSC in the *Egbase* case. It has been indicated before that the terminology of 'content' versus 'nature' or 'character' has now been abandoned totally. Also, as indicated before, the modern and appropriate terms are whether the agreement signed is 'radically' or 'essentially' or 'fundamentally or 'seriously' or 'very substantially' different from the one intended by the party pleading *non est factum*. Notwithstanding, either the difference in character or nature test or the radical or fundamental difference test would have led to the same conclusion, that is the PWI was entitled to the plea of *non est factum*

IV. REQUIREMENTS FOR A SUCCESSFUL PLEA OF *NON EST FACTUM*

In this segment, the discussion shows that there are three major requirements for a successful plea of *non est factum*. The first condition or requirement now, based on the modern test, as disclosed before, that must be satisfied before the plea of *non est factum* can be raised successfully is that the document which the signer actually-signed must be 'radically' or 'essentially' or 'seriously' or 'fundamentally' or 'very substantially' different from the document he thought he was signing.

Second, a signer of a mistakenly-signed document must not be negligent, otherwise he would not be able to successfully-plead *non est factum*. In the *Saunders* case, the House of Lords held that negligence is material in all cases of *non est factum* and not only to cases involving negotiable instruments.

It is important to bear in mind that it is not necessary to prove that the signer of a document owed a duty of care to the plaintiff, in order to establish negligence, as required under tort law.[55] Arguably, such technicalities are not applicable in cases of contract. According to Lord Pearson in the case above, 'the word "negligence" in this connection had no special technical meaning. It meant carelessness….' The signer must, indeed, take all precautions in the circumstances.[56] In the words of Lord Denning, MR:

> 'Whenever a man of full age and understanding who can read and write, signs a legal document put before him for

55. Sagay, see n 51 above, 286.
56. See n 42 above, 593.

> signature which on its face is intended to have legal consequences then, if he does not take the trouble to read it, but signs it as it is, relying on the words of another as to its character or contents or effects, he cannot be heard to say that it is not his document'.[57]

The point is that there is need for a signer of a document to exercise reasonable diligence in reading documents. It is argued that a person cannot rely on the plea of *non est factum* merely because he is too lazy or busy to read through a document before signing the same or because it contains objectionable terms or terms the legal effect of which he is unaware.[58] Also, it is argued that if such a person is content to execute it without so informing himself of its contents, it would generally be binding on him, even though its contents are radically or fundamentally-different from what he thought or supposed the same to be.[59] The truth is that such a person cannot, later, be heard to complain that the deed is void, because he was oblivious of the contents of the same.[60]

Lastly, it was held by the House of Lords in the *Saunders* case that another requirement to be satisfied for the plea of *non est factum* to avail the signer of a document is that the mistake was as to the general character or nature of the document, as opposed to the legal effect.

V. CONSEQUENCES OF A SUCCESSFUL PLEA OF *NON EST FACTUM*

What is of concern under the sub-heading above is the issue of the consequences or effect of a successful plea of *non est factum.*The issue of consequences that attach to a successful plea of *non est factum* or effect of a successful plea of *non est factum* was well-discussed by the Nigerian Court of Appeal in the *Ejilemele* case. The Court of Appeal above (per Nsofor, JCA) held that where it was established that the element of consent was totally-lacking and that the transaction which the document purports to effect was essentially-different in substance or in kind from the transaction intended, then the document would be held void and the

57. Quoted in JH Baker, '*Non Est Factum'* , L LLoyd and S Berger (eds), *Current Legal Problems* (London: vol. 23, Stevens and Sons Ltd., 1970) 54.
58. *Ibid*.
59. *Ibid*.
60. *Ibid*.

signature on the same was invalid and of no force or effect.[61] According to the Court above, the signature of the signer was invalid not merely on the ground of fraud, where fraud existed, but on the ground that the mind of the signer did not accompany the signature.[62]

(i)Is the adoption of the common-law plea of *non est factum* on mistakenly-signed documents in Nigeria effective?

The question above is the last issue that comes to the fore for consideration by the author. The English word 'effective' means 'producing the result that is wanted or intended or producing a successful result.'[63] Every measure adopted has an aim or intended effect. It is effective when the aim or intended effect has been met. The aim or intended effect of the adoption of the common-law plea of *non est factum* is to end the menace of innocent Nigerians, including illiterate Nigerians being made to sign or thumbprint documents or contracts whoso contents were fraudulently or wrongly misrepresented to them. Notwithstanding the fact that the common-law plea has been adopted in Nigeria for more than 55 years now, the menace above still continues unabated. This may, also, mean that some illiterate Nigerians are still being exploited, contrary to the provisions of section 17(3)(f) of the Constitution which states that children, young persons and the aged people are protected against any exploitation whatsoever. It should be noted that the Constitution provides in its section 15(5) that the Nigerian State shall eradicate all corrupt practices and abuse of power. A typical example is the *Ejilemele* case, where the PWI an illiterate Nigerian man was made to sign a document whose contents were fraudulently misrepresented to him by the appellant/ defendant. Thus, the answer to the question above is ostensibly in the negative.

One core factor responsible for the continuation of the menace above is the high level of illiteracy in Nigeria. It must be put on record that, today, 60 million Nigerians or 30 percent (%) of Nigeria's population which, currently, stands at 200 million people cannot read or write or are

---

61. See n 56 above, 624.
62. *Ibid.,* 623 & 628.
63. S Wehmeier, C Mcintosh and J Turnbul (eds), *AS Hornsby's Oxford Advanced Learner's Dictionary of Current English* (Oxford: 7th edn, Oxford University Press, 2005) 469.

illiterates.[64] This, undisputedly, does not augur well for the socio-economic transformation of the nation. As disclosed earlier, the Nigerian Government is largely to blame for allowing the menace above to emerge, as it has not been able to reduce significantly illiteracy in the country. The truth of the matter is that Nigeria seems not to be serious on the pursuit of education for the benefit of the nation and its citizens as well as eradication of illiteracy from its body polity. In the first instance, section 18(3) of the Constitution declares as follows: Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide-

(a) free, compulsory and universal primary education;

(b) free university education; and

(c) free adult literacy programme.

The words to emphasise are 'Government shall as and when practicable provide'. This means that it is as and when practicable that the Nigerian Government would provide items (a), (b) and (c) above. The implication is that under the Constitution, citizens of Nigeria are not yet guaranteed the right to free, compulsory and universal primary education, the right to free university education, and the right to free adult literacy programme. This is unacceptable, as these rights ought to be guaranteed to all citizens of Nigeria upon the coming into force of the Constitution on 29 May 1999.

Also, the Constitution can be vilified on the ground that its section 6(6)(c) renders non-justiciable the provisions of sections 15, 17 and 18 as well as other provisions under Chapter Two, dealing with 'Fundamental Objectives and Directive Principles of State Policy'.[65] This is in tune with the practice in other countries like India where Article 37 of the Indian Constitution 1949 declares non-justiciable the socio-economic rights guaranteed to all Indians under Part Four of the Constitution above, dealing with 'Directive Principles of State Policy'. It is argued that Chapter Two of the Constitution and Part Four of the 1949 Indian Constitution constitute the basis of the social contract between the citizens and their leaders and,

64. <https://knoema.com>atlas>population> and <https://www.premiumtimesng.com> accessed 8 April 2020.

65. See *Musa Baba-Panya v President of the Federal Republic of Nigeria and Two Others* [2018] 15 NWLR (pt 1643) 395, 401 Court of Appeal (CA).

therefore, it is bizarre that the provisions under the same have been rendered non-justicable in both nations. The approach in Nigeria contrasts sharply with the approach in other countries where citizens are guaranteed the right to education in constitutions of the same. For example, section 29 of the Constitution of the Republic of South Africa 1996 guarantees to every citizen the right to basic education, as a fundamental and enforceable right. In a similar vein, Article 38(2) of the Constitution of Ghana 1992 guarantees to every citizen the right to education, as a fundamental and enforceable right. Again, section 75(1)(a) of the Constitution of Zimbabwe 2013 guarantees to every citizen and permanent resident of the nation a fundamental and enforceable right to a basic State-funded education, including adult basic education.

A point to note is that the approach in South Africa, Ghana and Zimbabwe is in accord with international human rights' norms or treaties. One note-worthy international human rights' treaty, in this regard, is the United Nations (UN) International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966. Its Article 13 recognises the universal right of education without discrimination of any kind. Other note-worthy international human rights' norms or treaties are the UN Convention on the Rights of the Child (UNCRC) 1989 and African Union (AU) African Charter on the Rights and Welfare of the Child (ACRWC) 1990 whose Articles 28 and 11, respectively guarantee children's right to education. Nigeria has both signed and ratified these treaties. Thus, they are legally-binding on the nation.

In the second place, Nigeria's education budget over the years has been about 6% of the nation's total budget, contrary to the directive of the United Nations Education, Scientific and Cultural Organisation (UNESCO) that the educational budget of a member-nation of the UN should be nothing less than 26% of the National budget.[66] To be precise, Nigeria has a total National budget of ₦10.59 trillion for 2020.[67] Sadly enough, only the sum of ₦691.07 billion was appropriated for education, representing 6.7% of the 2020 National budget.[68]

---

66. <http://www.thisdaylive.com> accessed 8 April 2020.

67. <https://www.ajazeera.com> accessed 8 April 2020.

68. <https://www.educcleb.com> Nigeria> accessed 8 April 2020. Other factors responsible for the continuation of the menace above include: (i) laziness on the part of many literate Nigerians to read documents placed before them for their

VI. OBSERVATIONS

It is glaring from the forgoing reflection on the plea of *non est factum* under Nigerian Law of Contract that the Nigerian Government has adopted the common-law plea of *non est factum* which allows a person who seeks to nullify a deed or contract or, a declaration that the deed or contract is void, on the ground that such a deed or contract was mistakenly-signed. This is in consonance with the practice in other countries which practice the common-law, including Kenya, Zimbabwe, the USA, the UK, India, Ghana, South Africa, Singapore, Sierra Leone, Grenada and Zambia.

It is observable that the common-law plea of *non est factum* which literally translates to 'it is not my deed' developed to mitigate the harshness of the common-law principle or rule that a party is bound by his signature to the contents of a document whether he understood or not. The plea was originally a devise for the protection of illiterates and blind persons. But in modern times, it has been modified and adapted for the protection of a literate person who, in the absence of negligence on his part, has been fraudulently or wrongly-induced to sign a document radically or fundamentally-different from that document which he thought he was signing. Of course, the plea above, undoubtedly, remains vital in regulating the contractual obligations that enure between an illiterate contractor and another party. The purpose is certainly to protect the former from unconscionable contracts or bargains with the latter, especially where there is an element of fraud. Besides, it is settled law that a contract is predicated on the concept of *consensus ad idem*. The illiterate person or a person generally, may seek to resile out of his contractual obligations because a contract is not his deed.

Also, it is observable that many innocent Nigerians, including illiterate Nigerians have been made to sign or thumbprint documents or contracts

---

signatures; (ii) greed on the part of some Nigerians who desire to exploit innocent Nigerians for their personal gains in order to be rich; (iii) lack of enforcement of the criminal laws dealing with cheating, fraud and forgery by the law enforcement agencies. In Nigeria, cheating, fraud and forgery are criminal offences. See, for example, the Criminal Code Act Cap C 38 Laws of the Federation of Nigeria (LFN) 2004, ss 421, 463-467 and Penal Code Law Cap 89 Laws of the defunct Northern Nigeria 1963, ss 177, 320,322, 362 & 363; (iv) poverty makes some Nigerians exploit their fellow-Nigerians in order to survive; and (iv) low degree of socialisation on the dominant legal norms on mistakenly-signed documents as well as cheating, fraud and forgery in Nigeria.

whose contents have been fraudulently or wrongly misrepresented to the same. These have given rise to raising the plea of *non est factum,* in order to nullify such documents or contracts. A classic example is the *Ejilemele* case, where the PWI an illiterate Nigerian man was made to sign a document whose contents were fraudulently misrepresented to him by the appellant/defendant. The document turned out to be a deed of conveyance of the PWI's family land in favour of the appellant/defendant-fraudster. Good enough, the plea of *non est factum* was successfully raised by the PWI.

There are three major requirements for a successful plea of *non est factum,* namely: (i) the mistake must relate to the character or nature of the document signed, as opposed to its legal effect; (ii) the signer must not have been negligent; and (iii) there must be a radical or fundamental difference between what the signer signed and what he thought he was signing. One major criticism of the latter is that the word 'radical' or 'fundamental' had not been defined by judicial authorities. What is a 'radical' or 'fundamental' difference between what the signer signed and what he thought he was signing is, therefore, subject to the absolute or wide-discretion of the court in each case. This discretionary power of the court, as indicated above, is being misused.

Again, it is observable that the adoption of the common-law plea of *non est factum* by the Nigerian Government has not been effective in tackling the menace of innocent Nigerians, including illiterate Nigerians being made to sign or thumbprint documents or contracts whose contents were fraudulently or wrongly misrepresented to them. Thus, the menace continues unabated. A continuation of the menace poses a grave danger to the survival and protection of innocent Nigerians, including illiterate Nigerians. Their survival and protection must be of paramount interest to all Nigerians and, therefore, must be ensured. The author wishes to re-call the provisions of sections 17(3)(f) and 15(5) of the Constitution. It has been indicated already that the menace has engendered loss of lives of some victims. This is contrary to the right to life guaranteed to all Nigerians, including illiterate Nigerians as enunciated under section 33(1) of the Constitution. Also, it is contrary to the right of every person to life as encapsulated under Articles 6(1) and 4 of the ICCPR and ACHPR, respectively. The author has shown before that the former has the effect of a domesticated enactment in Nigeria while the latter enjoys a status

higher than a mere international convention, having been domesticated in Nigeria and the same is part of the Nigerian body of laws. A very typical example is the *Oluwo* case. It is an open secret that Oluwo died after he found out that one Adewale had defrauded him of his property through the signing of a document which Adewale falsely represented as the receipt for a loan of £3, 200 given to Oluwo by the same. The document later turned out to be a deed of assignment on an out-right sale of Oluwo's property to Adewale. As disclosed before, after the death of Oluwo, the executors of his estate instituted an action in court for an order to set-aside the deed on the ground of fraud, relying on the plea of *non est factum* but the Federal Supreme Court rejected the plea for reasons given earlier. To cut matters short, the sad effect of the menace on victims which may be unquantifiable and life-long cannot be underscored. One core factor responsible for the continuation of the menace is that the Nigerian Government is not serious on the pursuit of education for the benefit of the country and its citizens as well as eradication of illiteracy. As disclosed already, the implication of section 18(3) of the Constitution is that under the Nigerian Constitution above, Nigerians are not yet guaranteed: the right to free, compulsory and universal primary education; the right to free University education; and the right to free adult literacy programme.[69]

The problem of innocent Nigerians, including illiterate Nigerians being made to sign documents or contracts whose contents have been fraudulently or wrongly misrepresented to the same must be quickly arrested or check-mated in Nigeria.

VII. RECOMMENDATIONS

The problem of innocent Nigerians, including illiterate Nigerians being made to sign or thumbprint documents or contracts whose contents have been fraudulently or wrongly misrepresented to the same should be urgently and effectively addressed or tackled by the Nigerian Government. This is cardinal, so as not be create the impression that the Nigerian Government itself is not serious with the extermination of the menace above from Nigeria's body polity. In order to surmount the problem above, the author strongly makes some recommendations. To start with, Nigeria

69. For other factors responsible for the continuation of the menace, see n 68 above.

should continue to retain the common-law plea of *non est factum*. In Nigeria, where, as indicated before, 60 million Nigerians or 30% of its population which currently stands at 200 million people are unable to read and write or illiterates, the special protection offered by the plea of *non est factum* to that easily-exploited and defrauded class of citizens, that is illiterates, as disclosed before, is still of great relevance and currency in Nigeria for the regulation of contractual obligations between the illiterate contractor and other parties.[70] The situation in Nigeria contrasts sharply with the situation in the developed nations like the USA and UK, where the illiteracy level has been reduced significantly, owing to the advancement in education.

Second, Nigeria should amend the Constitution to expunge the provisions of section 18(3) of the same and guarantee to all citizens of the nation the rights to free, compulsory and universal primary education, free and compulsory secondary education, free tertiary education and free adult literacy programme and other social, economic and cultural rights guaranteed in Chapter Two of the Constitution, under Chapter Four of the Constitution, dealing with 'Fundamental Rights' so as to make them justiciable or enforceable rights in Nigeria. This is in alignment with what obtains in other countries like Ghana and South Africa, where the social, economic and cultural rights guaranteed to their citizens are placed side by side with the civil and political rights under one Chapter dealing with 'Fundamental Rights'.[71] Also, it is in consonance with the provisions of international human rights' norms or treaties, as disclosed before. The relevant international instruments are the ICESCR, UNCRC and ACRWC. As a member of the UN and AU as well as State-Party to these instruments, Nigeria is obligated to apply their provisions. The country, in this connection, must show respect to international law and its treaty obligations, as enjoined by section 19(d) of the Constitution.[72]

---

70. Sagay, see n 55 above, 277.

71. See, for example, ss 24, 26(1), 27(1), 29(1), 30 & 31(1) under Chapter Two of the Constitution of South Africa 1996 and ss 20, 24, 25, 26, 27 & 28 under Chapter Five of the Constitution of Ghana 1992.

72. Other recommendations of the author include: (a)Nigeria should amend the Illiterates Protection Act to define a radical or fundamental difference between what the signer signed and what he thought he was signing in an amended or another Act; (b) the illiterates protection laws in Nigeria should be amended to define an illiterate to mean a person who cannot read the document presented to

VII. CONCLUSION

This article reflected on the plea of *non est factum* under Nigerian Law of Contract. It identified short-comings in the various applicable laws and stated clearly that the making of innocent Nigerians, including illiterate Nigerians sign or thumbprint documents or contracts whose contents were fraudulently misrepresented to them is criminal and contrary to the principle of contract law that there must be *consensus ad idem* in a contract and, therefore, Nigeria should faithfully enforce the Nigerian Criminal Law and continue to retain the common-law plea of *non est factum*. This article, also, highlighted the practice in other countries and proffered suggestions and recommendations, which, if implemented could effectively address the problem of innocent Nigerians, including illiterate Nigerians being made to sign documents or contracts whose contents have been fraudulently or wrongly misrepresented to them in Nigeria.

■

---

the same for his signature in the language in which it was written or person who is not sufficiently literate to read and understand the contents of the document presented to him for his signature in the language in which it was written; (c) the poverty alleviation programmes of the Nigerian Government should be pursued to their logical conclusion; (d) the law enforcement agencies must rise to the challenge of faithfully enforcing the Nigerian criminal law. For instance, despite numerous incidences of cheating, fraud and forgery in mistakenly-signed documents there is to the author's knowledge virtually no case regarding mistakenly-signed documents, where violators of the law against cheating, fraud and forgery have been successfully prosecuted and penalised; (e) the Nigerian Government must show seriousness in the campaign against illiteracy and the pursuit of education for the benefit of Nigeria and Nigerians. Ghana which is a model State as far as pursuit of education of its citizens is concerned should be emulated as the same has laws and policies geared toward rapid development of the education sector. <http://www.premiumtimes.ng-com> accessed 25 July 2019. Besides, It has been disclosed before that Nigeria's National budget for education hovers around 6% of its total National Budget. This is certainty far below expectation for a country with about 10.5 million out-of-school children-the world's largest number. See http: //www.premiumtimes.ng.com above. Nigeria should raise its education budget to 26% of its total National budget in line with the directive of the UNESCO, as disclosed before; (f) the agencies of socialisation must re-double their efforts to socialise Nigerians on the dominant norms with regard to cheating, fraud and forgery as well as the plea of *non est factum*; and (g) the Nigerian Government should organise public lectures as well as other public enlightenment and awareness programmes so as to interface with Nigerians on, or senisitise Nigerians against, the 'get-rich- at- all- cost syndrome', on the need to refrain from fraudulent practices and other exploitative behaviours as well as to consider one another as his brother's keeper in line with the traditions and customs of the Nigerian people.

CHANGING DIMENSIONS OF SOVEREIGN IMMUNITY CONCEPT IN INDIA

PRADEEP KUMAR SINGH*

ABSTRACT : Society has responsibilities towards members of society and for bearing such responsibilities formal instrumentalities were developed. Most important and crucial instrumentality is state. State to perform functions to satisfy objectives of its establishment needs two things - firstly, state must have complete freedom in doing the various kinds of act, and thereby, immunity, and secondly, restrictions and liabilities impositions to make responsible and responsive state. Sovereign immunity concept has been developed in such aforesaid regards which provides immunity for some acts but for other acts immunity is not available and liability is imposed on erring state employee and state itself. Society is dynamic, therefore, with change in society, state and concept of state change, hereby, it becomes necessary that concept of sovereign immunity should also change. This paper will analyze change in concept of sovereign immunity in India with change in concept of state and governance.

KEY WORDS : Employer, Society, Sovereign immunity, State, Tort, Tortuous act, Vicarious liability, Welfare state.

I. INTRODUCTION

Law is an instrumentality created by society for regulation of human interactions so that society and members of society should have continued existence, attain continuous development, and enhance peace and happiness. Society has one universal quality that it is dynamic so that societal structure and societal process change with passing time. Change in societal structure and societal process create new kind of problems,

* PhD, Professor, Faculty of Law, Banaras Hindu University, India. Author may be contacted at e-mail: pradeep@bhu.ac.in

change in rate, seriousness and impact of problems. Further, there is also emerging of new human interests and desires. The whole development and changes in society give rise to new kind of challenges before the society; in case if these are not dealt properly, it may affect the whole development, peace, economic well-being of members of society and society at large. Therefore, there is need to review the law applicable for time being and modify and create proper and effective law with futuristic objectives to deal with challenges.

Society is developing and continuing only to regulate interactions of members of society and to provide spaces for proper interactions. Within spaces provided by society persons may perform their interactions properly. These two acts of society are very crucial and determinative for proper functioning of society, and further, peaceful coexistence of human being. These are regulatory measures used by society to regulate all those activities of human being which may affect the other fellow human being and in this regard not only interactions means rights of persons are decided but also space within which these interaction means rights have to be exercised is decided. For bearing responsibilities in this regard society has developed formal and informal social institutions. Formal social institutions comprise law and state. Society has decided that every person is free to exercise his rights within space provided by society through the measures of law but it must be within space provided in this regard by the law. Whenever any person exceed his space, it is taken as the person has committed violation of his duty; no doubt such act is considered as improper act and thereby wrongful also, society never permits that person should exceed his limits but for it generally liabilities are not imposed. There may be some instances when a person has gone beyond his space and entered in space of another person and violated right of that person, now person wrongdoer has not only committed violation of his duty but also committed violation of right of other person, act of such person is not simple wrongful act but has become actionable wrongful act, for which law gives a technical term 'Tort' and against act of tort actions are taken and liabilities are imposed under Law of Torts. Law of tort imposes responsibilities on every member of society to not commit any tortuous act (wrongful act), and further, also imposes duty to supervise, regulate and control subordinates thereby they should also not commit tortuous act. Superior who is employer, if he fails to control,

supervise and regulate subordinate who is his employee and he commits tortuous act then liability for wrongful act is not only imposed on employee but also liabilities is imposed on employer. Employer has vicarious liability for wrongful act committed by employee in course of employment. Vicarious liability is imposed on employer for his failure to regulate the activity of his employee and thereby preventing him from commission of tortuous act. State is now largest employer; previously state was only concerned with protection against external and internal security challenges but now state is indulged in developmental, welfare, and commercial activities also. State is now not only police state indulged in sovereign acts but also through employees it performs various non-sovereign acts. In such situation a pertinent question arises that whenever State employee commits tortuous act which causes infringement of right of individual then whether state will have vicarious liability for tort committed by its employee. Traditionally, in reference to tortious liability state uses sovereign immunity and act of state pleas to avoid vicarious liabilities. These immunities are available to state for performance of sovereign acts and now when state is also performing non-sovereign acts, situation of vicarious liabilities have to be reviewed. Justice considerations always require that in case of violation of legal right, justice must be available to victim irrespective by whom or by whose employee wrongful act has been committed, thereby, whenever wrongful acts are committed by employees of state, it should also be tested on vicarious liability criteria, and it comes out that Union of India and States of India should also be vicariously liable in the same manner as vicarious liability is imposed on a common employer for tortuous acts committed by his employee in course of his employment. In this regard it is needed to analyze legal regime in India to find out liability of Union of India and States of India for tortuous acts committed by its employees.

II. SOVEREIGN IMMUNITY PROTECTION BEFORE INDEPENDENCE OF INDIA

In England by tradition it was considered and followed that crown could not be held liable in any court and on this basis crown could not be held vicariously liable for tort committed by its employees. Crown was not liable towards any person because it was considered that crown could not do wrong. King was most superior judge and he could not be held liable in his own court. It was considered that whatever was commanded

by king was law; his command can never be unlawful. Further, king was considered as having divine rights. It was implicit in such situations that besides immunity to king from any legal action there was immunity for act committed under his command. Therefore, when employee committed any act under command of sovereign, sovereign and employee both could not be held liable. For other acts committed by employee which were beyond command of sovereign, employee himself was liable, his employer was not liable. For all tort actions king had sovereign immunity defence which providing him complete immunity against liability. Sovereign immunity was based on maxim '*rex non potest peccare*' which meaning was taken that king cannot do wrong; king does acts in the interest of common mass and he cannot be subject to jurisdiction of any municipal court. The only remedy was available to the aggrieved person to pray for some kind protection through filing of petition of right. But nothing could be claimed as a matter of right because a claim for damages against the king and his servants was not permissible due to absolute immunity available through sovereign immunity. In 1947 Crown Proceeding Act was passed by which sovereign immunity was abolished, thereby, in Britain state has vicarious liability for tort committed by its employee in course of employment.[1] State in Britain for tort committed by its employee treated

---

1 . Section 2 of Crown proceeding Act prescribes –

"Liability of the Crown in tort.

(1)Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:—

(a)in respect of torts committed by its servants or agents;

(b)in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and

(c)in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property:

Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate.

(2)Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity.

at par with private employer of full age and capacity, and accordingly vicarious liability is imposed. In *Home Office v. Dorsett Yacht Co*[2] Court did not gave benefit of sovereign immunity and vicarious liability was imposed on government for negligence committed by its employees. In this case ten borstal school[3] inmates were working on Brownsea island in Poole Harbour under supervision and control of three borstal officers, seven borstal trainees escaped in night due to the negligence of officers on duty. Officers were sleeping rather than to remain careful on duty. Borstal trainees used one yacht, collided and caused consequential damage to yacht belonging to plaintiff. Further, borstal trainees committed damage to one more yacht. Plaintiff sued Home Office for damage caused by negligence of its employees as they failed to keep proper control, supervision over borstal trainees. House of Lords held Home Office vicariously liable.

In India, liability conditions of Union of India and States of Union are dealt in Article 300 (1) of Constitution. The aforesaid Article of Constitution gives legal personality to Union and States. Article 300 of Constitution gives legal personality to Union of India and States that they may sue and sued in the same manner as Constitution was not enacted means what was liability situation before independence that still exists. Before independence matter of liability was dealt under India Act 1935 under that directive was given for continuance of same situation which was already in existence before enactment of this Act, thereby, ultimately matter of liability of British India and Provinces was dealt under Government of India Act 1858. Government of India Act 1858 was

---

(3)Where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown..."

2. (1970) 2 All ER 294 (HL)

3. Borstal school is reformatory established for reformation of delinquent juvenile; in this institution juvenile delinquents are provided with training with objective to reform them. Now in our country under Juvenile Justice (Care and Protection of Children) Act 2015 such delinquent juveniles are called as Child in Conflict with Law and Act prescribes keeping them in reformatories to reform them. Child in Conflict with Law is child who has committed crime.

applicable over whole British India and by it British government took direct control over British India which was previously vested in East India Company. Section 65 Government of India Act 1858 declares that Secretary of State for India would have same liability as it was of East India Company before the enactment of government of India Act 1858. Hereby, what was liability of East India Company, the same was imputed under Government of India Act of 1858 and then it was continuously carried and applied in Government of India Act of 1935 and ultimately after making of Constitution same has been applied in reference to liability of Union of India and States of India. Section 65 in Government of India Act 1858 was provided with space in Section 32 of Government of India Act 1915 and then in Section 176 (1) of Government of India Act 1935 and then ultimately in Art 300 (1) of Constitution. All the laws made after Government of India Act 1858 for dealing with liability of state have referred situations similar to Government of India Act 1858. Government of India Act 1858 itself referred situation which was before its enactment, thereby, liability of State was and even today it is same which existed before enactment of Government of India Act 1858. Section 65 of Government of India Act 1858 Provides:

> "The Secretary of the State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate and all persons and bodies politic shall, and may have and make the same suits, remedies and proceedings, legal and equitable against the Secretary of state in Council of India as they could have done against the said Company."

Section 32 (2) of Government of India Act 1915 provides:

> "Every person shall have the same remedies against the Secretary of State in Council as he might have against the East India Company if the Government of India Act 1858 and this Act had not been passed."

Section 176 (1) of Government of India Act 1935 provides:

> "The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this chapter, may,

> subject to any provisions which may be made by Act of the Federal or a Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed."

Hereby, if whole situation is analysed it comes out that now Union of India and states have same liability which was of East India Company before the enactment of Government of India Act 1858. East India Company was performing two functions – firstly, sovereign functions on behalf of British Crown and secondly, commercial functions like business of Company. British crown was performing sovereign acts and had sovereign immunity, thereby, East India Company performing sovereign functions on behalf of British crown would have sovereign immunity. On this basis East India Company was not liable for any sovereign act committed by its employees but such protection was not available for commercial acts. In case of performance of commercial acts, if employee of company committed tortuous act, company could be held vicariously liable.

In 1861 Calcutta Supreme Court decided a major case relating to sovereign immunity. Calcutta Supreme Court was predecessor of High Court established later on. Supreme Court of Calcutta in *Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India*[4] differentiated sovereign and non-sovereign act, and decided that sovereign immunity is available for sovereign acts but such immunity will not be available for business acts. Now similar will be situation of union of India and its States that vicarious liability cannot be imposed for sovereign acts committed by its employees but for non-sovereign acts no immunity will be available and vicarious liability can be imposed. *Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India* case was decided by Chief Justice Peacock. This case was not reported in any reporter from Calcutta but it was reported in reporter from Bombay with much delay in 1868-69. The fact of the case was that the employee of P & O Steam Navigation Co. was going somewhere in a carriage van driven by pairs of horses. In the mean time government employees working in

4. (1868-1869) 5 Bomb HCR App 1P. 1

Khidirepore Dock were negligently carrying iron funnel which was to be used in steamer under repairing. Iron funnel fell on the road, caused injury to one of the horses. Case was filed before the court. Chief Justice Peacock decided that Secretary of State for India had same liability as it was previously imposed on East India Company. East India Company was liable for non-sovereign acts, only immunity was available for sovereign acts, thereby, secretary of state was decided to have vicarious liability for negligence of its employees performing non-sovereign act of carrying funnel to be used for repairing of steamer. In this case Court classified all the acts of Government employees into sovereign and non-sovereign acts. When Government commits any wrongful act in performance of sovereign act, Government has no liability; on the other hand when Government employee commits wrong during performance of non-sovereign act, Government shall have no immunity but vicarious liability shall be imposed for tortuous act committed by its employee. The decision given by Calcutta Court was not accepted by Bombay and Madras High Courts. These High courts expressed opinion that division of government acts in sovereign and non-sovereign act is not proper; Government should have liability for all the acts, immunity may be provided for Act of State. For acts other than Act of State, state shall not have protection against vicarious liability. In *Secretary of State for India v. Hari Bhanji*[5] respondent purchased a quantity of salt at Bombay and paid excise on it. When salt was in transit import duty was raised. In the notification permission was available to importer to pay the difference between excise duty and import duty. On the landing of salt in Madras Presidency the collector required the respondent to pay the difference between paid and amount now after raise in import duty. Businessman paid amount asked by collector and took possession of salt but then after filed suit to recover the sum respondents compelled to pay. One issue was raised by appellant that a sovereign cannot be sued in his own court without his consent and he is not amenable to the jurisdiction of municipal court. Court decided that East India Company was not sovereign and by Government of India Act same position was given to Secretary of State for India, therefore, he cannot claim immunity from jurisdiction of court. Court observed acts done by Government in the exercise of the sovereign powers of making peace and war and of concluding treaties do not fall

5. ILR (1882) 5 Mad 273

within the province of Municipal Law but for other acts even though committed by Government, Court will have jurisdiction. Here court was expressing view that for act of state immunity is available to sovereign but it is not available for simple governmental acts. It was decided that court had jurisdiction to decide case, and further, it was decided that appellant could not be protected by its plea of sovereign immunity.

The cases decided by Courts before independence of Country did not clear the confusion regarding vicarious liability of state and availability of sovereign immunity. It was clear from provisions that vicarious liability of government for acts committed by employees was same which existed before the Government of India Act 1858. Through case decisions It was clear that state had sovereign immunity for sovereign act but liable for non-sovereign act. But confusion was much regarding issue that what acts should be strictly put in sovereign act category and what act should be treated as non-sovereign act. In *Hari Bhanji case* court opined that for some acts there might be immunity but there were some acts which were exclusively governmental acts but for such acts government should have responsibility and immunity would not be provided.

III. ACT OF STATE

Sometimes sovereign immunity and Act of State are confused as same thing; it is needed to be cleared. Sovereign immunity term is used when State employees do the act and it affect citizenry of one's own country while Act of State is doing act by which person or property of other country or citizen of other country is affected. Act of state is committed with order of state or sanction of state or later on ratified by state. Act of state is doing some acts which adversely affect person or property of citizen of other country or property or existence of other country. Act of state is not subject of municipal law. In *Secretary of State for India in Council v Kamachee Boye Saheeba*[6] *Raj of Tanjor* was taken by East India Company by using policy of laps. *Lord Dalhausi* was using this policy by which adoption was prohibited for kings in colonial India and when king of any princely state died without son related by blood relationship then his state was taken over and made part of British India, adopted son had no claim over the state. *Raja of Tanjor* died without any

6. (1859) 7 MIA 477

son related by blood and then after his state was made part of British India. His widow challenged the order. Privy Council decided that order issued and consequential acts of British India was Act of State and it cannot be challenged before any court governed by municipal law. In *P V Rao v. Khushal Das Advani*[7] Bombay High Court observed that the Act of State has extra-territorial operation, its legal source is not the law made by the state but sovereign power of the state. The Act of State is not related to citizens of the state. Therefore, it follows that there cannot be an Act of State between sovereign and its own citizens.

IV. SOVEREIGN IMMUNITY PROTECTION AFTER INDEPENDENCE OF INDIA

After Independence liability of Union and state is decided under Article 300 of Constitution of India and it prescribes same liability which was applicable before making of Constitution and ultimately the situation is that what was liability situation of Government at the time of enforcement of Government of India Act 1858, the same is liability situation of Union and States of India. Article 300 (1) of Constitution provides:

> "The government of India may sue and be sued by the name of the Union of India, and the government of a State may sue or be sued by the name of State and may, subject to any provisions which may be made by the Act of parliament or of the Legislature of such State enacted by virtue of powers conferred by the Constitution, sue or sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."

Previously it was believed that *P & O Steam Navigation Co. case* was only leading decision and thereby it was considered that sovereign immunity is available to state but then after it was identified that Madras and Bombay High Courts had decided for unavailability of sovereign immunity defence to state for act committed by state employees. Madras and Bombay High Courts decided that in all the situations except Act of State, if state employee committed tortuous act, state will have vicarious

7. AIR 1949 Bom 277

liability under Law of Tort. State is always abstract one, it has no mind, hands and feet of its own but it works through mind, hands and feet of its employees. Whenever it is stated that state done the particular act it is referring that act is committed through state employees. When wrongful act is committed by state employee in course of performance of his duties, certainly it is act committed by state, therefore, if employee committed wrongful act of course of employment means in course of performance of duty, state shall have liability but then after question arises whether sovereign immunity defence will be available to state or not and thereby state will be exonerated for liability or will have liability. With making of Constitution through Article 300 (1) it was cleared that Union of India and its states shall have liability for wrongs committed by state employees but in same manner as was the situation ultimately existing before enforcement of Government of India Act 1858 but due to different and contrary decision situation by Calcutta Supreme court, Madras and Bombay High Courts confusion was there regarding sovereign acts. When act was non-sovereign then it was clear that there shall be liability but for sovereign acts there was confusion. Calcutta Supreme Court decided that for sovereign act there shall be no liability but Madras and Bombay High court decided that there shall be liability. After Independence for the first time issue relating to sovereign immunity arose before Supreme Court in 1962 in *State of Rajasthan v. Vidhyawati*[8] and Court imposed liability on the state for negligent performance of duty by state employee. This case was decided by constitutional bench of Supreme Court. In this case a vehicle was in service of Collector, Udaipur. Once, after repairing of vehicle driver was returning, he drove vehicle negligently and caused accident resulting into death of husband of widow who was respondent in this case. Supreme Court decided that after independence, if state will not be held liable, it will be injustice with the victim. Supreme Court observed that in England immunity to crown was based on old feudalistic concept; our country is democratic republican country with welfare and socialistic objectives, thereby application of sovereign immunity rule may only subject the victim to injustice; therefore State should be vicariously liable for wrongful acts committed by its employees in the same manner as it happens with common employer. *Vidhyawati case* was decided with similar line which was taken in *Secretary of State for India v. Hari Bhanji*

8. AIR 1962 SC 933

case. In *State of Rajasthan v. Vidhyawati* Supreme Court observed:

> "This case also meets the second branch of the argument that the State cannot be liable for the tortious acts of its servants, when such servants are engaged on an activity connected with the affairs of the State. In this connection it has to be remembered that under the Constitution we have established a welfare state, whose functions are not confined only to maintaining law and order, but extend to engaging in all activities including industry, public transport, state trading, to name only few of them. In so far as the State activities have such wide ramifications involving not only the use of sovereign powers but also its powers as employers in so many public sectors, it is too much to claim that the State should be immune from the consequences of tortious acts of its employees committed in course of their employment as such. .."

Again in 1965 issue relating to liability of State arose before the Supreme Court in *Kasturilal Ralia Ram Jain v. State of UP*[9]and decided by constitutional bench but in this case *Vidhyawati case* was discussed without considering decision given in later case on sovereign immunity. Supreme Court differentiated case that present case is different from *Vidhyawati case*. At that time existing law on sovereign immunity was Supreme Court's verdict in the case of *State of Rajasthan v. Vidhyawati;* it was needed to be considered. In *Kasturilal Ralia Ram Jain case* Court decided that state has no liability for sovereign act; here in this reference Supreme Court accepted case decision given in *P & o Steam Navigation Co. v. Secretary of state for India*. This case was decided by constitutional bench of Supreme Court. *Kasturilal case* decision has never been changed, therefore, this decision forms law of land due to provisions contained in Article 141 of Constitution. According to this decision acts of state are divisible into sovereign and non-sovereign acts; state has liability for non-sovereign act, it has no liability for sovereign act. *Kasturilal case* laid down rule for Indian Law that state has sovereign immunity. In *Kasturilal Ralia Ram Jain case* plaintiff was jewelers' firm doing business in Amritsar. One partner in connection with business was in Meerut at the

9. AIR 1965 SC 1039

time being concerned. He was arrested and a larger quantity of silver and gold found in his possession was seized. Seized articles were kept in *Malkhana*. Partner of Firm was released from custody and silver was returned but gold could not be returned because police personnel in charge of *Malkhana* misappropriated and fled to Pakistan. Supreme Court decided that arrest, seizure and keeping material in *Malkhana* are sovereign functions and for sovereign acts state cannot be held liable. *Kasturilal Ralia Ram Jain* case was decided in consonance with *P & O Steam Navigation Co Case* decision.

Kasturilal Ralia Ram Jain case ratio was never overruled, therefore, law relating to state liability is still the same which was laid down in this case but with passing time it has been identified that state actions have increased manifold and these are affecting life, liberty and property of common citizenry and justice requires that state should be held liable. Supreme Court has not overruled *Kasturilal Ralia Ram Jain case ratio* but on some other ground cases are decided for providing justice to injured person. Further in Fundamental right case violation sovereign immunity rule is not applicable. Fundamental rights are always available against state, and further. Fundamental rights are available against legislative and executive actions. If sovereign immunity is applied in case of fundamental right then fundamental right conferment will have no meaning. Therefore sovereign immunity rule is inapplicable in case of fundamental violation. Now days ambit of fundamental rights is expanding and majority of acts committed by state employees causing injuries to citizenry are treated as fundamental rights violation and in this case sovereign immunity rule is inapplicable, and thereby, state has no defence and held vicariously liable for tortuous acts committed by its employees. For sake justice by using aforesaid two measures, even though sovereign immunity is available to Union of India and States in Union of India but Courts have relaxed strictness of sovereign immunity rule.

In *State of Gujrat v Memon Mahomed Haji Hasam*[10] two trucks and a station wagon belonging to respondent were seized by custom authorities of State of Junagarh under Junagarh State Sea Customs Act but not properly kept. State of Junagarh was merged in State of Saurashtra and then after State of Gujarat. Vehicles were kept in improper way outside

10. AIR 1967 SC 1885

police station and then it became mere scrap and sold off. Money obtained from sale was paid to one creditor. Supreme Court decided that Seizure was illegal and it was not permitted in law and when seizure was illegal, there arose bailment. State was held liable to return the goods or in alternative pay the value. In case of *Smt. Basava Kom Dyamogonda Patil v. State of Mysore*[11] there was a theft in house of appellant in 1958 and ornaments and cash were stolen. In raid by police in the places belonging to accused persons some articles belonging to appellant were recovered and seized. Those seized articles were produced before the Magistrate. Magistrate directed to police to keep the material properly in safe custody to get verified and valued by goldsmith. In a trunk the seized articles were kept and placed in guard room. Later on when trunk was opened on direction of magistrate to return to appellant, in the trunk only stones were found. The seized articles lost while it was kept in guard room. Court ordered to pay value of property to the owner on the ground that seizure of property by police amounts to entrustment of property to the Government and now it is needed to be returned. When these cases are compared with *Kasturilal Ralia Ram Jain case,* then it is clear that facts are similar but without overruling *ratio of Kasturilal case* ground of decision was changed.

In case of fundamental right violation, sovereign immunity rule is inapplicable. When fundamental right is violated by state employees, Union of India or State in Union, as the case may be, is liable. High Court and Supreme Court usually give liberal interpretation for giving justice to common citizenry as and when state employees commit wrongful act causing injury and ambit fundamental rights is widened. Hereby, sovereign immunity available to state is shrinking and government is becoming more and more liable. In *Bhim Singh v. State of J&K*[12] appellant was sitting MLA of J&K; he was suspended from Assembly during Budget Session, he filed petition before High Court which stayed suspension order. Government was determined to prevent the MLA from attending Assembly Session to be held on 11th September 1985; when MLA was proceeding towards Shrinagar in the night of 9 - 10 September, he was arrested by police officer on pretext of one FIR filed under Section 153-A Ranbir

11. AIR 1977 SC 1749
12. AIR 1986 SC 494

Code for giving provocative speech in Jammu on 8th September. His whereabouts were not known to any person; his wife filed present writ petition before Supreme Court. Supreme Court issued notice to state of Jammu and Kashmir and police officers. Police produced Mr. Bhim Singh before the Magistrate on 14th September 1985 and it was much delay to constitutional and statutory requirements to produce arrestee before magistrate within 24 hour. Bhim Singh was granted bail and released on 16th September 1985 by Additional Session Judge, Jammu. Supreme Court decided that it was violation of fundamental right contained in article 21 of Constitution and Court directed State Government to pay the compensation. Supreme Court observed:

> "When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation. We consider this an appropriate case. We direct the first respondent, the State of Jammu and Kashmir to pay to Shri Bhim Singh a sum of Rs. 50,000/- within two months from today. The amount will be deposited with the Registrar of this court and paid to Shri Bhim Singh."

In *State of Andhra Pradesh v. Challa Ramakrishna Reddy*[13] a person was under-trial prisoner, he died as bomb was thrown in his cell. In suit by the dependents of deceased against the state, it was found that jail authorities were negligent in properly guarding jail in spite of warning that some miscreants were likely to make an attempt on life of the prisoner. Court decided that sovereign immunity rule has no application in this case as it was case of violation of fundamental right contained in Article 21 of Constitution. Further, Supreme Court decided that the claim is not defeated on the fact that it was brought through filing of suit and not though petition under Article 32 or 226 of Constitution.

In *N. Nagendra Rao & Co. v. state of A. P.*[14] supreme Court opined

13. AIR 2000 SC 2083
14. AIR 1994 SC

that sovereign immunity concept is older and feudal, presently State is responsible state which cannot be permitted to affect life and property of citizen and then take immunity from liabilities on the basis of sovereign immunity. In this case Supreme Court observed:

> "But there the immunity ends. No civilized system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the state above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the state without any remedy…In welfare state, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even martial. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression f crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity…"

In strict liability cases also sovereign immunity is inapplicable. Whenever Government employee commits any tortuous act causing imposition of strict liability, Government cannot be permitted to take sovereign immunity defence. Violations of fundamental rights are considered as strict liability cases. Custodial violence is considered one of such strict liability wrongful act. No doubt after payment of compensation state may make reimbursement of amount paid by it. In calculation of compensation compensatory considerations should be considered rather than punitive considerations. In *D K Basu v. State of W. Bengal*[15] Supreme Court observed:

> "Thus to sum up, it is now a well accepted proposition in

15. AIR 1997 SC 610

> most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the state is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the state, which shall have the right to be indemnified by the wrongdoer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element…"

In case of custodial violence, if it is established that custodial violence was committed resulting into death of person in the custody but yet case is pending before the court to determine who committed custodial violence; in such situation Supreme Court directed in *Amol Vithalro Kadu v. State of Maharashtra*[16] that state shall pay compensation and when wrongdoer is identified through proving of case state may recover back the amount paid by it from the guilty police officer. The case was relating to custodial death which took place in *Nanded*. Writ petition was filed before High Court which directed State to pay compensation of seven lakh rupees to dependents. Further, High Court directed to realize amount from officer in charge of police station. Officer in charge of police station challenged order of High Court before the Supreme Court. Supreme Court decided that in case of custodial violence which is strict liability case, sovereign immunity defence is not available to state. State is mandatorily bound to compensate the victim but after payment of compensation state has right to be indemnified by wrongdoer. Further, court has jurisdiction to impose liability directly on guilty employee. Employee is wrongdoer, thereby, he has personal liability also. In this case liability was not yet decided but High Court ordered to pay the compensation and recover back the amount from the in-charge of police station. Supreme Court decided that state shall pay the compensation and when liability for the crime in question is decided, the state shall be at liberty to recover the amount of compensation from the concerned erring officials.

16. AIR 2019 SC 218

V. CONCLUSION

Previously state was police state and it was doing only acts relating to maintaining peace in the society and protection of state from external aggressions. For these acts always there was/is need of freedom to state for doing various kinds of acts without any kind of restrictions and hindrances. In those days for providing freedom to state in taking actions and avoiding interferences in state actions, concept of sovereign immunity was developed. Further, states were ruled through feudal considerations in which absolute powers of governance were concentrated in ruler. In those days concept of sovereign immunity was provided and developed to its zenith which might be useful too. But same rule cannot be used in changed situation of governance in the present era of democratic, welfare state and governance concept. Now state is democratic state and various rights are conferred on citizenry. Further, now state is welfare state and it has duties to function for protection of person and property of citizenry. State which has duty to protect interest of citizenry cannot infringe rights of citizens and then after claim that it should not be liable and for this purpose give rationalization of sovereign immunity. Now state is not only maintain peace and actions against external aggressions but also acts variously affecting every aspect of life of every person; in such situation, if government will not be responsible for acts committed by its employees, the whole citizenry, the all concepts of justice and state itself shall be completely and adversely affected. Now sovereign immunity is permissible only for inalienable acts like administration of justice, internal and external security; for these acts whole through the history immunity has been available to State, even presently sovereign immunity is available for such acts. But state has no immunity for the acts other than aforesaid inalienable acts; State has vicarious liability for tortuous acts committed by its employees. Sovereign immunity concept has changed and it will change with change in concept of state and state actions. Such change is necessary for responsible and responsive state and governance. State should be responsible and responsive state, therefore complete immunity may not be proper but at the same time if immunity is completely taken away it may cause greater problem for various basic state activities; there is need to make balance. State should have limited immunity for proper performance of basic state functions but at the same time it should have vicarious liability for torts by its employees in reference to other functions to make responsible and responsive state and for protection of common citizenry.

■

CLINICAL TRIAL AND RIGHT TO HEALTH : A CRITICAL ANALYSIS

J.P.RAI*

ABSTRACT : Foreign pharmaceutical companies had turned to India as a drug research opportunity by taking advantage of the vast population and loose regulatory system. It is the duty of the State to protect and improve the health of its citizens as the right to health is fundamental right of every citizen. But, when the State allows in its premises the unethical and inadequate clinical trials to be conducted, it violates the very fundamental right to health of the citizens.

KEY WORDS : Clinical Trial, Right to Health, Informed Consent, Right to Life, Covid-19, Development of Medicines, Pharmaceutics

I. INTRODUCTION

Right to life and good health is a fundamental right[1] and it cannot be ensured until there is availability of medicines and other medical facilities. Medicines play a vital role in the promotion of physical health and welfare. A medicine either helps to prevent certain illnesses, or it serves as a treatment that may reduce the suffering of individuals faced with certain illnesses.[2]

Man has been confronting with the callousness of nature and tried

---

* LL.M. (Gold Medalist), Ph.D., Professor, Faculty of Law, BHU, Varanasi-221005. Author can be reached at <jprailawschool@gmail.com>

1. Indian Constitution does not expressly recognize the fundamental right to health. However, Article 21 should be read with Articles 38, 42, 43, and 47 to understand the nature of the obligation of the State in order to ensure the effective realization of this right.

2. Farida Lada, *"On Guarding the Welfare of Clinical Trial Subjects while Promoting Novel Drug Innovation"* 2016 Boekenplan Naastricht, pg12, Available at www.boekenplan.nl, visited on Nov 22, 2020

to overcome all type of disasters and more specifically health related concerns. Two ancient Indian scripts *Charaka Samhita* (a text of medicine) and *Sushruta Samhita* (a text of book of surgery), complied as early as 200 B.C. and 200 A.D. respectively shows that medical research is not a new concept for India. However, a lot has transformed in the clinical research scenario since then. Currently, estimated at 500 million US Dollar, India's clinical research market has estimated to cross one billion US Dollar mark driven by favourable reasons like diverse and accessible population, availability of low cost and effective resources.[3]

Clinical trials are crucial for the development of new medicines, treatments or medical devices. Carefully conducted clinical trials are the fastest and safest way to find treatments that work in people and way to improve health.[4] It includes pre-clinical experimentation on micro-organisms and animals, filing for controlling status for an investigational recent medicine to initiate clinical trials on humans, and may include the step of obtaining controlling acquiescence with a recent medicine request to market the medicine. A clinical trial for a specific drug takes nearly 9 to 10 years to reach the completion stage.

In recent years, the nature of clinical trials has changed considerably. An increased emphasis has been placed on cost-effectiveness of

---

3. Dr. Lily Srivastava, *"Clinical Research Law, Ethics and Techno-Science"* Available on https://ujala.uk.gov.in/files/Lilly.pdf, pg1, visited on Sept 08, 2020.

4. *Supra* note 3. Clinical trials are designed to test the safety and efficacy of new drugs in humans. Introducing new drugs in humans clearly involves risks to the subjects; however, without exposing subjects to such risks, innovation in medicine and access to new drugs would not be possible. Clinical trial subjects may be faced with possible physical harm, psychological harm, social harm or economic harm. A balance between the possibility of harm and the possibility of benefit to the subjects must be established in order to proceed with a given trial. To ensure an acceptable balance, the design and conduct of clinical trials, with the intention of bringing a product to market, must necessarily consider four elements: (i)The scientific design of the clinical trial must be consistent with sound research design, such that the trial will yield valid data in a most effective manner, which requires adequate scientific review by regulatory agency approving conduct of trial; (ii)The proposed procedures do not unnecessarily expose subjects to risk; and potential benefits outweigh the potential risks, which requires adequate ethics committee oversight; (iii) The clinical trial must be monitored in order to ensure compliance with applicable regulations and ethical guidelines; and (iv) Consequences of non-compliance and rewards for ensuring compliance must be considered.

pharmaceutical Research & Development (R&D), as well as increased productivity to maintain the high output. Consequently, the pharmaceutical industry has witnessed rapid expansion of outsourced clinical services in both the West and in developing nations, most notably India and China. Importantly, pharmaceutical and biotechnological companies are increasingly delegating the responsibility of clinical trials to Contract Research Organizations (CROs).[5]This rapid expansion of outsourced clinical services has given birth to a number of health-related issues because clinical trial and right to health are closely related. They are two sides of the same coin. It has convinced the conduct of unethical clinical trials. The clinical trial misconducts infringe the right to health. Failure of a government to provide a clinical trial subject the safe clinical trial environment and to avoid the clinical trial misconduct results in violation of the patient's right to health and life.

The role of controlling bodies in clinical trials is to ensure quality medicine supply and maintaining physical health and well-being of trial participants. Main controlling bodies in India are Indian Council of Medical Research[6], Central Drugs Standard Control Organization (CDSCO)[7], The National Pharmaceutical Pricing Authority (NPPA)[8] and Drugs Technical

---

5. Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2952305/, visited on Dec 22, 2020.
6. Available at https://en.wikipedia.org/wiki/Indian_Council_of_Medical_Research, visited on Oct 10, 2020. The Indian Council of Medical Research the apex body in India for the formulation, coordination and promotion of biomedical experimentation, is one of the oldest and largest medical experimentation bodies in the world.
7. Available at https://en.wikipedia.org/wiki/Central_Drugs_Standard_Control_Organisation, visited on Sept 10, 20. The Central Drugs Standard Control Organisation under the Ministry of Health and Family Welfare (headed by the Drug Controller General of India) develops standards and controlling measures for medicines, diagnostics and devices; lays down controlling measures; and regulates the market authorisation of recent medicines as per the Drugs and Cosmetics Act.
8. Available at https://en.wikipedia.org/wiki/National_Pharmaceutical_Pricing_Authority, visited on Oct 09, 2020. The Department of Chemical and Petrochemicals of Ministry of Chemicals and Fertilisers, through National Pharmaceutical Pricing Authority (NPPA) set the prices of medicines; maintains data on production, exports and imports; and enforces and monitors the supply of medicines and also gives opinions to Parliament on the related issues.

Advisory Board (DTAB)[9].

This paper makes an attempt to critically analyse conduct of clinical trial *vis-à-vis* right to health in India and efficacy of present legal framework providing protection to the right to health.

II. PHASES OF CLINICAL TRIAL

Clinical Research is one of the major steps in the development of new drugs to address diseases. Clinical trials spend almost 70% of time and money of new drug growth, to be generally conducted in four phases.

Phase I is the test of an experimental drug/treatment in a small group of healthy volunteers (20-80) for the first time to assess its safety, determine a safe dosage range, and identify side effects. Its objects are to study metabolic & excretory pathways (impinges on toxicity testing in animals), variability between individuals, effect of route, bioavailability and tolerated dose range. It also gives clue of therapeutic effects & side effects.[10]*Phase II* clinical trials are performed on larger groups (up to about 300 subjects) and are designed to assess the efficacy of the drug in humans having the disease or medical condition to determine whether the drug has some level of therapeutic effect. It often involves comparison of the experimental drug to either a placebo (an inactive substance) or another drug.[11] It gives indication for use as per the type of patients, severity of disease, dose range, schedule & increment, nature of side effects & severity.[12] In *Phase III*, the experimental drug/treatment is given to larger groups of patients (1000-3000) at multiple sites/centres to assess its effectiveness, examine side effects, compare it to commonly used treatments (therapeutic benefits), and collect information that will permit the experimental drug or treatment to be used safely. These are long term studies on patients to determine whether the drug will be truly effective

9. DTAB is highest statutory decision-making body on technical matters related to drugs in the country. It is constituted as per the Drugs and Cosmetics Act, 1940. It is part of Central Drugs Standard Control Organization (CDSCO) in the Ministry of Health and Family Welfare. It provides technical guidance to the CDSCO.
10. Surbhi Saraf Deodia, G.R.Soni, V.R.Kashyap, N.K.Jain, *"Clinical Trials: An Overview of Global Standards and Indian Scenario"* Indian Journal of Pharmaceutical Education & Research 44(2), Apr-June, 2010, pg2.
11. *Supra* note 3.
12. *Supra* note 11.

in normal medical settings.[13]

Upon successful completion of phase III clinical trials, the pharmaceutical company may submit a New Drug Application (NDA), approval of which would result in permission to bring the drug to market. Regulatory Approval demands safety, quality and efficacy of product. The Regulatory body approves protocols, examines data and grants clinical trials certificate if volunteer and animal data are satisfactory and once all clinical data has been submitted, reviewed and approval is granted, the product gets license to be launched in market.

In *Phase IV,* post-marketing surveillance generates additional information including the drug's risks, benefits, and optimal use, detects drug interactions, any rare or long-term adverse effects over a much larger patient population and longer time period. Any harmful effect discovered, may result in a drug being no longer sold, or restricted to certain uses.[14]

III. ETHICS IN CLINICAL RESEARCH

Ethical standards for the conduct of clinical trials emerged as a result of abuses of research subjects through unethical experimentation. The first such code of ethics was delineated in the Nuremburg Code[15], which was published in 1947 primarily as a result of harmful and often deadly experiments conducted by German physicians on concentration camp prisoners during World War II.

Most basic and complex principle of clinical research ethics is informed consent. The theory of informed consent forms the backbone of all ethical guidelines for medical experimentation with humans. The consent obtained after informing all the vital material facts to the research participant is known as informed consent. An ethically valid informed consent has four key components: disclosure, understanding, voluntariness, and competence.[16]

---

13. *Ibid*.
14. *Ibid*.
15. Available at http://www.jewishvirtuallibrary.org/jsource/Holocaust/Nuremberg_Code.html, visited on Oct 29, 20202
16. Available at https://www.emedicinehealth.com/informed_consent/article_em.htm, visited on Dec 11, 2020

Clinical trials are fundamentally different from clinical practice. In clinical practice, proven and routine treatment is used. However, evidence must be collected in clinical trials for treatment to become routine. The main objective of the clinical practice done by medical professionals is to bring some good or welfare to the patient. On the other hand, clinical trial is non-therapeutic and does not presume to benefit or help in curing the ailment of the patient participant. Trial is carried out in the presumption of anticipated benefits that its outcome may bring benefits to future patients. In majority of cases the clinical trial is non-therapeutic, only in minimum cases it aims at treating the research participant and to bring cure to his ailment.[17]

IV. CLINICAL TRIALS: GLOBAL LEGAL FRAMEWORK

Modern ethics in human experimentation mainly emerged after World War II, when Nazi physicians used prisoners for inhuman experiments. There are many international instruments that confer and safeguard the rights of participants in clinical trials.

1. Nuremberg Code, 1947[18] was the first modern effort by the international community to create instructions governing experimentation on humans. The standards on medical experimentation laid out by the

17. *Ibid*.

18. Available at https://dal.ca.libguides.com/c.php?g=256990&p=1717828, visited on August 23, 2020. The goal of the Code is to protect the rights of subjects and to prevent the horrific non-therapeutic, non-consensual medical experiments carried out by Nazi researchers during World War II from recurring. The code consists of ten principles: 1. Anyone participating in an experiment must give informed assent. 2. The experiment should be of a nature which provides fruitful results for the betterment of society, unobtainable by other ways, and not random and unnecessary in nature. 3. The experimentation should be designed on the basis of the results of clinical trials on animals and knowledge of the natural background of the disease or other problem under research, that the anticipated results will justify the performance of the experiment. 4. The experiment should be conducted in a manner to avoid all unintended physical and mental injury. 5. If there is any reason to believe that death or disability injury will occur, researcher should not conduct any experiment. 6. The risk level should not cross the limit that determined by the humanitarian importance of the problem to be solved by the experiment. 7. There should be proper preparations and adequate facilities to protect the experimental subject from even remote probability of injury, disability, or death. 8. Only scientifically qualified persons are eligible to conduct an experiment. The highest degree of skill and care should be taken through all

Nuremberg Tribunal in *United States* v. *Karl Brandt*[19] (Nuremberg trials) have come to be known as the Nuremberg Code. Although not a binding international treaty, the Nuremberg Code became the first international standard defining permissible medical experiments.

2. Declaration of Helsinki, 1964[20] (first international regulation written by physicians for physicians) by the World Medical Association (WMA) spells out a cornerstone document on human experimentation ethics. Along with requirement of free consent and trial primarily on non-vulnerable populations, Declaration has shown a focus on adequate compensation and treatment for subjects who are harmed as a result of participating in the experimentation.[21] The Declaration of Helsinki is generally referred as a guide for many other ethical frameworks.

3. International Covenant on Civil and Political Rights (ICCPR), 1966 seriously focused on human rights in clinical trials. According to this covenant, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishments. In particular, no one shall be subjected without his free assent to medical or scientific experimentation.[22]

---

stages of the experiment. 9. While conducting the experiment, the human subject should be at liberty to bring the experiment to an end, if he has reached the physical or mental state, where continuation of the experiment seemed to him to be impossible. 10. During the course of the experiment, the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of the good faith, superior skill and careful judgment required of him, that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.

19. Nov. 21, 1946 - Aug. 20, 1947. In Nuremberg trials, Nazi doctors were convicted of the crimes committed during human experiments on concentration camp prisoners.
20. Available at https://www.who.int/bulletin/archives/79(4)373.pdf, visited on August 28, 2020. The Declaration of Helsinki lays out the basic principle that *"In any experimentation on human beings, each potential subject must be adequately informed of the aims, methods, anticipated benefits and potential hazards of the research and the discomfort it may entail. He or she should be informed that he or she is at liberty to abstain from participation in the research and that he or she is free to withdraw his or her assent to participation at any time."*
21. Article 15, Declaration of Helsinki, (Amendment 2013)
22. Article 7 of the International Covenant on Civil and Political Rights, 1966

4. Council[23] of the International Organization of Medical Sciences (CIOMS) Guidelines 1982[24] are the first to regulate specifically how researchers funded by developed countries perform experiments with subjects in developing nations.[25] The Guidelines identify 26 separate items of statistics, an investigator must provide to trial participants before getting their informed consent. These Guidelines also provide participants right to free treatment for injuries caused during experimentation and the right to compensation for accidental injury resulting from the trial.

5. Convention on Human Rights and Biomedicine (CHRB), 1997, adopted by Europe, is a transnational instrument aimed to protect human right in the specific field of biomedical experimentation, genetics, and physical health care. It is a unique legal instrument, with power to hold responsible the ratifying states that do not comply with the minimum level of protection conferred to human rights regarding biology, medicine and physical health care. CHRB became the first legally binding international treaty to govern human experimentation.[26]

6. Good Clinical Practices[27] (ICH-GCP) 1997 is an internationally recognised ethical and scientific quality standard set containing thirteen principles for formulating, conducting, recording and reporting clinical

---

23. The Council for International Organizations of Medical Sciences (CIOMS) was established jointly by the WHO and the UNESCO in 1949 as an international, nongovernmental, non-profit organization and now includes 45 international, national, and associate member organizations, representing many of the biomedical disciplines, national academies of sciences, and medical experimentation councils.
24. The International Ethical Guidelines for Biomedical Research Involving Human Subjects (which were developed in conjunction with the WHO and superseded the Proposed Ethical Guidelines) were published in 1993, and were updated in 2002. The goal of the Guidelines is to support and help implement the ethical principles of the Helsinki Declaration, particularly in developing countries, given their socioeconomic circumstances, laws and rules, and executive and administrative arrangements.
25. The CIOMS Guidelines define externally sponsored research as "research undertaken in a host country but sponsored, financed, and sometimes wholly or partly carried out by an external international or national agency." at Guideline 15.
26. Article 1(2) of CHRB
27. Good Clinical Practice instructions (GCPs) were formulated by the International Conference on Harmonization (ICH), which was established in 1990 and is a partnership between government regulators and industry brought together to rationalize and harmonize regulation of pharmaceuticals.

trials which involve the human subjects. Sponsors, investigators, the ethics committees and any clinical experimentation organizations which are involved in the clinical trial are obliged to follow the relative GCP standard irrespective of the size of trial or the conditions of subjects.

V. CLINICAL TRIAL & RIGHT TO HEALTH: INDIAN LEGAL FRAMEWORK

There are several laws which provide for the rights of clinical trial subject and the liability of the researcher can be fixed under them.

(a) Constitution of India –The constitutional provision for right to health is not very explicit but the Supreme Court of India, through its progressive interpretation of the Constitution has effectively included the right to health as an integral part of the right to life under Article 21. The Supreme Court has held that the right to live with human dignity, enshrined in Article 21, derives from the Directive Principles of State Policy and therefore includes protection of health.[28] Further, it has also been held that the right to health is integral to the right to life and the government has a constitutional obligation to provide health facilities.[29] Similarly, the Court has upheld the State's obligation to maintain health services.[30]

Articles 15(3), 21, 24, 38, 39 (e) and (f), 41, 42, 47, 243G[31] of Indian Constitution impose liability on the government to ensure a social order for the betterment and welfare of the individuals who are coming in contact with the health care sector. Under these provisions, the State is mandated to perform or to direct its policies to secure the citizens against exploitation in one form or the other. Thus, right from the national level

28. *Bandhua Mukti Morcha* v. *Union of India,* AIR 1984 SC 802
29. *State of Punjab* v. *Mohinder Singh Chawla,* (1997) 2 SCC 83
30. *State of Punjab* v. *Ram Lubhaya Bagga,* (1998) 4 SCC 117
31. Article 243G says there may be proper legislations empowering the panchayats with essential power and authority with regard to issues mentioned in the eleventh Schedule, specifically relating to health, women and child development. It is within the duty of the panchayaths to take care of women and child care and development, family welfare, Primary health centers and dispensaries, welfare of the society, Public health, safeguarding the interest of weaker sections of society, Vital statistics including registration of deaths etc. The village panchayats have the power and authority to function as units of self-government by the 73rd Amendment Act of 1992 and part IX of the constitution was inserted titled "The Panchayats" giving significant implications for the health sector.

to the grassroots level, the State is liable to improve and protect the public health.

(b) Law of Contract - The principle of informed consent transforms the essence of the doctor-patient fiduciary relationship to a contractual one to promote individual autonomy and freedom of choice by making the researcher to give the research subject all knowledge that make him an equal bargaining partner. The connection between a person doing the research and his research subject is a contractual one. A contract between parties who are competent gives rise to contractual obligations.

(c) Law of Crimes - To touch someone or to administer to them a noxious substance, without their consent is a criminal offence. Any treatment or procedure carried out on an individual in the absence of consent of the research subject, could amount to a criminal offence, unless it is done in good faith for the benefit of a person. In cases of serious injury, the doctor may be charged under Sections 336,337 or 338, I.P.C.[32] If death occurs, the researcher may be prosecuted under Section 304A IPC.

(d) Law of Torts - Presently, the judicial interpretations throughout the world follows the principle that if informed consent is not obtained properly or material facts relating to the research are not disclosed to the research subject, it ends ups as a liability in negligence. The duty arises from the relationship between the researcher and the subject. When the researcher doesn't confirm the professional standard of care required from a reasonable and professional researcher, it leads to breach of duty.

(e) Drugs and Cosmetics Act, 1940 regulates the import, manufacture and distribution of drugs in the country to ensure that drugs and cosmetics sold in the country are safe, effective and conform to essential quality standards. Under the Act, the Drugs Technical Advisory Board (DTAB) and the Drug Consultative Committee (DCC) have been created. The DTAB consists of the experts who advise central and state governments on technical areas of drug regulations. The DCC ensures drug control measures all over India and has central and state drug control officials as it members.[33]

---

32. Indian Penal Code, 1860
33. Kalindi Naik, *"Clinical Trials in India: History, Current Regulations and Future Consideration"* (2017), School of Health Science, Eastern Michigan University, Ypsilanti, Michigan, pg10

(f) Schedule Y of Drugs and Cosmetic Rules, 1945 forms the basis of medical research's legal frame work. Schedule Y applies to medical research to test the efficacy of new drugs. In January 2005, the Government of India introduced a rule which allows foreign pharmaceuticals and other interested parties to conduct medical research for finding out and testing the efficacy of a newly introduced medicine in India. Latest Rule 2020 has been discussed later on.

(g) National Ethical Guidelines on Medical Research- There are general as well as specific ethical guidelines applicable to medical research consisting of human research subjects. These non-binding instruments are issued by those organizations which does a national oversight role for human subject research. The Ethical Guidelines for Social Science Research (2000)[34], Good Clinical Practices for Medical Research in India (2001)[35], Guidelines for Stem Cell Research and Therapy (2017)[36] are some such guidelines providing for different aspects of clinical trial in India.

VI. CLINICAL TRIAL: JUDICIAL APPROACH

Indian judiciary has played a very important role in dealing with the

34. Available at https://www.jstor.org/stable/4409050, visited on Sept. 14, 2020. All technological and scientific pursuits, inclusive of those conducted by the social scientists, involving of human beings as research subject have an effect on human beings or on the society and the environment at large. Taking into account all these factors it is essential that scientists/researchers look into the ethical issues and the aftermath of their scientific actions and act accordingly. The guidelines give an ethical background based on moral or normative principles that are relevant for ethical conduct of medical research in India.

35. Available at https://rgcb.res.in/documents/Good-Clinical-Practice-Guideline.pdf., visited on Nov 23, 2020. Good Clinical Practice (GCP) refers to an international quality standard for the purpose of regulating clinical trials that involve human research participants. GCP criteria offer guarantee as to the effect and safety of compounds developed in medical research, protection of basic human rights, and also define the responsibilities of the of medical researchers, clinical trial sponsors and clinical research associates.

36. Available at https://www.researchgate.net/publication/333718239_The_National_Guidelines_for_Stem_Cell_Research_2017_What_ academicians_need_to_know, visited on Nov 21, 2020. ICMR and DBT, GoI have formulated certain guidelines to regulate Stem Cell Research and Therapy (SCRT) mentioning that the stem cell Research can be conducted when it is essentially a research with potential health benefits.

cases relating to the clinical trial and health related issues. In ***I**ndian Medical Association* v. *V.P. Shantha*[37], the Supreme Court had an occasion to remark whether the doctrine of informed assent could be applied in India at all and the Court said that the stark reality is that for a vast majority in the country, the concepts of informed assent or any form of assent, and choice in treatment, have no meaning or relevance.[38] The judgment in *Democratic Women Association* v. *Union of India*[39] is important because the Supreme Court first time took note of the fact that there was violation of the clinical trial guidelines and a symbolic acquiescence that the Courts would not tolerate such malpractices. In *Rahul Dutta* v. *Union of India*[40], the Court came down hard on pharmaceutical companies for flouting the norms on informed consent and causing the death of subjects who were not even aware of the fact that they were being used as guinea pigs. In *Samira Kohli* v. *Prabha Manchanda Dr.*[41], the Court differentiated between informed assent and real or valid assent.

In 2009, States of Andhra Pradesh and Gujarat experimented vaccine for Human Papilloma Virus (HPV) causing cervical cancer. Girls between 10 – 14 years were vaccinated during trial[42] but some died. So, trial was stopped starting an inquiry resulting in report of inadequate informed consent and consequent condemnation.[43] A Public Interest Litigation petition was filed in the Supreme Court by the women's health activists about the unethical advertisement of the vaccine in the private and the public sectors, violation of informed consent rules, and the demand to investigate the deaths and adverse events after the immunization.[44] The

37. 1995 (6) SCC 651
38. *Ibid,* para 37
39. (1998) 5 SCC 2144
40. WP No. 12280 of 2010. Available at http://elegalix.allahabadhighcourt.in/elegalix/WebShowJudgment.do, visited on Nov. 26, 2020.
41. 1(2008) CPJ 56 (SC).
42. G. Mudur, "Human papilloma virus vaccine project stirs controversy in India," BMJ 340 (2010)
43. 72ndParliamentary Committee Report, Department of Health Research, Ministry of Health and Family Welfare
44. "SC Notice on Vaccine Trials," The Telegraph (November 12, 2013).Available at http://www.telegraphindia.com/1131112/jsp/nation/story_17557096.jsp#.U00Bk1foCUk, visited on Nov 23, 2020

Court defined uncontrolled clinical trials of medicines on humans by multinational companies as havoc in the country, observing that the government had slipped into deep slumbers in addressing this menace.[45] The Court criticized the negligence of the Ministry of Health and Family Welfare and the Central Drugs Standard Control Organization (CDSCO) for not addressing the issue, and asked for urgent action. Complying with this order, on January 30, 2013, the government passed amendments to its regulation of clinical trials, providing, for example, easier access to compensation in case of injury or death by clarifying and broadening the category of trial-related injuries.[46]On January 9, 2014, the CDSCO published a draft of new guidelines on audio-visual recording of the informed consent process in clinical trials.[47]

In Swasthya AdhikarManch, Indore v. Minisry of Health and Family Welfares Case[48], a PIL was filed to stop unethical clinical trials in which many Bhopal Gas victims were used as guinea pigs. The Supreme Court of India recommended more stringent controls on the conduct of clinical trials in order to protect the rights of participants in such trials. In response to the SC's observations and directions, the Indian regulator, the Central Drugs Standard Control Organisation (CDSCO) introduced a slew of measures, some of which have been blamed for a significant drop in the number of clinical trials being conducted in India, with both domestic and foreign drug companies moving to alternate clinical trial sites.[49]

After *HPV vaccine* and *Swsthya Adhikar Manch* cases it can be said that the SC has raised a voice to protect helpless citizens from being used as guinea pig for clinical trial.

---

45. "SC raps govt slumber on illegal clinical trials," The New Indian Express (January 4, 2013). Available at http://newindianexpress.com/nation/article1406966.ece, visited on Dec 13, 2020
46. P. Chatterjee, "India tightens regulation of clinical trials to safeguard participants," British Medical Journal (2013), Vol. 346, f1275
47. Central Drugs Standard Control Organization, Directorate General of Health Services Ministry of Health & Family Welfare, Draft guidelines on Audio-visual recording of informed consent process in clinical trial, January 9, 2014.
48. Available at https://www.casemine.com/judgement/in/58117eca2713e179478bb3d4, visited on Dec 12, 2020
49. Roy Chaudhury R, Mehta D. Regulatory developments in the conduct of clinical trials in India. Glob Health Epidemiol Genom. 2016;1:e4. Published 2016 Feb 23. doi:10.1017/gheg.2015.5

VII. COVID-19: TRIALS FOR NEW DRUG & RIGHT TO HEALTH

The world is facing an unprecedented crisis. At its core is a global public health emergency on a scale not seen ever, requiring a global response with far-reaching consequences for our economic, social and political lives. The priority is to save lives. Countries are in a race to discover a new drug. The crucial question is 'when and what does it take to prepare an approved new drug and whether we have the correct parameters to conduct such clinical tests?'

The government, realizing the reasons for hesitancy of sponsors for new clinical trials, relaxed the regulatory passageways to conduct clinical trials in India. It relaxed the rules for marketing foreign drugs in India by introducing the New Drugs and Clinical Trials Rules, 2019.[50] On June 5, 2020, the Government of India again released Draft Rules, 2020[51], considering the growth of Covid-19, where they proposed an amendment to the Original Rules, 2019. Under this, the procedure of accelerated approval to manufacture or import a new drug has been added for "compassionate use". The compassionate use suggests that the dying patient can make a declaration through a medical officer to the Central Licensing Authority to import or to manufacture the unapproved drug in a limited quantity for that patient's use only, prohibiting sale in the domestic open market.[52] With the rapid increase in the numbers of corona virus-infected people, this makes the entire population subject to a trial-and-error method with zero responsibility of the sponsors or the doctors, and ensuring the administration of "on request drugs" are certainly not free.

VIII. CONCLUSION

The necessity of medical services in a society upturns the number of clinical researches carried out in a country. Clinical trials are the investigation analysis that explore whether a medical device, treatment or

---

50. Available at https://cdsco.gov.in/opencms/export/sites/CDSCO_WEB/Pdf-documents/NewDrugs_CTRules_2019.pdf, visited on Dec 16, 2020.
51. Available at https://www.indialegallive.com/top-news-of-the-day/covid-19-vaccine-rules-of-clinical-trials/., visited on Dec 12, 2020.
52. Saju Jacob, Nancy Shah and Ekta Bharathi, *"Covid-19 Vaccine: Rules of Clinical Trials"*, India Legal Bureau, July 11, 2020.

strategy is safe and effective for humans or not. The government is responsible for controlling oversight of clinical trials. It not only ensures that the medicines brought to market are safe and effective, but also that the clinical trials are carried out in a manner that protects the rights and welfare of experimentation subjects. Laws and rules governing clinical trials differ from nation to nation, but standard clinical trials share important criteria such as respect for subjects, strong scientific evidence, supervision by independent committees and compliance with appropriate laws and rules concerning experimentation on human subjects etc. Thus, to organize and carry out medical research, with human beings as research participants bear lots of issues that need to get converted into clear, definite and transparent regulatory frame work.

■

FREEDOM OF EXPRESSION, CONTEMPT PROCEEDINGS AND THE JUDICIAL INTERPRETATION

*SUKANTA K NANDA**

ABSTRACT : We know that Article 19 (1) of the Constitution guarantees freedom of speech and expression. The citizens as well as the press or the media people enjoy this freedom as the functioning of a true democracy is based on the active and intelligent participation of all. But such freedom enjoyed by the people and the press is not absolute, unlimited and unqualified. It is subject to certain restrictions as provided under Article 19(2) of the Constitution. Contempt of Court is one such restriction and this is subject to law made by the State. The Courts have been given wide powers to punish for contempt so as to protect the judiciary from being imputed with improper motives so that people do not lose faith in them. For this reason, the Parliament has conferred wide powers on judges to punish the contempt of court summarily with imprisonment or fine or with both. The contempt law constitutes a clear exception to the right of the freedom if speech and expression as provided under Article 19 (1) (a) of the Constitution.

KEY WORDS : Freedom of Expression, Contempt, Parliamentary Democracy, Punishment for Contempt, Dignity of the Court, Public Confidence, Contemnor, Administration of Justice.

I. INTRODUCTION

Freedom is essential and indispensable for the development of one's individuality and freedom of expression also is an important tool of Parliamentary Democracy. In our country this freedom is being used in very wide manner. The citizens as well as the press or the media people

* Professor-cum-Principal, Madhusudan Law College, (Utkal University), Cuttack, Odisha

enjoy this freedom as the functioning of a true democracy is based on the active and intelligent participation of all. In such an atmosphere every citizen also has a right to get the proper information so as to enable them to form a better opinion. Media plays an important role in keeping the people informed about what is happening around the world and also keep the people aware with the update information. But such freedom enjoyed by the people and the press is not absolute, unlimited and unqualified. It is subject to certain restrictions as provided under Article 19(2) of the Constitution. Contempt of Court is one such restriction and this is subject to law made by the State. Although with the commencement of the Constitution, the concept of the contempt of court was there but there was absence of a specific law on the subject. Accordingly, the courts were dealing issues relating to contempt proceedings when there was any act which was considered as derogatory to the judiciary, any act which tend to interfere in the administration of justice and any publication or conduct was responsible to shake the confidence of the people in the judicial system.

II. THE ACT OF 1971

After two decades of the Constitution came in to force, in the year 1971 , Parliament came out with the Contempt of Courts Act which aims to define and limit the power of certain courts in punishing contempt of courts. As per the provision of the Act, the contempt is of two types, civil or criminal and the Supreme Court and the High Courts are empowered to punish the contemnor for the contempt of the court. The Courts have been given wide powers to punish for contempt so as to protect the judiciary from being imputed with improper motives so that people do not lose faith in them. For this reason, the Parliament has conferred wide powers on judges to punish the contempt of court summarily with imprisonment or fine or with both. The contempt law constitutes a clear exception to the right of the freedom of speech and expression as provided under Article 19 (1) (a) of the Constitution. The Act provides that fair and accurate reporting of judicial proceedings and even fair criticism are not contempt of court. Therefore, while deciding such issues the court has to act with much precaution and with great circumspection. Only when the court is convinced that there is no way out and the contemnor deserves the punishment for his conduct, then the person committing the

mischief or the wrong can be punished.

If we go through provision of Section 2 (C) of the Contempt of Courts Act, as said by the Supreme Court, the proof of*mens rea* is not necessary. In fact, the effect or the tendency of the offending act constitute the main issue before punishing the offender. In Brahma *Prakash Sharma vs. State of U. P.*[1] the Supreme Court has held that if the publication and disparaging statement were calculated to interfere in the due curse of justice or proper administration of law by the court then it is a contempt which is considered a wrong done to the public and is punishable.Further, in *E.M.S.Namboodripad vs. T.Narayan Nambiar*[2]the Supreme Court held that the contempt law punishes not only acts which had in fact interfered with the courts and administration of justice, but also those which have a tendency that is to say, are likely to produce a particular case of lowering the prestige of the judges and the courts in the eyes of the court.

In the same case[3] where it was alleged that the contemnor used certain words against the judiciary, it was held that the words spoken amount to contempt. Accordingly rejecting the argument that in particular circumstances conduct of alleged contemnor may be protected by Article 19 (1) (a) of the Constitution; i.e. right to freedom of speech and expression , the court observed that the words of the second clause, of the same provision bring any existing law into operation, thus provisions of the Act of 1971 would come in to play and each case is to be examined in its own facts and the decision must be reached in the context of what was done or said. Further in *Vishram Singh Raghubanshi v State of U.P.*[4] the Court observed that "liberty of free expression is not to be confounded or confused with license to make unfounded allegations against any institution much less the judiciary".

III. POWERS OF THE SUPREME COURT

Besides being a Court of Record, the Supreme Court has the power to punish for contempt of itself. One question automatically comes, whether this power as conferred by Article 129 of the Constitution,

1. AIR 1954 SC 10
2 . AIR 1970 Sc 2015
3 . *E.M.S. Namboodripad v T. Narayanan Nambiar*, AIR 1970 SC 2015
4 . AIR 2011 SC 2275

includes the power to punish other courts subordinate to the Supreme Court. It is pertinent to mention here that Article 215 of the Constitution also confers similar powers on the High Courts. However, despite a specific provision for the High Courts, the Supreme Court in numerous decisions had made it clear that the powers conferred on it under Article 129 is wide enough to include the power to punish for contempt of courts or Tribunal subordinate to itself. Therefore, whenever the attention of the Supreme Court was drawn that anybody has done something or said something which tend to lower the dignity of the court and the court is satisfied that such actions actually amounts to contempt of the court, the Supreme Court by exercising its power under Article 129 of the Constitution has punished the contemnor. Further, the Supreme Court also intervened when the object of the contempt jurisdiction to safeguard the interests of the public is adversely affected, if the authority of the court is denigrated and public confidence in the administration of justice is weakened.

Coming to the case of Namboodripad[5] again, the Supreme Court held that the contempt law punishes not only acts which had in fact interfered with the courts and administration of justice, but also those which have a tendency to lower the prestige of judges and the courts in the eyes of the people. In the instant case Mr. E.M. Sankaran Namboodripad in 1967 when he was the Chief Minister of Kerala at a Press Conference made various critical remarks relating to the Judiciary. When the matter came to the High Court, the Court convicted the appellant for contempt of court and in an appeal to the Supreme Court against the conviction, the appellant contended that "the law of contempt must be read without encroaching upon the guarantee of freedom of speech and expression in Article 19(1) (a) and that the intention of the appellant in making his remarks at the press conference should be examined in the light of his political views which he was at liberty to put before the people."

Upholding the appellant's conviction, the Supreme Court was of the opinion that "the law punishes not only act which had in fact interferes with the courts and administration of justice but also those which have the tendency, that is to say, are likely to produce a particular result. Judged from the courts and administration of justice there was no doubt that the

5 . *E.M.S. Namboodripad v. T. Narayanan Nambiar*, AIR 1970 SC 2015

appellant was guilty if contempt of court and the likely effect of his words must be seen and they clearly had the effect of lowering the prestige of the judges and courts in the eyes of the people."

Observing that the changes made by the appellant that the judiciary as "an instrument of oppression" and the judges as "dominated by class hatred, class prejudices", "instinctively" favouring the rich against the poor, and the judiciary "works against workers, peasants and other sections of the working classes" and "the law and the system of judiciary essentially served the exploiting classes". amount to constitute contempt if court , the Supreme Court was of the view that" these words aim to draw a very distorted and poor picture of the judiciary , and it was clear that the appellant bore on attack upon judges which was calculated to raise the minds of the people a general dissatisfaction with an distrust of all judicial decisions and it awakened the authority of law and law courts". Holding the above view, the court went on to observe:

"While the spirit underlying Article 19 (1) (a) must have due play, the court could not overlook the provisions of the second clause of that Article. Its provisions are to be read with Article 129 and 215 which specially confer on this court and the High Courts the power to punish for contempt of themselves. Although Article 19 (1) (a) guarantees complete freedom of speech and expression, it also makes an exception in respect of contempt of court. While the right is essential to a free society, the Constitution has itself imposed restrictions in relation to contempt of court and it cannot therefore be said that the right abolishes the law of contempt or that attacks upon Judges and courts will be condoned."[6]

It is pertinent to mention here that the statement made by the appellant and subsequent conviction for contempt of court by apex Court was done before the Contempt of Courts Act, 1971 was enacted which termed such statements as criminal contempt.

IV. DELHI JUDICIAL SERVICE ASSOCIATION CASE

In *Delhi Judicial Service Association v. State of Gujarat*[7] five police

6. *E.M.S. Namboodripad v T. Narayanan Nambiar*, AIR 1970 SC 2015 at p. 2019
7. AIR 1991 SC 2176

officers were punished for assaulting, harassing and arresting a Chief Judicial Magistrate of the city of Nadiad in Gujarat on filmy grounds. He was also handcuffed, tied with rope and photographs were published by those police officers. These acts of the police officers were held constituted clear case of criminal contempt and it was also held that these were wide enough to include any act which would tend to interfere with administration of justice or which would lower the dignity and authority of the court. The contemnors contended that as Articles 129 and 215 demarcate the respective areas of jurisdiction, the apex Court has no power to indict them even if they are found to be guilty. Article 129 confines the apex Court to the contempt of itself and it has no power to indict a person for contempt of an inferior court and no constitutional or statutory power was there for the Supreme Court to take action for contempt of a Chief Judicial Magistrate, as it is a Court of Record.

The Supreme gave a wider interpretation of the provision contained in Article 129 and ruled that "under this provision it has 'power to punish or contempt not only of itself but also of High Courts and of the lower courts' and maintained that as a 'Court of Record' as laid down in Article 129, this is the inherent power of the court. The court was of the opinion that subordinate courts administer justice at the grass root level. Their protection is necessary to preserve the confidence of people in the efficacy of courts and to ensure unsullied flow of justice at its base level"[8]. Taking the misbehaviour of police officers seriously, they were held guilty of contempt of court and were punished accordingly.

The object of criminal proceedings is not to afford protection to the individual judges personally but to create confidence in the minds of the people while upholding the dignity of the institution of judiciary and judicial system. It is evident from the view of the Supreme Court in *C. Ravichandran Iyer v. A.M. Bhattacharjee*[9] which is as follows:

> "It is true that freedom of speech and expression guaranteed by Article 19 (1) (a) of the Constitution is one of the most precious liberties in any democracy. But equally important is the maintenance of respect for judicial independence which

8. *Delhi Judicial Service Association vs. State of Gujarat*, AIR 1991 Sc 2176 at p. 2200
9. (1995) 5 SCC 457

> alone would protect the life, liberty and reputation of the citizen. So, the nation's interest requires that criticism of judiciary must be measured, strictly rational, sober and proceed from the highest motives without being coloured by partisan spirit or pressure tactics or intimidator attitude. The court must, therefore, harmonic constitutional values of free criticism and the need for a fearless crucial process and presiding functionary, the judge. If freedom of expression subserve public interest in reasonable measure , public justice cannot gag it and manacle it; but if the court considered the attack on the judge or the judges scurrilous, offensive, intimidatory or malicious beyond condonable limits, the strong arm of the law must strike a blow on him who challenges the supremacy of the rule of law by fouling its source and stream. The power to punish the contemnor is, therefore, granted to the court not because judges need protection but because the citizens need an impartial and strong judiciary."[10]

V. VINAY CHANDRA MISHRA CASE

In *re: Vinay Chandra Mishra*[11], the contemnor, a Senior Advocate and Chairman, Bar Council of India misbehaved with a Judge of the Allahabad High Court during the hearing of a matter.When the matter went to the Supreme Court, the contemnor also raised the jurisdiction of the court under Article 129 and also the jurisdiction of High Court vested with identical and independent power of punishing for contempt of itself. Rejecting the objection of the contemnor, the Supreme Court said:

> "....Article 129 vests this court with the powers of the Court of Record including the power to punish for contempt of itself, it vests such powers in this court in its capacity as the highest court of record and also as a court charged with the appellate and superintending power over the lower courts and tribunals as detailed in the Constitution. To

10. *C. Ravichandran Iyer v A.M. Bhattacharjee*, (1995) 5 SCC 457 at p. 478
11. (1995) 2 SCC 584

> discharge its obligations as the custodian of administration of justice in the country and as the highest court imbued with supervisory and appellate jurisdiction over all the lower courts and tribunals, it is inherently deemed to have been entrusted with the power to see that the stream of justice in the country remains pure, that its course is not hindered or obstructed in any manner, that justice is delivered without fear or favour and for that purpose all the court and tribunals are protected while discharging their legitimate duties. To discharge this obligation, this court has to take cognizance of the deviation from the path of justice in the tribunals of land, and also of attempts to cause such deviations and obstruct the course of justice"[12].

Again observing that " when the Constitution vest this court with a special and specific power to take action for contempt not only of itself but of the lower courts and tribunals, for discharging its constitutional obligations as the highest custodian of justice in the land , that power is obviously coupled with a duty to protect all the limbs of the administration of justice from those whose actions create interference with or obstruction to the course of justice"[13] the Supreme Court found the contemnor guilty 'of the offence of criminal contempt of the court for having interfered with and obstructed the course of justice by trying to threaten, overawe and overbear the court by using insulting, disrespectful a d threatening language' and convicted him of the offence. Further, the court suspended him from practicing as an advocate for a period three years[14]and ordered to vacate him from all the elected and nominated office/ posts hold by him in his capacity as an advocate.

VI. CASE AGAINST THE CHIEF JUSTICE OF INDIA

Interestingly in *Dr. D.C.Saxena v The Chief Justice of India*[15]the

12. In *re: Vinay Chandra Mishra*, (1995) 2 SCC 584 at p. 603
13. Ibid; at p. 625
14. *Supreme Court Bar Association vs. Union of India*, (1998) 4 SCC 409. The Supreme Court revising its view in *re: Vinay Chandra Mishra* ruled that under Article 129 it has no power to suspend the practice license of an advocate held guilty of contempt of court.
15. (1996) 5 SCC 216

petitioner filed a writ petition in the Supreme Court in the public interest seeking to recover from P.V. Narasimha Rao, the them Prime Minister, the expenditure incurred for the private use of Indian Air Force aircraft and helicopters and consequential reliefs. The petition was summarily dismissed by a bench consisting Justice A.M. Ahmadi, the then Chief Justice if India and Justice S.C.Sen. The contemnor, again filed s second writ petition making the Chief Justice of India (Justice Ahmadi) , the respondent thereto. In his petition he prayed that it be declared that the respondent was unfit to hold the office of Chief Justice of India; that the respondent be stripped of his citizenship; that an F.I.R. be registered against the respondent for committing forgery and fraud; for a direction that the respondent prosecuted under the Prevention of Corruption Act and for other reliefs. This second petition was also dismissed as the petition had no merit. But taking into consideration the attitude of the petitioner and his persisted stand, the court thought it proper to initiate the proceedings to punish him for the contempt of court. After due deliberation, the court came to the conclusion that the conduct of the contemnor amounts to contempt of court. Thus, the court taking into consideration "the gravity of the contumacious statements, the recklessness with which they are made, the intemperateness of their language, the mode of their publication in a writ petition in this court and the alleged contemnous influential position in the society" the contemnor was held guilty of contempt of court and was punished accordingly.

VII. SUPREME COURT BAR ASSOCIATION CASE

In *Supreme Court Bar Association v Union of India*,[16] where the earlier order of the apex Court in *Re: Vinay Chandra Mishra*[17] was challenged, the issue before the Supreme Court was whether the punishment for established contempt of court committed by an advocate can include punishment to debar the concerned advocate from practice by suspending his license for specified period, in exercise of its power under Article 129 read with Article 142 of the Constitution of India.

It is pertinent to mention here that as discussed above, the Supreme Court while holding Vinay Chandra Mishra, Senior Advocate and Chairman,

16. (1998) 4 SCC 409
17. (1995) 2 SCC 584

Bar Council of India guilty of contempt in view of the gravity of contumacious conduct of the contemnor, the court by evoking the power under Article 129 read with Article 142 of the Constitution convicted him guilty of contempt and awarded punishment and also suspended his license to practice for three years.

While assailing the correctness of the above finding, the learned counsels in the *Supreme Court Bar Association case*[18] submitted that powers conferred on this court by Article 142 , though very wide in their attitude, can be exercised only to " do complete justice in any case or cause pending before it " and since the issue of 'professional misconduct' is not the subject matter of "any cause" pending before this court while dealing with a case of contempt of court it could not make any order either under Article 142 or 129 to suspend the license of an advocate contemnor, for which punishment statutory provisions otherwise exists. Further, according to the learned counsel, a court of Record under Article 129 of the Constitution does not have any power to suspend the license of a lawyer to practice because that it is not a punishment which can be imposed under its jurisdiction to punish for contempt of court and that Article 142 of the Constitution cannot also be pressed in to aid to make an order which has the effect of assuming "jurisdiction which expressly vests in another statutory body constituted under Advocates Act, 1961".

Thus, overruling its order given in In *re: Vinay Chandra Mishra*[19] the Supreme Court observed that " we are of the opinion that this court cannot in exercise of its jurisdiction under Article 142 read with Article 129 of the Constitution, while punishing a contemnor for committing contempt of court , also impose a punishment of suspending his license to practice where the contemnor happens to be an Advocate". Further, the court observed that "an Advocate who is found guilty of professional misconduct in a given case but it is for the Bar Council of the State or Bar Council of India to punish that Advocate by either debarring him from practice or suspending his license as may be warranted, in the facts and circumstances of each case.

---

18. *Supreme Court Bar Association v Union of India*, (1998) 4 SCC 409.
19. (1995) 2 SCC 584

VIII. NARMADA BACHAO ANDOLANCASE

In another much debated issue relating to certain objectionable remarks by a celebrity author Ms. Arundhati Roy in her book "*The Greater Common Good*", which came up for consideration in *Narmada Bachao Andolan vs. Union of India*[20] , the court noted that the freedom of speech and expression does not include the freedom to distort orders of the court and present incomplete and one sided picture deliberately which has the tendency to scandalize the court and bring it in to disrepute or ridicule. The court expressed much anguish over the matter and maintained that we are unhappy at the way the leaders of Narmada Bachao Andolan and Ms Arundhati Roy have attempted to undermine the dignity of the court and we expect better behaviour from them. The court noticing no objectionable writings thought that Ms Roy might have realised her mistake and accordingly thought it appropriate to let the matter rest and not to pursue it any further.

Again, a contempt petition[21] was filed by J.R.Parashar, Advocate and others against three respondents named in the petition alleging that they stage a *dharna* with a huge crowd in front of the Supreme Court and shouted abusive slogans against the court including slogans ascribing lack of integrity and dishonesty to the institution. A police complaint was lodged and subsequently notices were issued to the respondents on the basis of the contempt petition.Through separate affidavits all the three respondents admitted that a *dharna* was staged being organised by Narmada Bachao Andolan with the persons who lived in Narmada Valley. After deliberations, although the apex Court dismissed the petition, the court found a portion of the affidavit by one respondent in response to contempt notice to be objectionable and contemptuous.

In her affidavit, the respondent maintained that 'the court displays a disturbing willingness' to issue notice 'when it comes to an absurd, despicable, entirely unsubstantiated petition', in order to "silence criticism and muzzle dissent and to harass and intimidate those who disagrees with it"[22]. The court directed to issue notice in the prescribed form to the respondent as to why she should not be proceeded against for contempt

20. (1999) 8 SCC 308
21. *J.R. Parashar v Prasant Bhushan*, (2001) 6 SCC 735
22. Ibid; at pp. 740-41

for the statements in her affidavit and accordingly proceedings were initiated.

However, the matter did not end there. In *Re: Arundhati Roy*[23] the court was called upon to deal with the case of the respondent against whom *suo motu* contempt proceedings were initiated by the Supreme Court. Considering all the issues and the position of law, findings on various pleas raised and the conduct of the respondent, the court came to the conclusion that "the respondent has committed the criminal contempt of the court by scandalising its authority with malafide intentions"[24] and she was held guilty for the contempt of court punishable under the Contempt of courts Act.

IX. SOME OTHER CASES

In *Income-Tax Appellate Tribunal vs. V.K.Agarwal*[25] , it was alleged that the Secretary, Ministry of Law , wrote a letter to the President of the Tribunal which in the opinion of the court amounts to contempt as "he has travelled for beyond exercising administrative control over the Tribunal and he has tried to influence or question the decision-making process of the Tribunal. The court said that "in our view that kind of conduct and that, too on the part of the Law Secretary, who is expected to maintain the independence of the Income Tax Appellate Tribunal and not interfere with its judicial functioning amounts to gross contempt of court. It is a deliberate attempt on his part to question the judicial functioning of the Tribunal coming as it does from a person of his rank. It is rightly perceived by the President as well as the two concerned members of the Tribunal as a threat to their independent functioning in the course of deciding appeals coming up before them". Thus, he was held guilty of contempt and accordingly punishment was awarded.

In another case, namely *Vishram Singh Raghubanshi vs. State of U. P.*[26], the conduct of an Advocate having nearly 30 years of experience was considered amounting to contempt of court and he was punished

---

23. (2002) 3 SCC 343
24. *Re: Arundhati Roy*, (2002) 3 SCC 343 at p. 375
25. AIR 1999 SC 452
26. AIR 2011 SC 2275

accordingly despite the apology tendered by the contemnor. In the instant case it was alleged that the said Advocate produced one person for the purpose of surrender, impersonating him as somebody else who was wanted in a criminal case and when presiding officer of the court raised certain issues regarding the genuineness of the person, the contemnor misbehaved with the said officer in the court by using abusive language.

Holding the view that the attitude of the appellant contemnor has a direct impact on the court's independence, dignity and decorum, action needed to be taken 'in order to protect the administration of public justice' as his conduct and utterances cannot be ignored or pardoned as he had no business to overawe the court.[27] Thus sentencing him for the offence, the court maintained that:

> "Thus, it is apparent that the contempt jurisdiction is to uphold majesty and dignity of the law courts and the image of such majesty in the minds of the public can not be allowed to be distorted. Any action taken on contempt or punishment enforced is aimed at protection of the freedom of individuals and orderly and equal administration of laws and not for the purpose of providing immunity from criticism to the judges. The superior courts have a duty to protect the reputation of judicial officers of subordinate court taking note of the growing tendency of maligning the reputation of judicial officers by unscrupulous practising advocates who either fail to secure desired orders or do not succeed in browbeating for achieving ulterior purpose. Such an issue touches upon the independence of not only the judicial officers but brings the question, of protecting the reputation of the institution as a whole."[28]

In *M/S Shorilal and Sons v Delhi Development Authority*,[29] on the allegations of irregularities committed in the allotment of plots in the Narain Warehousing Scheme, the Delhi Development Authority (DDA) was directed by the court to look into the allegations by constituting a committee. As no action was taken by the DDA, the Supreme Court holding them

27. *Vishram Singh Raghubanshi v State of U.P.*, AIR 2011 SC 2275 at p. 2283
28. Ibid; at p. 2280
29. AIR 1995 SC 1084

guilty of committing contempt of court, observed:

> "....public bodies like DDA, which are trustees of public properties and are to carry out public functions, in our view cannot escape their accountability for their failure to carry out the orders of this court mainly in public interest. The officers of the DDA who are guilty of function in our view, should be proceeded against in contempt action."[30]

However, the court thought it proper to give the DDA one more chance to comply the orders and accordingly no punishment was imposed.

In *Pravin C. Shah v K.A. Mohd. Ali*,[31] the Supreme Court while deciding the question 'when an advocate was punished for contempt of court can he appear thereafter as a counsel in the court, unless he purges himself of such contempt', observed:

> "When the Rules stipulate that a person who committed contempt of court cannot have the unreserved right to continue to appear and plead and conduct cases in the courts, without any qualm or remorse, the Bar Council cannot overrule such a regulation concerning the orderly conduct of court proceedings. Courts of law are structured in such a design as to evoke respect and reverence for the majesty of law and justice. The machinery for dispensation of Justice according to law is operated by the court. Proceedings inside the courts are always expected to be held in a dignified and orderly manner. The very sight of an advocate who was found guilty of contempt of court on the previous hour standing in the court and arguing a case or cross-examining a witness on the same day, unaffected by the contemptuous behavior he hurled at the court, would erode the dignity of the court and even corrode the majesty of it besides impairing the confidence of the public in the efficacy of the institution of courts."[32]

---

30. *M/S Shorilal and Sons v Delhi Development Authority*, AIR 1995 SC 1084 at p. 1088
31. (2001) 8 SCC 650
32. *Pravin C. Shah Ali v K.A. Mohd. Ali*, (2001) 8 SCC 650 at p. 659

It is pertinent to mention here that an advocate, who was practicing mostly in the courts situated within Ernakulam District at Kerala State, was hauled up for contempt of court on two successive occasions and subsequently the High Court also found him guilty of criminal contempt in both cases and convicted him under Section 12 of the Contempt of Courts Act,1971.On appeal, he could not succeed in the Supreme Court and also his apology was not accepted by the apex Court. Despite that, he appeared in the courts and when the matter came to the Supreme Court, the court came out with the above observation. The courts in the above case further maintained that "conduct in the court is a matter concerning the court and hence the Bar Council cannot claim that what should happen inside the court could also be regulated by the Bar Council in exercise of its disciplinary powers. The right to practice, no doubt, is the genus of which the right to appear and conduct cases in the court may be specie. But the right to appear and conduct cases in the court is a matter on which the court must have the supervisory power. Hence, the court cannot be divested of the control or supervision of the court merely because it may involve the right of an advocate.

In *Mahipal Singh Rana vs. state of Uttar Pradesh*[33] the appellant approached the Supreme Court under Section 19 of the Contempt of Courts Act,1971 against the judgment of the high court of judicature at Allahabad, where the High Court found the appellant guilty of criminal contempt for intimidating and threatening a Civil Judge (Senior Division), Etah in his court and sentenced him to imprisonment and also fine. The State Bar Council was also directed to initiate appropriate proceedings against the appellant for professional misconduct.

While going through the details of the case, the Supreme Court found two questions for consideration. First, whether the interference in the orders passed by the High Court is necessary and secondly, whether on conviction for criminal contempt, the appellant can be allowed to practice. Thus, taking into consideration the facts of the case, the Supreme Court came to the conclusion that "the High Court has rightly convicted the appellant under the Act after having come to a conclusion that of the incidents and allegations of mala fides against the complainant Judge has been made by the appellant to save himself from the consequence of

33. (2016) 8 SCC 335

contempt proceedings. The appellant has refused to tender apology for his conduct. His affidavit in support of stay vacation/ modification and supplementary affidavit did not show any remorse and he had justified himself again and again, which also shows that he had no regard for the majesty of the law."[34] The Court further observed that "it is a well - settled proposition of law that in deciding whether contempt is serious enough to merit imprisonment, the court will take into account the likelihood of interference with the administration of justice and the culpability of the offender. The intension with which the act complained of done is a material factor in determining what punishment, in a given case, would be appropriate. In the case at hand, the High Court has rightly held that the appellant was guilty of criminal contempt."[35]

So far as suspension of license of the Advocate along with awarding punishment for contempt, the Court referred to the decision of the court in *Supreme Court Bar Association v Union of India*[36] where it was held.:

> "that while in exercise of contempt jurisdiction, this court cannot take over jurisdiction of Disciplinary Committee of the Bar Council and it is for the Bar Council to punish the advocate by debarring him from practice or suspending his license as may be warranted on the basis of his having been found guilty of contempt, if the Bar Council fails to take action, this could invoke its appellate power under Section 38 of the Advocates Act. In a given case this court or High Court can prevent the contemnor advocate from appearing before it or other courts till he purges himself of the contempt which is different from suspending or revoking the license or debarring him to practice as an advocate."[37]

Taking into consideration the above, the Supreme Court observed that "we may add that what is permissible for this court by virtue of statutory appellate power under Section 38 of the Advocate Act is also permissible to a High Court under Article 226 of the Constitution in appropriate cases on failure of the Bar Council to take action after its

---

34. *Mahipal Singh rana v State of Uttar Pradesh*, (2016) 8 SCC 335 at p. 353
35. Ibid.
36. (1998) 4 SCC 409
37. In *Mahipal Singh rana v State of Uttar Pradesh*, (2016) 8 SCC 335 at p. 353

intension is invited to the misconduct."[38] Holding the view that in the instant case, the appellant has already been given sufficient opportunity in this regard, the Supreme Court in exercise of the appellant jurisdiction under Section 38 of the Advocates Act came to the conclusion that "conviction of the appellant is justified and is upheld; sentence of imprisonment awarded to the appellant is set aside in views of his advanced age but sentence of fine and default sentence are upheld; further direction that the appellant shall not be permitted to appear in the courts in District *Etaha* until he purges himself of contempt is also upheld; under Section 24-A of the Advocates Act, the enrolment of the appellant will stand suspended from two years from the date of this order and as disciplinary measure for proved misconduct, the license of the appellant will remain suspended for further five years."[39]Accordingly, directions were issued by the apex Court.

X. VIRTUAL HEARING BY THE APEX COURT IN A *SUO MOTU* CONTEMPT

In 2020 when the country is battling the fight against the deadly pandemic Corona virus, applying the inherent jurisdiction, the Supreme Court took the contents of two letters sent by two contemnors and in which the third contemnor was involved as having the knowledge of the letter as contempt of court *suo motu* in *Re: Vijay Kurle and others*[40] and held all the three contemnors guilty of contempt of court. In the instant case two letters were sent to the President of India, the Chief Justice of India and was also circulated in the social media, where scandalous allegations were made against two judges of the Supreme Court who were the members of a Bench hearing an issue. In the case a fourth contemnor was also there, but after due consideration he was discharged. After going through the contents of the letters, the court was of the opinion that "we have no doubt in our mind that the tenor of the letters is highly disrespectful and scandalous and scurrilous allegations have been leveled against two judges of this court."[41]

---

38. Ibid: at p. 368
39. Ibid: at pp. 368-69
40. *Suo motu* Contempt Petition (Criminal) No. 2 of 2019, www.Livelaw.in dated 27th April, 2020
41. Ibid.

After going through quite a few number of preliminary issues raised by the three contemnors and the related case laws of the court and the constitutional power conferred on the Supreme Court, the Supreme Court came to the conclusion that the contemnors by making such allegations have not only shown disrespect to the judges, but also to the entire justice delivery system and accordingly they were found guilty of the contempt of court. Before concluding the observation, the court went on to discuss about the freedom to criticize and was of the opinion that:

> ".....There can be no manner of doubt that every citizen is entitled to criticise the judgment of this court and Article 19 of the Constitution which guarantees the right of free speech to every citizen of this country must be given the exalted status which it deserves. However, at the same time, we must remember that clause (2) of Article 19 of the Constitution also make it clear that the right to freedom is subject to existing laws for imposing reasonable restrictions as far as law relates to contempt of court. This right of freedom of speech is made subject to the laws of contempt which would not only include Contempt of courts Act but also the powers of the Supreme Court to punish for contempt under Article 129 and 142(2) of the Constitution. Similar powers are vested with the High Courts.[42]

After holding the above view, the Court further went on to observe:

> "The purpose of having a law of contempt is not to prevent fair criticism but to ensure that the respect and confidence which the people of this country repose in the judicial system is not undermined in any manner whatsoever. If the confidence of the citizenry in the institution of justice is shattered then not only the judiciary, but democracy itself will be under threat Contempt powers have been very sparingly used by the courts and rightly so. The shoulders of this court are broad enough to withstand criticism, even criticism which may transcend the parameters of fair criticism. However, if the criticism is made in a concerted

42. Ibid.

> manner to lower the majesty of the institution of the courts and with a view to tarnish the image, not only of the Judges, but also the courts, then if such attempts are not checked the results will be disastrous. Section 5 of the Contempt of Courts Act itself provides that publishing of any fair comment on the merits of any case which has been heard and finally decided does not amount to contempt."[43]

The Court further held the view that:

> "There can be no manner of doubt that any citizen of the country can criticise the judgments delivered by any court including this court. However, no party has the right to attribute motives to a Judge or to question the bonafides of the Judge or to raise the questions with regard to the competence of the judge. Judges are the part and parcel of the justice delivery system. By and large judges are reluctant to take action under contempt laws when a personal attack made on them. However, when there is a concerted attack by members of the Bar who profess to be members of an organisation having a large following, then the court cannot shut its eyes to the slanderous and scandalous allegations made. If such allegations which have not only been communicated to the President of India and the Chief Justice of India, but also widely circulated on social media are permitted to remain unchallenged then the public will lose faith not only in those particular Judges, but also in the entire justice delivery system and this definitely affects the majesty of law."[44]

Thus, holding the view that the allegations are scurrilous and scandalous and such allegations cannot be permitted to be made against the Judges of the highest court of the country the Supreme Court held all the three alleged contemnors to be guilty of contempt and they were sentenced to three months simple imprisonment and a fine of Rupees two thousand each.

---

43. *Re: Vijay Kurle and others*, www.Livelaw.in dated 27th April, 2020
44. Ibid.

It is pertinent to mention here that the judgment was delivered on 27th April 2020 and the punishment was awarded on 6th May 2020 amidst the pandemic and lockdown situation through video conferencing due to COVID-19 lockdown. Before announcing the punishment, the court observed that:

> "There is no iota of remorse or any semblance of apology on behalf if the contemnors. Since they have not argued on sentence, we have to decide the sentence without assistance of the contemnors. In view of the scurrilous and scandalous allegations leveled against the judges of this court and no remorse being shown by any of the contemnors, we are of the considered view that they cannot be let off leniently."[45]

After observing this, the court concluded by saying that " therefore it is obvious that this is a concerted effort to virtually hold the judiciary to ransom" and awarded the punishment of three months' imprisonment with fine to all the three contemnors. Further, the court directed that the sentence shall come into force after 16 weeks from today when the contemnors should surrender to undergo imprisonment due to prevailing COVID-19 pandemic and lockdown conditions.

XI. CONCLUSION

In a democratic set up, the Judiciary being the protector of constitutional values enjoys a superior position in the minds of the people of this country. No one has got the freedom to make any statement or do anything which will lower the dignity of this institution. It has its own dignity, reputation which every individual hold in high esteem. It is the duty of everybody to uphold the independence and supremacy of the Supreme Court as it has always tried to rise to the occasion and pass orders keeping in mind the interest of the constitutional norms and values. But sometimes the decisions of the court may not go in favour of somebody or may not even suit the interest of some and it is obvious that they will not be happy. That does not mean that in order to express our dissatisfaction over certain decisions, forgetting minimum ethical values we will go on speaking ill of the Judiciary, tarnish the image of the Judge

45. www.Livelaw.in dated 6th May 2020

that too in certain unaccepted words which seem to be derogatory and at times may tend to corrupt the minds of the general public. At this juncture, it is up to the Judiciary to come to its rescue, not to protect the interest of the persons delivering the order, but to see that the people do not lose confidence in the temple of justice and faith of the people remains intact on the Judiciary thereby maintaining the dignity of the institution, preventing interference in the course of justice, maintaining the authority of law and protecting the public interest in the purity of administration of justice.

■

CHANGING DIMENSIONS OF ECOFEMINIST JURISPRUDENCE : EAST AND WEST

ARTI NIRMAL*
PRAKASH CHANDRA SHUKLA**

ABSTRACT : The growing recognition of the relation between nature and man in recent years has led ecofeminism to emerge as a new aspect of feminist thought. It is a movement, a theory that applies the principles and approaches of feminism to both women and ecology. The paper seeks to study the changing dimensions of ecofeminist jurisprudence from the perspective of both East and West. It has been predominantly divided into two parts. Part one traces the conceptual development of ecofeminism based on Western ecofeminist texts. Its various dimensions and kinds conceptualized by the western scholars have been discussed here to set the background for arguments to be initiated in the next part of the paper. In the second part, ecofeminism in the Indian tradition has been foregrounded with special reference to the contributions of Indian scholars. Here, the emphasis is also on studying the links between 'feminine principle' and nature in ancient Indian tradition with respect to Hinduism, Buddhism, Sankhya philosophy, and various cultural practices. The paper concludes that ecofeminism in particular and environmentalism, in general, can gather more momentum if seen from a holistic perspective by recognizing the feminist and ecological concerns of people across the cultures.

KEY WORDS : eco-feminism, logic of domination, spiritual feminism, *prakriti* (feminine principle), eco-sangha.

I. INTRODUCTION

Ecofeminism is a branch of feminism. It is a movement, a theory

* Assistant Professor, Department of English, Banaras Hindu University, INDIA, artinirmalbhu@gmail.com

** Additional District & Session Judge, Jaunpur, Uttar Pradesh, INDIA.

that combines all principles and approaches of feminism to the relationship with both women and ecology. Although there are various schools of feminism- liberal feminism, socialist feminism, cultural or difference feminism, radical feminism, and postmodern feminism, they all focus on women's status in society and attribute their subordinate and inferior position *vis a vis* men to patriarchy.[1] As in their understanding, it is the law that reflects, maintains, and legitimizes patriarchy; they compellingly and unequivocally argue that both law and human rights law have a bias and the mainstream law is 'male stream law'. Ecofeminism is based on the premise that patriarchy is detrimental not only to women but also to ecology.[2] Although ecofeminism, both as a theory and movement has been studied by western scholars, their overall approach to this newly emerging branch of jurisprudence, ecology, women empowerment, gender justice[3], and environmental protection is Eurocentric and based on the experiences of the European women. In India, however, certain scholars have presented their own interpretation of ecofeminism in the light of the experiences of Indian women. However, the indigenous scholarship on the subject could be seen only as a modest attempt to relate the western idea of ecofeminism to Indian conditions. The present paper seeks to explore and analyze the issues related to ecofeminism in terms of its origin and evolution, its basic tenets, the need to develop indigenous 'ecofeminist jurisprudence',[4]

---

1. Denise Meyerson, *Understanding Jurisprudence* (Britain and NY: Routledge-Cavendish, 2007).
2. "Gender and the Environment: What are the Barriers to Gender Equality in Sustainable Ecosystem Management? IUCN, Jan. 23, 2020. Avialable at: https://www.iucn.org/news/gender/202001/gender-and-environment-what-are-barriers-gender-equality-sustainable-ecosystem-management (Visited on Dec.18, 2020).
3. For a partial list of literature on feminism see, H Barnett, *Introduction to Feminist Jurisprudence* (London and Sydney: Cavendish Pub. Ltd., 1998); P. Cain, "Feminism and the limits of Equality" 24 *Georgia Law Review* 803 (1990); Katharine T. Bartlett and Rossane Keneddy (eds.), *Feminist Legal Theory: Readings in La and Gender* (NY: Routledge, 2018); CA MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass, and London, England: Harvard Univ. Press, 1987); MC Nussabaum, *Sex and Social Justice* (New York and Oxford: OUP, 1999); and EV Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston: Beacon Press, 1988).
4. See, Cynthia G Bowman, "Path from Feminist Legal theory to Environmental Law and Policy", 22 (3) *Cornell J of Law and Public Policy* 641-647 (2013), available at: http://scholarship.law.cornell.edu/cjlpp/vol22/iss3/3 (Visited on

and relate it to the environmental law[5] and policies along with the notion of climate justice[6].

With the recognition of the importance of the relation between nature and man in recent years, ecofeminism has emerged as a new aspect of feminist thought in different forms, sets, and manifestations. The paper seeks to study the changing dimensions of ecofeminism from the perspective of both East and West. It has been broadly divided into two parts. Part one deals with the conceptual development of ecofeminism on the basis of Western ecofeminist texts. Its various dimensions and kinds conceptualized by the western scholars have been discussed to set the background for arguments to be initiated in the next part of the paper. In the second part, ecofeminism in the Indian tradition has been foregrounded with special reference to the contributions of some of the prominent Indian scholars. The purpose of discussion in this section is to highlight the links between 'feminine principle' and nature in ancient Indian tradition with respect to Hinduism, Buddhism, *Sankhya* philosophy, and various other cultural practices. In the Indian context, tradition conveys a wider concept, which includes beliefs, cultural ethos, doctrines, philosophy, and civilization. The paper concludes that ecofeminism in particular, and environmentalism, in general, can gather more momentum if also seen from the Indian perspective based on ancient Indian philosophy as well as cultural and civilizational ethos with regard to the conservation of nature as an integral part of day to day human life.

Dec18, 2020). Also see, Douglas A Vakoch & Sam Mickey, *Women and Nature? Beyond Dualism in Gender, Body, and Environment* (NY: Routledge, 2016).

5. For a partial list of literature on International Environmental Law see, P. Sands, *Principles of International Environmental Law* (Manchester, 1995); V. P. Nanda, *International Environmental Law and Policy* (New York, 1995); P Birnie and A Boyle, *International Law and the Environment* (Oxford, 1992); A Kiss and D Shelton, *International Environmental Law* (London: Transnational Publishers Inc. and Graham & Trotman, 1991). For an introduction to Indian Environmental Law, see; Armin Rosencranz & Shyam Divan, *Environmental Law and Policy in India: Cases, Materials, and Statutes* (Oxford University Press, 2001); P Leelakrishnan, *Environmental Law in India* (LexisNexis Butterworth, 2005); SC Shastri, *Environmental Law* (3rd Edition, Lucknow: Eastern Book Company, 2008).

6. B C Nirmal, "Climate Change, Sustainable Development and Indian Supreme Court" in in Manoj Sinha, Shivkumar and Furqan Ahmad (eds.), *Environmental Law and Enforcement: Contemporary Challenges* 245-283 (2016).

II. CONCEPTUAL DEVELOPMENT OF ECOFEMINISM

As we know, Ernest Haeckel coined the term ecology in the 1860s to offer the principle of interdependence of each human and nonhuman component in the environment for existence and survival. Ecofeminists rest their discourse on this principle of interconnectedness and interdependence in ecology to advocate the necessity of a congenial relationship between men and women as well as nature. American environmentalist and scholar Rachel Carson's book *Silent Spring* (1962) was one of the early attempts to analyze the environment from women's perspective and make the environment a public issue. Terry Tempest Williams[7], a forerunner of ecofeminism, significantly focused on social and environmental justice, including ecology, women's health, and culture-nature relationship. In the West, however, ecofeminism found its currency in 1974 with the French feminist Francoise de Eaubonne's book *Le Feminisme ou la mort* (*Feminism or Death*), who tried to engage with the primary question: is environment a feminist issue?

Ecofeminism owes much to the environmental movements especially those run by the women in different parts of the world, viz. *Chipko* movement led by Gauri Devi in 1973 by the women in Gahrwal district of India who embraced trees to protect them from being cut and *Appiko*[8] movement in Karnataka in 1983; the Green Belt Movement in Kenya headed by the Nobel Laureate Wangari Mathai in 1977; the Green Party movement in Germany in 1978; protest against nuclear power by nearly 2000 women in Washington; and the Russian women's outrage that 'men never think of life. They only want to conquer nature and the enemy'[9] after the Chernobyl catastrophe in 1986. Similarly, in Sweden, feminists prepared jam from berries sprayed with herbicides to offer a taste to members of parliament; in Poland, women raised their voice against their government's move to undermine women's rights to abortion in

---

7. Terry Tempest Williams, *The Secret Language of Snow* (1984), *Desert Quartet* (1995), *When Women Were Birds* (2012), and *Erosion* (2019). See also, Aldo Leopold, "Land Ethic" (1949), a fundamental ecofeminist work.
8. *Appiko* movement was initiated in the Uttara Kannada district of Karnataka in September 1983 for the conservation of forest.
9. Vandana Shiva and Maria Mies, *Ecofeminism* 15 (Jaipur: Rawat Publication, 2010).

2016; [10] and in 2017, Brazilian women farmers in Via Campesina's Landless Workers Movement in Sao Paolo occupied an orange farm owned by a convicted rapist. These concurrent movements across the world signaled the emergence of a new discourse in the form of ecofeminism, which helped to discover that 'backgrounding' is one of the ways in which both nature and women have been devalued[11] and sexism, racism, and homophobia are forms of oppression that are directly linked to the oppression of nature.[12]

The United Nations Conference on the Human Environment in Stockholm (1972) and the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro (1992) were not only two flagship international legal instruments in the direction of environmental protection but also pioneering events in recognizing the connection between the exploitation of the non human world and race, class, and gender. Most importantly, the World Women's Congress for a Healthy Planet held in Miami in 1991, drafted the "Global Action for Women Towards Sustainable and Equitable Development." The *Agenda 21* adopted at the Rio Conference (1992) stressed the need to recognize the ecological value and to define 'productivity' as that which sustains life. In addition, it also emphasized the importance of ensuring women's participation in 'public life' through the elimination of "constitutional, legal, administrative, cultural, behavioral, social and economic obstacles".[13] Its vision statement 'Women, Procreation and Environment' added momentum to the ecofeminist movement and made it a matter of serious concern for the intellectuals and policy makers. It was in 2014 in Peru UN Climate Change Conference, that the United Nations declared that discussions on climate change should engage gender issues but Women, Environment and Development Organization (WEDO) was already talking about it. The

---

10. Christian Davies, "Women to Go on Strike in Poland in Protest at Planned Abortion Law" *The Guardian* (October 3, 2016). Avialable at: https://www.theguardian.com/world/2016.to-go-on-strike-in-poland-abortion-law (Visited on Dec. 22, 2020).
11. V Plumwood, *Feminism and the Mastery of Nature* (London: Routledge, 1993).
12. N Moore, "Eco/Feminism, Non-Violence and the Future of Feminism",10(3) *International Feminist Journal of Politics* 287, 282-298(2008).
13. *Agenda 21*, 1992. Available at: https://sustainabledevelopment.un.org/outcomedocuments/agenda21(Visited on Dec. 2, 2020).

Brazillian activist and founder member of WEDO. Thais Corral actively participated in the Earth Summit (1992) and emphasized the need to restore the dignity of both women and nature against the dominance of market: "We want to restore the dignity of women and native which has been used and abused according to the logic of the market…we want to redefine wealth in an ecological framework, peace in a new meaning of people's security and development in the fulfilment of basic human needs."[14] However, the foundation for discourse on ecofeminism was laid down in 1980's with the first conference on ecofeminism on "Women and Life on Earth: Ecofeminism in the 80s" held in Massachusetts which emphatically furthered this discourse.

As noted before, easly ecofeminists examine the effects of gender categories in order to demonstrate the ways in which social norms exert unjust dominance over both women and nature. They thought that feminism and environmentalism might be combined to promote respect for women and the natural world. The effort was also made to question the long historical precedent of associating women and nature with traits such as chaotic and irrational, required to be controlled by the men, whereas men were more ordered and rational, thus capable of directing the use and development of women and nature. They were also of the opinion that this assumption yields a hierarchal structure that grants power to men and allows them to be instrumental in exploiting both women and nature. Thus, early ecofeminism assumed that solving the predicament of either constituent would require undoing the social status of both.

Theologian Rosemary Radford Ruether, who was at the forefront of early ecofeminism, stressed the need to document historical connections between women and the environment. Her study of the intersections of feminism, theology, and 'creation care' led her to urge that, "Women must see that there can be no liberation for them and no solution to the ecological crisis within a society whose fundamental model of relationships continues to be of domination. They must unite the demands of the women's movement with those of the ecological movement to envision a radical reshaping of the basic socioeconomic

14. Thais Corral, "Eco'92 Through Women's Eyes", Rosiska Darcy de Oliveira and Thais Corral (eds.), *Terra Femina* 92-98 (Brazil: Companhia Brasileira de Artes Graficas,1992).

relations and the underlying values of this society."[15] Other ecofeminist texts such as Susan Griffin's *Women and Nature* (1978), Mary Daly's *Gyn/Ecology* (1978), Carolyn Merchant's *The Death of Nature* (1980), G. Gaard's *Eco-feminism: Women, Animals, Nature* (1993), Val Plumwood's[16] *Feminism and the Mastery of Nature* (1993), Mary Mellor's *Feminism and Ecology* (1997) further strengthened the understanding of ecofeminist thought in the Western canon.

American feminist theorist Ynestra King[17] adds force to ecofeminism through her article "What is Ecofeminism?" that appeared in *The Nation*. She stressed: "Ecofeminism…(sees) the devastation of the earth and her beings by the corporate, warriors, and the threat of nuclear annihilation by the military warriors as feminist concerns… it depends on multiple systems of dominance and state power to have its way."[18] Later, in 1993 Greta Gaard and Lori Gruen also published an essay "Ecofeminism: Towards Global Justice and Planetary Health"[19] and outlined an 'ecofeminist framework' to argue how the four factors-materialism, patriarchy, dualism, and capitalism have caused a 'separation between nature and culture'. Scholars namely Annette Kolodny[20] and Donna Haraway[21] also enrich the discourses on ecofeminism.

III. PERSPECTIVES OF ECOFEMINISM

Feminists in general, and ecofeminists in particular, explore various

15. Rosemery R Ruether, *New Woman/New Earth: Sexist Ideologies and Human Liberation* 204 (Boston: Beacon Press, 1975, 1995).
16. V Plumwood, *Feminism and the Mastery of Nature* (London: Routledge, 1993). See also, "Ecofeminism: An Overview and Discussion of Positions and Arguments", 64 (1) *Australasian J of Philosophy* 120-138 (1986), *tandfonline*.
17. Y King, "The Ecology of Feminism and the Feminism of Ecology". In Judith Plant (ed.), *Healing the Wounds* (Philadelphia and Santa Cruz: New Society Publishers, 1989). Also see, Y King, "Engendering a Peaceful Planet: Ecology, Economy, and Ecofeminism in Contemporary Context", 23 (3/4) *Women's Studies Quarterly*, *Rethinking Women's Peace Studies* 15-21 (Fall-Winter, 1995).
18. Y King, as qtd. in Vandana Shiva and Maria Mies (eds.), *Ecofeminism* (Jaipur: Rawat Publications, 1983).
19. Greta Gaard & Lori Gruen, 2 *Society and Nature* 1-35 (1993).
20. Annette Kolodny, *The Lay of the Land: Metaphor as Experience and History in American Life and Letters* (Chapel Hill, NC: University of North California, 1975).
21. Donna Haraway, *Primate Visions* (London: Routledge,1989).

dimensions to understand how the relationship between human and non-human world or women-nature and man's world exists. Karen J Warren recognizes the eight kinds of "woman-nature connections."[22] - historical, conceptual, empirical and experiential, symbolic, epistemological, political, ethical, and theoretical broadly based on the linguistic, historical, sociological, epistemological, and political factors. The *linguistic perspective* believes that language plays an important role in problematizing both nature and women. For example, there is a tendency of 'animalizing women and feminizing nature to authorize their inferior position.'[23] According to ecofeminists, expressions such as Mother Nature, womb of the Earth, barren land- infertile woman etc. are often used in people's conversation to signify this. On the other hand, the *historical perspective* views the separation of culture from nature as an outcome of the scientific revolution. Merchant,[24] for instance, in her study reminds us how in the ancient Greek belief system, 'mining the earth's womb' was strictly prohibited. Nature was supposed not to be seen as a resource but as a sustainer. The *socioeconomic perspective* states that it is true that both men and women mediate between nature and culture, but it is also a truth that they don't do so equally. M. Mellor argues that the system of predominantly male ownership of the means and forces of production results in a male-biased allocation and distribution of a society's economic resources that systematically disadvantages women economically and exploits nature.[25] The *epistemological perspective* concerns how gender influences conceptions, knowledge, the knower, and methods of inquiry and justification. According to this, women have a better knowledge of nature and their ecology, but they remain 'invisible'. And finally, the *political perspective* deals with political ideas and values such as freedom, democracy, solidarity, rights, equality, duty, participation with respect to ecological issues. It views that the ecological crisis results from a

22. Karen J Warren, "Introduction to Ecofeminism", Michael E. Zimmerman *et al*. (eds.), *Environmental Philosophy: From Animal Rights to Radical Ecology*, 253-267 (Prentice Hall, 1993).
23. Carol Adams, *The Sexual Politics of Meat* (USA: Bloomsbury, 2015).
24. Carolyn Merchant, *The Death of Nature: Women, Ecology and the Scientific Revolution* (San Francisco: Harper and Row, 1980).
25. M Mellor, *Feminism and Ecology* (NY: NY Univ. Press, 1997). See also, M Mellor, "Feminism and Environmental Ethics: A Materialistic Perspective", 5 (1) *Ethics and the Environment* 107-123 (2000).

Eurocentric capitalist patriarchal culture built on the domination of nature, and domination of women by men.

IV. SCHOOLS OF ECOFEMINISM

As opposed to the traditional ecocentric, the technocentric attitude of humans towards nature is responsible for the control and domination of nature and women. It is characterized by science and economic rationality and nurtures the logic of domination. The critics of different schools of ecofeminism perceive this logic of domination over woman and nature from different perspectives-liberal, socialist and radical (cultural and spiritual). The first school of ecofeminism is *liberal ecofeminism* which originated from the ideology of liberalism, which promotes individual freedom and equity. Liberal feminists explain the oppression of women as a result of a lack of equal rights. Likewise, liberal ecofeminists seek redistribution rather than restructural policy changes. It plays an important role in challenging the structure of the State and broadening the environmental agenda. Here, the objective coincides with the objectives of reform environmentalism to alter human and nonhuman relations through new laws and regulations.

Unlike liberal ecofeminism, the *Socialist/ Marxist ecofeminism* studies the cause of women's and nature's oppression by linking it with production and capitalist relation to the domination of nature as well as women by men. This ecofeminist theory argues that capitalism reflects only patriarchal or paternalistic values. It implies that the effects of capitalism have, on the one hand, not benefitted women and, on the other, harmfully dissected nature from culture.[26] They address the contradictions between production and reproduction and consider that radioactivity, toxic chemicals, and hazardous wastes that threaten the biological reproduction of the human species, could be seen as assaults on women's bodies and those on their children. Such influences also cause chronic and genetic diseases, often resulting in birth defects in children for which the mother is directly held responsible. This form of ecofeminism is also called 'materialistic ecofeminism' as it relates the exploitation of women and nature to patriarchy in terms of production and consumption. Carolyn

26. Terran Giacomini *et al*., "Ecofeminism Against Capitalism and for the Commons", 29(1) *Capitalism, Nature and Socialism* 1-6 (2018).

Merchant, therefore, in *The Death of Nature* (1980) notes that the strength of socialist ecofeminism is a critique of capitalist developments in which reproduction and ecology both are subordinate to production. In *Earthcare* also she discusses many other examples of the relations between environmentalism, feminism, and domesticity.[27] Merchant opines that the goal of socialist ecofeminism is to develop sustainable, nondominating relations with nature and create an "egalitarian socialist state, in addition to re socializing men and women into non sexist, non racist, non violent, antiimperialist forms of life." [28]

In the late 1980s, a new branch of ecofeminism began to emerge which was radical in nature. *Radical ecofeminism* branched later into two dimensions: Nature ecofeminism and Spiritual ecofeminism. Nature ecofeminism noticed that nature and women both had been attributed negative traits whereas men with positive qualities, and therefore, they discard any validity of such associations and see a womanly power in the phenomenon of nature. These ecofeminists also discern a deep and intimate relationship between women and the environment, allowing them to be more sensitive to the sanctity or degradation of nature. They study a biological connection between women and nature by referring to the common processes of menstruation, childbirth, and lactation.

In her book *Radical Ecology* (1992), Merchant refers to "spiritual ecofeminism" and says that it "celebrates the relationship between women and nature through the revival of ancient rituals centered on Goddess worship …"[29] It values intuition and human-nature interrelationships. Karen J. Warren, too, observes that women's oppression is rooted in women's reproductive roles and the sex/gender system: "Patriarchy oppresses women in sex-specific ways by defining women as beings whose primary functions are either to bear and raise children (i.e. to be mothers) or to satisfy male sexual desires (i.e. to be sex objects)."[30] Thus, "the challenge

27. Carolyn Merchant, *Earthcare: Women and the Environment* (NY: Routledge, 1995). See also, S Alaimo, *Undomesticated Ground: Recasting Nature as Feminist Space* (NY: Cornell University Press, 2000).
28. Carolyn Merchant, *Science and Nature: Past, Present and Future* 105 (NY: Routledge, 2017).
29. Carolyn Merchant, *Radical Ecology*: *In Search for a Livable World* (NY: Routledge, 1992).
30. Karen J Warren, "*Feminism and Ecology: Making connections",* 9(1) *Environmental Ethics* 3-20 (1987), doi:10.5840/enviroethics19879113 (Visited on Dec. 22, 2020).

to feminists, environmentalists, and environmental ethicists…is to overcome metaphors and models which feminize nature and naturalize women to the mutual detriment of both." [31] Radical ecofeminism highlights the ways in which both women and nature have been associated with negative or commodity attributes, whereas men have been seen as capable of establishing order. The division of characteristics encourages the exploitation of women and nature for cheap labor and resources. Thus, for radical ecofeminists, the liberation of both women and the nonhuman world lies in the dismantling of patriarchal systems and the end of male control over the body of women and the earth.

Spiritual ecofeminism is also known as cultural ecofeminism as it considers the spiritual connections between women and nature through worship, intuition, rituals, ethics of care, and compassion. It suggests reviving nature worship and paganism. Remarkable studies have been made by Riane Eisler, Carol Adams, and Charlene Starhawk in this field. For Russian theorist Starhawk, it is an earth based spirituality that recognizes that the earth is alive, and that we are an interconnected community.[32] Spiritual ecofeminism is not linked to one specific religion but is centered on care, compassion, and non-violence. These scholars often refer to the worship of *Gaia,*[33] the goddess of nature and spirituality in Greek mythology (Mother Earth). Radical ecofeminism also promotes the ethics of care and personal accountability, which further broadens the agenda of environmental organizations. According to Spretnak, ecofeminists "experienced the exhilarating discovery …(of) the sacred link between the Goddess in her many guises and totemic animals and plants, sacred groves, womblike caves, in the moon-rhythm blood of menses, the ecstatic-experiencing of knowing Gaia, her voluptuous contours and fertile plains, her flowing waters that give life."[34] Thus,

---

31. Id. 30
32. Starhawk, "Power, Authority and Mystery", in Gloria Feman Orenstein and Irene Diamond (eds.), *Reweaving the World: The Emergence of Ecofeminism* 73-86 (California: Random House,1990).
33. Also called *Ge* is the ancient Greek goddess signifying mother earth who brought forth this world and the human race from the void and chaos. Spretnak identifies *Gaia* as a powerful feminist and ecological symbol, which was later reinforced by Lovelock, who gave the scientific concept of homeostasis (restoration of equilibrium) by which nature restores its equilibrium.
34. Charlene Spretnak, 'Ecofeminism: Our Roots & Flowering', in I Diamond and G Orenstein (ed.), *Reweaving the World: The Emergence of Ecofeminism* 5 (Random House, California, 1990).

spirituality is perceived as a source of both personal and social transformation.

V. ECOFEMINISM IN THE WEST AND ITS LIMITATIONS

As already noted, ecofeminist discourse gained much currency in the West by the 90s and offered an alternative way of dealing with the issues related to the subordination and exploitation of both women and nature, but it has also been the target of critics for various reasons. For Stacy Alaimo, "It is crucial that we interrogate the grounds, purposes, and consequences of linking environmentalism and feminism, by analyzing specific articulations within particular places and contexts."[35] Scholars have also critiqued some of the leading assumptions of ecofeminism, such as- essentialism, theory- practice dualism, excessive focus on the mystical connection between women and nature, and its confinement to gender and ecology. Cecile Jackson, for example, examines the women and environment linkage and observes that ecofeminism is "ethnocentric, essentialist, blind to class, ethnicity and other differentiating cleavages, ahistorical and neglects the material sphere."[36] This view, in a way, promotes patriarchal stereotypes of what men want womenfolk to be rather than deconstructing it. Such notions "freeze women as merely caring and nurturing beings instead of expanding the full range of women's human potentialities and abilities."[37] American political writer Janet Biehl in *Rethinking Ecofeminist Politics*, also underlines the problems in ecofeminism and calls it selfcontradictory in certain ways, "Some eco-feminists literally celebrate the identification of women with nature as an ontological reality. They thereby speciously biologize the personality traits that patricentric society assigns to women. The implication of this position is to confine women to the same regressive social definitions from which feminists have fought long and hard to emancipate women."[38] Considering

---

35. Stacy Alaimo, "Ecofeminism without Nature? Questioning the Relation between Feminism and Environmentalism", 10(3) *International Feminist Journal of Politics* 299-305 (2008). *tandfonline.*
36. Cecile Jackson, "Women/Nature or Gender/History? A Critique of Ecofeminist 'Development'", 20 (3) *The Journal of Peasant Studies* 398, 389-419 (1993).
37. Janet Biehl, *Rethinking Ecofeminist Politics* 15 (South End Press: Boston, 1991).
38. Id. 37, p. 3

women as custodians of a feminine principle further alienates men from their responsibility towards the planet.

Noel Sturgeon too, studies and critiques ecofeminism on the grounds of "essentialism" and 'theory/practice dualism'. Regarding ecofeminism being essentialist, she argues that "environmentalism and feminism are profitably merged"[39] and for the theory/practice issue, she writes, "An analysis of ecofeminism that problematizes the divide between theory and practice is particularly interesting because of the way in which ecofeminism itself both recreates and confounds this dualism."[40] It has been seen as a highly utopic discourse by Lucy Sargisson, who attacks ecological feminism for failing to realize its full potential.[41] Elizabeth Carlassare adds another dimension to the essentialist debate while writing, "I explore a related tension within ecofeminism between the use of essentialism by cultural ecofeminists on the one hand, and the use of constructionism by social and socialist ecofeminists on the other."[42] Critics like Susan Prentice also criticize the essentialist approach of ecofeminism which according to her fails to yield any historical change in society. She also questions the sole role of women in caring for nature and contends that men too can develop the same ethics of care for nature as women.[43] Further, the role of capitalism and colonialism in the oppression of women and nature has also been largely ignored by ecofeminists.

Essentialism is also seen reflected in this discourse when women are presented as a homogeneous category. To illustrate this, the study of Indian scholar Bina Agarwal would be useful wherein she informs that in South Asia, the adverse effects of environmental degradation largely affect the poor women, not women in general. She advocates "feminist environmental"[44] perspectives, rooted in material reality and perceives

---

39. Noel Sturgeon, *Ecofeminist Natures: Race, Gender, Feminist Theory and Political Action* 7 (London: Routledge, 2016).
40. *Supra* 39, p. 7
41. Lucy Sargisson, "What's Wrong with Ecofeminism?" 10(1) *Environmental Politics* 52-64 (2010).
42. Elizabeth Carlassare, "Destablizing the Criticism of Essentialism in Ecofeminist Discourse", 5 (3) *CNS* 50 (September 1994).
43. Susan Prentice, "Taking Sides: What's Wrong with Ecofeminism?", *Women and Environments*, 9-10 (Spring 1998).
44. Beena Agarwal, "Engendering the Environmental Debate: Lessons from the Indian Subcontinent" 8 *CASID Distinguished Speaker Serie*s, 38-44 (Michigan State University, 1991).

the relation between women and nature structured by class, caste, race, production, reproduction, and resource distribution. The most recent argument to address the heterogeneity of the subject in ecofeminism comes from the study of A. E. Kings, who finds that ecofeminism limits itself only to gender and the environment. Kings examines the changing nature of ecofeminism and the inherent limitations of its intersectionality.[45] Thus, we observe several points of contradiction in ecofeminism in the West, but its merits are such that they cannot be overlooked. The movement cum discourse has been successful in drawing the attention of activists, scholars, researchers, and policymakers worldwide to recognize environment and ecology as a gender issue.

VI. ECOFEMINISM IN INDIAN TRADITION

The discussion made in the previous section of the paper sets a background to study ecofeminism in the Indian context in this part. The presence of 'feminine principle' in Nature has long been recognized in Indian tradition and belief system. Beginning with a reflection on the feminine principle in Hinduism in general, the discussion proceeds to mention the way *Sankhya* philosophy comprehends the same on the basis of *prakriti* (feminine principle) – *purusha* (masculine principle) dualism. Ecofeminism in India doesn't stand the way it has been argued in the West, but the fact cannot be denied that ideas and concepts analogous to it find expression in various Indian cultural and intellectual traditions. Buddhism is again an integral aspect of Hinduism, and hence has been mentioned here to understand how Buddhism recognizes women-nature linkage and proposes the concept of Eco-Sangha. The later part of this segment concentrates on identifying the ways women and nature relate with each other in Indian cultural practices, beliefs, customs, and rituals through religion, spirituality, and folk art. Before concluding the discussion, a detailed deliberation has been made on the modern Indian ecofeminist discourse developed by the scholars Vandana Shiva, Bina Agrawal, Ramchandra Guha, and others.

As mentioned earlier, ecofeminism in countries like India rests more

45. A E Kings, "Intersectionality and the Changing Face of Ecofeminism" 22(1) *Ethics and the Environment* 63-87 (Spring 2017). Available at: doi:10.2979/ethicsenviro.22.1.04 (Visited on Dec. 26, 2020).

on the conception of the integrality of man and nature as components. To be specific, a verse in *Yajurveda*[46] not only suggests a cosmic model of peaceful coexistence and sustainable development but also deconstructs efficiently the 'logic of domination' fostered by patriarchy, capitalism, and colonialism. According to the Indic philosophy, all human and non human elements are believed to coexist peacefully not only on this planet earth but in the entire cosmos. Thus, to better understand the issue and find a viable solution, it is necessary to see ecofeminist discourse comprehensively, and that could be possible only if it is analyzed from the perspective of both East and West.

As we know, Hinduism is not just a philosophy or a sect; it is not a sectarian principle or a set of activities; it is a way of being human and a process of building a civilized human society. Hinduism emphasizes concord, unity, and harmony between and among all: between humans and nature, man and woman. A verse in *Atharva Veda* suggests, "Let us have concord with own people, and concord with people who are strangers to us…. May we unite in our minds, unite in our purposes, and not fight against the divine spirit within us."[47] The idea of peaceful coexistence wherein none is dominant or inferior is central to Hindu philosophy. According to Paul Younger, "Society is not the slave of divine purpose, but it is part of larger order and its behavior should never become an occasion for the disruption of the vegetables, animals or heavenly realms."[48] This view very well advocates the need for the protection of all living creatures in this world- humans and non humans, feminine and masculine- and contains the seed of modern day concepts- 'sustainable development' and 'protection of environment'.[49] The ancients remarkably recognized the importance of harmony between man and nature and

---

46. In *Yajurveda* (36: 17), ॐ द्यौः शान्तिरन्तरिक्षँ शान्तिः/पृथ्वी शान्तिरापः शान्तिरोषधयः शान्तिः।/ वनस्पतयः शान्तिर्विश्वे देवाः शान्तिर्ब्रह्म शान्तिः,/सर्वं शान्तिः, शान्तिरेव शान्तिः, सा मा शान्तिरेधि।।/ॐ शान्तिः शान्तिः शान्तिः।।

47. Abinash Chanda Bose (Trans.), *Hymns from the Vedas* 216-17 (1966).

48. Paul Younger, *Introduction to Indian Religious Thought* 35 (Westminster Press,1972).

49. B C Nirmal, "Environmental Protection in Hinduism", Reading Materials, National Workshop on *Role of Religion, Indian Culture and Traditions in Environmental Protection* (22-23 June 2002, Law School, Banaras Hindu University). Also see, B C Nirmal, "An Ancient Indian Perspective of Human Rights and Its Relevance", 43 (3) *Indian Journal of International Law*, ISIL 445-478 (2003).

ensured that it is practiced in man's everyday life. Various texts and evidence prove that the Indic concept of nature and human relationship is very different from Western thinking. Contrary to the Western model, which is highly individualistic and atomistic, the Indian concepts focus on the combined action. Mathew Ritter also argues similarly while saying, "the absolute, universal and egalitarian character of western rights of the Individual is simply not consonant with the character of human rights through dharmic action."[50]

If we look at the tenets of Hinduism and Indian philosophical tradition, we notice that analogous to *Sankhya* dualism, in Hindu mythology too, the masculine and feminine principles have been recognized particularly while conceptualizing Gods. There are different concepts and forms of Gods in Hindu mythology. One such form is androgynous *ardhanarishwara* (composite of *Shiva*- male and *Parvati*-female) besides male and female deities. There is a concept of formless and genderless deity *Brahman* (universal absolute, supreme self as oneness in everyone). Similarly, in Shaktism, God is conceived as essentially female, and *Shakti* (feminine principle *Prakriti*) is worshipped. Moreover, In Indian mythology, each masculine God is partnered with a feminine deity to make him complete.

The Vedic age too invoked and praised both male as well as female deities. Most of the deities worshipped during this age were pagan or nature gods. The ancient text *Rigveda* mentions *Usha* (goddess of dawn) as the most worshipped goddess of that time to whom nearly twenty hymns have been dedicated. Early Vedic texts also mention female gods, *Prithvi* (earth), *Aditi* (mother of gods), *Saraswati* (river, nourishment), and *Nirrti* (death) as prominent deities. Whereas, *Indra* (rain, lightening), *Agni* (fire), *Varuna* (law), *Dyaus* (sky), *Savitr* (sun) were major male deities, Max Muller observes in his account that both male and female deities in Vedic time were revered equally: "neither superior nor inferior; almost everyone is represented as supreme and absolute."[51] Another scholar R. M. Gross, however, reflects on the nature and depiction of Indian deities, both male and female, and writes, "while masculine Gods are

50. Mathew A Ritter, "Human Rights: The Universalist Controversy…" 30 *California Western International Law Journal*, 71-90 (1999).

51. Max Muller, in William J Wilkins (ed.), *Hindu Mythology: Vedic and Puranic*, 8 (Calcutta: London Missionary Society Calcutta).

symbolically represented as those who act, the feminine Goddesses are symbolically portrayed as those who inspire action."[52] Thus, both *prakriti* and *purusha* complement each other without dominating one and another.

According to *Sankhya* philosophy, *prakriti* is the ultimate cause of the world of objects. It cannot be its counterpart *purusha* or the self because it is neither a cause nor an effect. Further, "Being the ground of such subtle products of nature as mind and the intellect, *prakriti* is a very subtle, mysterious and tremendous power which evolves and dissolves the world in a cyclic order."[53] *Prakriti* (matter, nature, feminine force) evolves the world of objects when combined with the *Purusha* (the self, masculine principle). The evolution of the world cannot take place due to the self alone because it is inactive. Based on dualistic realism *Sankhya* theory suggests liberation as the ultimate goal of life. Rege compares Samkhya dualism with Cartesian dualism, which dominated Western thought during the Enlightenment.[54] According to this dualism, 'the basic ontological division is between the mind (consciousness) and material things (extension and motion).'[55]

Vandana Shiva utilizes this philosophy of *Sankhya* school in her ecofeminist discourse and says that "women in India are an intimate part of nature, both in imagination and in practice."[56] She draws ideas from the Indian philosophical tradition, which studies the world in the light of *Prakriti* (Nature or feminine principle, which is both animate and inanimate) and *Purusha* (masculine principle or spirit). *Prakriti* (Nature or primal matter) is active and productive force of the cosmos, it is the *Shakti* (power) that creates the world in conjunction with *Purusha*: "ontologically, there is no divide between man and woman, because life in all its form arises from the feminine principle."[57]

---

52. Rita M Gross, "Hindu Female Deities as a Resource for the Contemporary Rediscovery of the Goddess", 46(3) *Journal of the American Academy of Religion* 269-291(1978).
53. S C Chatterjee and Dhirendramohan Datta, *An Introduction to Indian Philosophy* 242 (Rupa Publications, 2007).
54. M P Rege, "Sankhya Theory", (March 23, 2013). Available at: *speakingtree.in* (Visited on Dec. 30, 2020)
55. Chhaya Datar, *Ecofeminism Revisited* 114 (Jaipur: Rawat Publications, 2011).
56. Vandana Shiva, *Staying Alive: Women, Ecology and Development* 38 (New Delhi: Zed Books, 2002).
57. Id. 56, p. 40

Now turning to the discourse as women- nature connection in Buddhism, Rita M. Gross has made a remarkable study of ecological vision in Buddhism with respect to the third world women in her article "Buddhism and Eco-feminism: Untangling the Threads of Buddhist Ecology and Western Thought." [58] Although, Buddhism has much potential to deconstruct gender, yet it has failed to draw the attention of the Western scholar to take cognizance of this otherwise rich philosophy due to the present age which is governed by the "religion of market;" the global religion based on consumerism.[59] Buddhist philosophy informs that 'greed' is the sole cause of all suffering. Ecofeminists too focus on "their" greed and "my" resulting suffering. Similarly, in collaboration with Reuther in the book *Religious Feminism and the Future of the Planet: A Buddhist-Christian Conversation*, Gross has initiated a discussion on the possibility of 'Buddhist Eco-feminism'.[60] Besides, Stephanie Kaza, a practicing Buddhist, a professor of Environmental Studies, and a feminist herself, contributed an article "Acting with Compassion: Buddhism, Feminism and the Environmental Crisis" (1993) to explore the postulates of Buddhism and feminism pertaining to the ecological crisis. Kaza writes, "Both Buddhism and feminism provide critical tools for examining deeply the roots of anti relational thinking that support environmental destruction. Both insist on the thorough review of all aspects of the conditioned mind that perpetuate mental and physical patterns of domination."[61]

The principle of interrelatedness is the fundamental law in Buddhism,

---

58. Rita M Gross, "Buddhism and Ecofeminism: Untangling the Threads of Buddhist Ecology and Western Thought", 24 (2) *Journal for the Study of Religion* 17-32 (Special Issue: Transforming Feminisms: Religion, Women, and Ecology, 2011). Available at: https://www.jstor.org/stable/24764282 (Visited on Dec. 26, 2020). See also, Rita M Gross**,** "The Suffering of Sexism: Buddhist Perspectives and Experiences" 34 *Buddhist-Christian Studies* 69-81 (2014).
59. Loy David, "The Religion of the Market" in Harold Coward and D. Maguire (eds.), *Visions of a New Earth* 30 (State University of New York, 1999).
60. Rita M Gross and R R Reuther, *Religious Feminism and the Future of the Planet: A Buddhist- Christian Conversation* (London: Bloomsbury, 2001). See also, Sarah Katherine Pinnock, "Review of Religious Feminism and the Future of the Planet: A Buddhist-Christian Conversation", 23 *Buddhist-Christian Studies* 155-157 (2003). Available at: doi:10.1353/bcs.2003.0029 (Visited on Dec. 22, 2020).
61. Stephanie Kaza, "Acting with Compassion: Buddhism, Feminism and Environmental Crisis", in Carol Adams (ed.), *Ecofeminism and the Sacred* 56-57 (NY: Continnum, 1993).

which defines the world as 'a mutually causal web of relationship, each action affecting the other'. Ecological feminism too develops its principles on the idea of interconnectedness. Further, the three jewels of the Buddhist tradition- the *Buddha*, the *Dharma*, and the *Sangha* offer much to understand the web of women, ecology, and Buddhism. Here, Buddha can be seen as a teacher who enables us to learn from our experiences of the surrounding environment; *Dharma* is the truth of teachings in the form of experiences and perceptions. Each object of nature in the environment has a deep truth of reality, building interdependence, and the *Sangha* is the monastic community of Buddhists, which signifies community life: 'eco-sangha'.[62] The role of the community has been appreciated by Starhawk too when she says, 'Community permits the individual to give energy…community as a whole creates sustained movement'.[63] Thus, Women's voice within the Buddhist tradition has the power to empower all beings for the well being of others.

VII. WOMEN AND NATURE IN INDIA: CULTURAL PRACTICES

After giving a brief account of the Indian philosophy of what we call ecofeminism today, an attempt will now be made to show the presence of recognition of women-nature linkage in Indian cultural traditions. Before we proceed, we wish to explain that religion, beliefs, and culture are intertwined and together constitute the civilizational ethos of a society or community. Feminism or ecofeminism as such seems to be a foreign concept for India to address its issues but its manifestation in different forms can be observed in other cultural and intellectual traditions too. Irrespective of the view, whether it succeeded or failed in the West, the fact cannot be denied that these discourses stimulated the other parts of the globe to locate such native contexts and ideas that may address the problems of women in their societies in an effective manner. In India, too, though there has been no such movement akin to ecofeminism of the West, yet the Indian women have always been interacting with nature and their environment intimately. Besides communicating with nature for

62. Stephanie Kaza, supra 61. See also, Amanda C LaPointe, "Feminine Dharma: Buddhist Women and Duty to the Earth", *Afficio Undergraduate Journal* (Winter 2011).

63. Starhawk, "Power, Authority, and Mystery: Eco-feminism and Earth-Based Spirituality" in Gloria Feman Orenstein and Irene Diamond (eds.), *Reweaving the World: The Emergence of Ecofeminism* (Random House, California,1990).

daily needs, they engage themselves significantly with nature during the performance of religious, cultural, and spiritual rituals. As mentioned before, Hindus regard all living creatures as sacred, and women play a crucial role in observing this. Maria Mies makes an interesting observation of how women in India, in particular, and the Third World, in general, connect their tradition with nature. She asserts that the poor women in villages know that the earth is sacred, a living being that guarantees their survival and also the survival of other creatures. Their survival and sustenance are directly proportional to the nature's health. Hence, the Indian women in their cultural practices too synchronize with nature and their environment.

Nature has been entwined with Hinduism since the Vedic era. Besides nature deities, various animals such as cow, snake, bull, monkey, tortoise, and plants namely *neem peepal*, *tulasi*, banyan tree, sun, and river, are also observed sacredly in India. These non human creatures of the nature are worshipped by Indians since time immemorial, and in the worship, women play an active role. Women are mostly the carriers of these traditions and practices. In addition to this, women actively interact with nature while performing various cultural, religious, and spiritual rites particularly at the time of birth, wedding, and death. Most of these rites are performed near rivers or ponds and sacred trees. Women in India also observe ritualistic festivals with nature as an integral part of their day to day life and festivity. Tracy Pintchman in the book *Guests at God's Wedding: Celebrating Kartik among the Women of Benaras* (2005), has beautifully recorded the *kartik* celebration of the Assi Ghat by women in Varanasi (India).[64]

Folk forms such as *kajari, chaiti, faag, saanjh parati* sung by the rural women of India (particularly in the eastern Uttar Pradesh) have a direct relation to the nature and changing season. Folk song forms such as *kajari* (while celebrating the season of rain), *ropani* or *savanahi* (at the time of sowing paddy), *chaita* (while reaping the crop of wheat) are sung on various occasions by the rural women of India with intense folk expressions. Besides, tree and animal worship in India is also very popular among Hindus.[65] *Peepal* tree is considered as the "tree of enlightenment"

64. Tracy Pintchman, *Guests at God's Wedding: Celebrating Kartik among the Women of Benaras* (Albany: State University of NY Press, 2005).

65. S M Edwardes, "Tree-Worship in India", 1(1) *Empire Forestry Journal* 78-86 (March 1922). Available at: http://www.jstor.org/stable/42594484 (Visited on Nov. 17, 2020). See also, "Sacred trees and plants in Hinduism", Available at: *speakingtree.in* (Visited on Nov. 20, 2020).

and is worshipped by the Indian women to be blessed with child. It has been considered sacred in *Skanda Purana* too, and cutting it is a sin. Similarly, Banyan tree symbolizes *trimurti*- Brahma, Vishnu, and Shiva, and is worshiped by women in India on various occasions. The highly revered flower Lotus, a symbol of purity, is related to Brahma, Gayatri, and Lakshmi. Tulasi, coconut (wish fulfilling tree), and neem trees are considered holy and associated with goddess Durga (*Sheetala*); whereas, mango is taken as the symbol of love, fertility, and highly auspicious. Nanditha Krishna's book *Sacred Animals of India*[66] explores the customs and practices that led to the worship and protection of animals and connect Nature with Humans, particularly women.

Nature also holds great significance for tribal communities that carry much reverence for nature's objects and preserve them. In their cultural and religious practices too, they mostly worship female deities and maintain matrilineal society. Maneka Gandhi,[67] remarkably mentions tribal deities, most of them are female and nature born. For example, *Nagnechya Maa* (Hindu deity worshipped in Nagana, Rajasthan) is a snake goddess. *Manasa Devi* is also a folk goddess of snakes, worshiped mainly in Bengal and north-eastern India, to prevent and cure from the snake bite, chickenpox, fertility, and prosperity. *Baglamukhi*[68] (West Bengal), *Kamakhya*[69] Devi (Assam), *Rajarappa*[70] Devi (Jharkhand) are a few other significant female deities. As is evident from the discussion of the prototype of ecofeminism in ancient Indian tradition and cultural practices, the connection between women and nature was not only recognized in ancient India but was also manifested in several other forms. The practice of worshipping nature and female deities along with the male Gods needs to be given due account when scholars attempt a further theorization and reconstruction of

66. Nanditha Krishna, *Sacred Animals of India* (New Delhi: Penguin Books, 2008). Also see, Nanditha Krishna, *Hinduism and Nature* (New Delhi: Penguin Books, 2017); David L. Haberman, *People Trees: Worship of Trees in Northern India* (USA: OUP, 2013).

67. Maneka Gandhi, *Brahma's Hair: The Mythology of Indian Plants* 47 (New Delhi: Rupa & Co., 2007).

68. one of the tantric Hindu deities who rides on Bagula (crane) bird and is associated with wisdom and concentration.

69. Seated in Guwahati of Assam, she, too is a *seedh peetha* popularly known as *kamrupa-kamakhya*. Dedicated to Saktism's ten *mahavidyas*, she is an important Hindu tantric deity of desire also described in *Kalika Purana* as 'mahamaya' – great goddess of illusion.

ecofeminism to put it on a strong and stable pedestal and make it more socially acceptable than before.

VIII. MODERN ECOFEMINIST DISCOURSE IN INDIA

The modern concept of ecofeminism in India has been chiefly articulated as a reaction to the experiences of modern industrialized society. Indian scholars namely Vandana Shiva, G. S. Arora, Amartya Sen, Ramchandra Guha, Madhav Gadgil, Bina Agarwal, Krishna Kumar, Gita Sen, Shobhita Jain, Madhu Khanna, and others have made a substantial contribution to the understanding of Woman- Nature linkage with respect to development, ecology, culture, and capitalism in the context of India and Third World Women. They situate the women of India in the backdrop of environmental degradation and examine their relationship to agricultural technology, workforce, hunger, sanitation, poverty, production, and reproduction crisis. Environmentalist Medha Pateker (a key figure in Save the Narmada Movement) and Indian literary veterans Mahashweta Devi, Kamala Markandeya, and others have also expressed their ecofeminist concerns in their ways.

Given the constraint of time and space, it is not possible in this brief paper to discuss the contribution of all the above mentioned Indian scholars. As Vandana Shiva's contribution to the discourse on global ecofeminism has been recognized far and wide, it would perhaps be appropriate to confine this discussion to some of her prominent propositions. Shiva has the credit to base her arguments on Asian experiences of colonialism and western modernization. Her books *Staying Alive* (1988) and *Ecofeminism* (1993 co-authored by the German scholar Maria Mies) offer an Indian perspective on ecofeminist discourse. The western canon of theorization somehow overlooked the Third World scenario both in terms of women and nature. Shiva, in her first book, stresses the need for a more sustainable and productive approach to agriculture, which can be achieved through reinstating the system of farming in India that is more centered on engaging women. She observes that the violence to nature, which seems intrinsic to the dominant developmental model, is also associated with the violence to women who depend on nature for their sustenance and also of their families and

societies.[71]

She advocates against the prevalent 'patriarchal logic of exclusion', claiming that ecological destruction and industrial catastrophes threaten daily life, and the maintenance of these problems has become the responsibility of women.[72] She also questions the assumption of 'women and tribal and peasant societies embedded in nature to be *unproductive* not because they don't contribute to economy or material production but because it is considered that 'production' can take place only when mediated by technologies, even if it is at the cost of life. Development, done in this way, therefore is maldevelopment because it is devoid of the feminine, the conservation and the ecological principle.'[73] Shiva and Mies examine empirical evidence by linking women, children, and people of color with various health- risk factors associated with environmental degeneration as a result of pesticides and other pollutants. They offer a skeptical view of modern science as objective while mentioning how the medicalization of childbirth and the industrialization of plant production have altered the very process of childbirth, which was natural to women's life. [74]

Shiva critiques modern science and technology as a Western, patriarchal, and colonial project, which is inherently violent and perpetuates violence against women and nature. Pursuit of this development model means a shift away from the traditional Indian philosophy, which perceives nature as a 'feminine principle', from which all life takes birth. Unfortunately, the development model embraced by us has reduced both women and nature to 'resource' meant for consumption and utilization. She notices that the Third World women are not merely victims of the developmental process but also a strong force with the potential to bring a radical change in this system worldwide. She highlights the role of women in the *Chipko Movement* of Uttarakhand to protect forests. The

---

70. located in the Ramgarh district of Jharkhand, this *Chhinnamasta* (headless) goddess is considered a tribal goddess and an important tantric deity.
71. Vandana Shiva, *Staying Alive: Women, Ecology and Development* xvi (New Delhi: Zed Books, 2002).
72. Vandana Shiva, *Empowering Women*, June 2004, wordpress.com (Visited on Nov. 29, 2020).
73. Vandana Shiva, *supra* 71, p.4.
74. Vandana Shiva and Maria Mies (eds.), *Ecofeminism*, Jaipur: Rawat Publications, 1993, Indian Reprint, 2010).

women's role in this movement has been highlighted also by Shobita Jain who says, "They [women] were able to perceive the link between their victimization and the denuding of mountain slopes by commercial interests. Thus, sheer survival made women support the movement."[75]

However, Shiva's views have been criticized also largely on account of her focus on the rural women of northwest India and lesser concern for the class, caste, race, religion, and other factors that define Indian society as well as women to a great extent. Reactions are also against her labeling of modern science and technology as Western. Reflecting upon the role of women in the *Chipko* Movement, Janet Biehl comments that it was not all in all women's project but was motivated by a Gandhian social development movement. Ramchandra Guha, a well known Indian scholar, too remarks on this movement's essentialist perception by calling it "one in a series of protest movements against commercial forestry."[76]

IX. CONCLUSION

Ecofeminism has received both encomium as well as criticism from scholars and academics of the world and has been stringently attacked for its essentialism. Despite a few limitations, one cannot deny that it is one of the most celebrated discourses even today as it relates to ecology, and ecology is essential for our sustainable development. It is a celebration of the diverse ways in which we may act for the welfare of society by promoting peaceful coexistence. It creates a progressive dialogue and ensures equal participation of both men and women in achieving the goals of sustainable development.[77] It is a pluralistic inclusive philosophical

---

75. Shobita Jain, "Standing up for trees: Women's Role in the Chipko Movement", 36(146) *Unasulva* 12-20 (1984). See also, Irene Dankelman and Joan Davidson, *Women and Environment in the Third World: Alliance for the Future* (Earthscan Publication Ltd. London, 1988).
76. Ramchandra Guha, *The Unquiet Woods: Ecological Change and Peasant Resistance in the Himalaya* 174 (Delhi: OUP. 1989). See also, R Guha "Radical American Environmentalism and Wilderness Preservation: A Third World Critique", 11(1) *Environmental Ethics* 71-83 (1989).
77. UN Sustainable Development Goals-Agenda 2030. Available at: https://www.undp.org/content/undp/en/home/sustainable-development-goals.html (Visited on Oct. 11, 2020). See also, B C Nirmal, "Sustainable Development, Human Rights and Good Governance", in JL Kaul *et al.* (eds.), *Human Rights and Good Governance* 1-31(2008).

doctrine that helps draw the attention of the policymakers for a radical change in regulations towards establishing a synergetic relationship between the human and non human world. To dismantle the 'logic of domination' there is a need to recall and revive that oppression against both human and non human world could be brought to an end; socio-political-environmental justice can be made a reality; love, harmony, and care can be ensured only if we believe in our cosmic model of peace and ecological wellbeing suggested by the Indian philosophical and cultural tradition. If appropriate measures are adopted in the light of Indic philosophy, its ancient belief systems, and cultural practices in which man's approach to nature has been eco-centric, and man is believed to be just a component of a great cosmic structure, a healthy society can become a reality. The Indian concept of the feminine (*prakriti*) and masculine (*purusha*) force does not see them antithetical to each other; instead, it considers them correlatives. In a broader sense, the Indian concept of *vasudhaiva kutumbakam*[78] perceives all humans and non humans as one family. In the same spirit, the present study underlines the importance of ecofeminism from a holistic perspective, which reflects a confluence of civilizations. To achieve this end, ecofeminism needs to be studied from the perspective of ancient Indian tradition and all cultures and civilizations across the globe.

■

78. उदारचरितानां तु वसुधैव कुटुम्बकम्।। The original verse appears in Chapter 6 of *Maha Upanishad* VI.71-73. Also found in the *Rig Veda*. The verse suggests magnanimity of the heart of those who consider the world as 'one family'.

ALTERNATE DISPUTE RESOLUTION METHODS IN CRIMINAL JUSTICE SYSTEM

*VIVEK KUMAR PATHAK**

ABSTRACT : Access to justice is the ultimate aim of criminal justice system, however, an overload of criminal cases reduces the strength of the resources of entire court system. The dockets of courts are full and pendency of litigation is huge. In this context the importance of alternate methods of dispute resolution cannot be denied. Despite that the ADR techniques have not become popular in criminal justice system mainly because these are considered fit for resolution of civil disputes only. In recent past various initiatives have been taken in different countries to explore the possibility to apply ADR methods in criminal law. Some have shown successful results and some are still in the stage of evolution. Victim offender mediation has proved to be an effective method in which victim also finds place in the criminal justice system. In Indian context the Criminal Procedure Code provides for compounding of certain offences and also the concept of plea bargaining which may be considered as beginning of inclusion of ADR methods in criminal justice system. In this context the present paper presents an overview of some of the methods of ADR which may be used in criminal law. The paper highlights the importance of restorative justice.

KEY WORDS : Criminal justice system, ADR, Restorative justice, Victim offender mediation, Plea bargaining, Family group conferencing, Community Crime Prevention Programs.

I. INTRODUCTION

Justice is the foundation of any civilized society. The search and pursuit for justice has been an ideal of civilized society and the mankind

* LL.M., Ph.D. (Bareilly), Assistant Professor, Faculty of Law, Banaras Hindu University, Varanasi.

has been aspiring for generations for achieving this great ideal. The framers of our Constitution also seem to reflect such aspiration in the Preamble to the Indian Constitution.[1] Article 39-A of the Constitution provides for ensuring equal access to justice.[2] Administration of Justice involves protection of the innocent, punishment of the guilty and the satisfactory resolution of disputes.[3]The Justice delivery system seems to be in crisis in most of the countries. The civil litigation has become too expensive, time consuming and uncertain. An overload in criminal cases reduces the strength of the resources of entire court system. In these circumstances access to justice seems not to be the reality for anyone either poor or middle class or wealthy. It becomes the challenge of the day to improve the situation and therefore judges and lawyers are required to develop new approaches and techniques and to acquire new skills to resolve the disputes. The exploitation of traditional methods of dispute resolution outside the rubric of formal criminal justice system may be an important and useful mode for maintaining peace, harmony and close and continuing relationships in the society.[4] Restorative Justice is one of such methods which have received a great deal of attention throughout juvenile and criminal justice systems across the globe. Hawaii has endorsed the movement for restorative Justice and has implemented the Pono Kaulike program as an Alternative Dispute Resolution process at the District Court level. With the help of trained mediators, the Pono Kaulike program has helped many individuals to heal their relationships with those affected by crime.[5] The world has experienced that adversarial litigation is not the

1. When it declares that We, the people of India having solemnly resolved to constitute India into a …….. and to secure to all its citizens the justice social, economic and political …….

2. Article 39A, Constitution of India: The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

3. Hon'ble JusticeS.B.Sinha, Judge Supreme Court of India, "ADR and Access to Justice: Issues and Perspectives", a lecture delivered at Tamilnadu State Judicial Academy on June 15, 2013.

4. Melissa Lewis and Les Mc Crimmon, "The Role of ADR Processes in the Criminal Justice System: A view from Australia".(2005), Available at; *http:// www.justice.gov.za/ alraesa/conferences/.../ent_s3_mccrimmon.pdf.*

5. Lyle Keanini,"ADR in Hawai'i Courts: The Role of Restorativ Justice Mediators", *Asian-Pacific Law & Policy Journal* ,Vol. 12:2, 175

only means of resolving disputes. Congestion in court rooms, lack of manpower and resources, delay, cost, and procedure etc. speak out the need of better options, approaches and avenues. Alternative Dispute Resolution mechanism has been evolved as such an option.There is alooming need to supplement the current infrastructure of courts by means of Alternative Dispute Resolution mechanisms.[6] In 1997 the Law Commission of Western Australia was given a broad reference to examine and report on criminal and civil justice system in Western Australia including the role of legal profession and other alternative dispute resolution professionals and other mechanisms for the resolution of disputes. Commission reviewed the criminal and civil justice system in Western Australia and submitted its report to the Attorney General. The Commission made 447 recommendations for reform of civil and criminal justice system. In making its recommendations the Commission sought to reduce delay, cut cost and demystify the justice system by making it faster, simpler and easier to understand. Out of these 447 recommendations total of 15 recommendations were made concerning alternative criminal charge resolution.[7] The need for alternatives to the formal legal system has engaged the attention of the legal fraternity including judges, lawyers and legal scholars for several decades. This has for long been felt as an essential to the process of judicial reform for signifying the access-to justice approach.[8]

The formal justice system involving civil and criminal justice,institutions like police, public prosecution, and courts build the basic foundation of administration of justice[9]. It would be relevant to mention that a general perception seems to be that despite the formal structure,formal procedure and formal machineries, the formal justice

---

6. *Supra* note 3
7. Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia,* Project No 92(1999).
8. Special Address by Dr.S.Muralidhar, Part-time Member, Law Commission of India in an International Conference on ADR, Conciliation, Mediation and Case Management Organised By the Law Commission of India at New Delhi on May 3-4, 2003.
9. EwaWojkowska, "*Doing Justice: How informal justice systems can contribute"* United Nations Development Programme, Oslo Governance Centre, (The Democratic Governance Fellowship Programme*),* 2006, p.9., available at *http// www.undp.org/oslocentre/dgfelpro.htm.*

system is increasingly becoming inadequate, extravagant, inflexible and inefficient when compared to the more accessible and speedy alternative dispute resolution system.This does not meanthat the idea of ADR should substitute the formal system as the venue for justice, ratherADR process will provide a set of different options for the offenders or victims of crime in criminal justice[10]. The formaljustice system is always existent to adjudicatecases where the defendant /offender or the plaintiff/victim does not wish to participate in thealternative dispute resolution process, or cases where the parties fail to reach a resolution in such a process.[11] Therefore, dispute resolution processes through ADR can be seen as a critical element of efforts to maintain community harmony by maintaining the relationship ofdisputing parties in a more flexible option.[12]

ADR processes are not new but rather have been rediscovered. Such informal justice mechanisms have long been the dominant method of dispute resolution in many societies, and in indigenous communities in particular.[13] The rebirth of ADR is often associated with the development of community justice centers to resolve neighborhooddisputes in the 1970s and 1980s. Subsequently, the use of ADR processes extends to cover other areas also, such as family, environmental, commercial and industrial disputes.[14] Formal court processes were criticized as being expensive,inaccessible, conflict-inducing, and disempowering for those involved. On the other hand, ADRwas seen as a more accessible, flexible and efficient form of justice which allowed for the active participation of all parties and assisted in the preservation of relationships.[15]ADR has now

---

10. Ric Simmons, Private Criminal Justice, *Wake Forest Law Review* (2007) Vol. 42, p. 912.
11. *Id*.
12. Thomas Barfield, NeamatNojumi, and J Alexander , The Clash of TwoGoods: State and Non-State Dispute Resolution in Afghanistan in a conference on 'Relationshjip Between State and Non- State Justice System in Afganistan' held on Dec. 10-14, 2006 at Kabul, Afganistan, Imprint: Washington DC; United States Institute of Peace(USIP), 2006, available at;http:/www.usip.org/files/file/clash_two_goods.pdf.
13. Hilary Astor and Christine M.Chinkin, *Dispute Resolution in Australia* ,LexisNexisButterworths, 2nd ed, 2002 at 5.
14. *Id.*At 6.
15. LaurenceBoulle, *Mediation: Principles, Process, Practice,* Butterworths, 1996 at 35.

become widely accepted, more institutionalized. Nowa days it is also being promoted by governments. It seems that the ADR has been extensively integrated and co-opted into the system. The idea of alternative dispute resolution has become ingrained and deep rooted, despite the fact that thedescription of such processes as an alternative attracted significant criticism in earlier decades. There have beensome conceptual criticisms of the use of the term 'alternative'. Some scholars argue that it is incorrect to suggest that such processes can supplant, displace or replace the traditional court mechanisms. In this context Sir Laurence Street, the former Chief Justice of New South Wales states that it is not in competition with the established judicial system, "… Nothing can be alternative to the sovereign authority of the court system. We cannot tolerate any thought of an alternative to the judicial arm of the sovereign in thedischarge of responsibility of resolving disputes between state and citizen or betweencitizen and citizen. We can, however, accommodate mechanisms which operate as additional or subsidiary processes in the discharge of the sovereign's responsibility.These enable the court system to devote its precious time and resources to the more solemn task of administering justice in the name of the sovereign."[16]Some others may advance the criticism that it suggests a conceptually and empirically indefensible distinction between ADR processes and traditional litigation. It may also be the point of discussion and debate that the term 'alternative' is socially and historically inaccurate, bestowing an undeserved primacy on litigation where in reality the majority of disputes have traditionally been resolved without the use of formal legal processes.

II. ADR IN CRIMINAL JUSTICE SYSTEM

Most of the literature dealing with ADR contains little or no reference to its use in the criminal justice context, and as a corollary, most criminal law texts dealing with processes such as conferencing do not utilize ADR terminology. This is because ADR is usually considered to be amethod of resolving disputes between parties without resorting to formal method of adjudication by traditional courts. It is also relevant to note that traditional

16. L Street, 'The Language of Alternative Dispute Resolution' (1992) 66 *Australian Law Journal* at 194, available at *www.supremecourt.justice.nsw.gov.au.*

theories of criminal justice, on the other hand, considers criminal offending as mainly a matter between the offender and the state.[17]It is believed that the use of ADR processes in criminal matters is a relatively new trend in Western countries. To some extent though not entirely, the increased interest in the application of ADR processes to the criminal justicesystem was borne from a general dissatisfaction with traditional adversarial methods of dispute resolution. The traditional formal criminal justice system has engrossed some criticisms. It is perceived as unsuccessful in reducing rates of recidivism. It is realized that sometimes it may even increase the likelihood of reoffending for particular groups, such as juveniles and Indigenous persons. It ignores the victims of crime and fails to recognize crime as a form of social conflict.[18] Nils Christie,[19]who has been a strong proponent of the application of ADR methods and techniques to criminal disputes, has asserted that conflicts become the property of lawyers and that formal legal processes deprive individuals of their right to full participation in the dispute resolution process. The proliferation of the idea, that a criminal offence represents not only crime against state but also a community conflict which requires resolution between individuals, has led to increased support for the use of informal methods under criminal justice system. It is also postulated that traditional formalcriminal justice processes make the offender an object forstudy, manipulation and control which reduces the victim to a non-entity and the offender to a thing.[20]

In recent years, various processes of ADR have been adopted, adapted and applied in criminal justice system in several international jurisdictions. In the context of criminal justice system, the term ADR may include a number of methods, processes, and practices like victim-offender mediation, family group conferencing[21], victim offender-

17. RickSarre and K Earle, 'Restorative Justice' in R Sarre and John Tomaino, *Key Issues in Criminal Justice,* Australian Humanities Press,2004, Pp.144, 145.
18. S Kift, 'Victims and Offenders: Beyond the Mediation Paradigm?' (1996) *Australian Dispute Resolution Journal* at71.
19. A Professor of Criminology from Norway
20. N Christie, 'Conflicts as Property',*The British Journal of Criminology,* 17(1), 1977, Pp.1-14
21. Family group conferencing was pioneered in New Zealand in the 1980s during the reform of their juvenile justice system. It was devised after consultation with

panels,[22] victim assistance programs[23], community crime prevention programs[24], sentencing circles[25], ex-offender assistance[26], plea bargaining, community service programs,and school programs. It may also include

---

the public including Maoris and Pacific Islanders throughout New Zealand. It is a form of restorative justice wherein families and communities are involved in asking decisions who are accused of committing crimes.

22. Victim-Offender Panels can be attributed to the rise of movements for victims' rights in recent times. In particular, it is a campaign against drunken drivers. It is a community based meeting for victims, witnesses and offenders to describe the experience which the victims have endured due the actions of drunken drivers.
23. Victim Assistance Program is an initiative on the part of Governments for providing information, aid and assistance to persons who have suffered direct physical, emotional or pecuniary harm as aresult of the commission of crime. The objective of the Program is to improve victims' understanding to the criminal justice system and their participation therein. The Program attempts to make victims of crime feel supported and comfortable in the criminal court system by providing them assistance, information and services after the police have laid criminal charges.

    It has been observed that the victims of crime who have a better understanding to the criminal justice process and feel that there are services available to help them are more often able to fully participate in the proceedings of the criminal court.
24. Community Crime Prevention Programs are grounded on the philosophy to change social conditions which are responsible for commission of crimes in residential communities.
25. According to the observations made in the thesis entitled "*Sentencing Circles For Aboriginal Offenders In Canada: Furthering The Idea Of Aboriginal Justice Within A Western Justice Framework"* Submitted to the Faculty of Graduate Studies and Research through the Department of Sociology and Anthropology in Partial Fulfillment of the Requirements for the Degree of Master of Arts at the University of Windsor, by Melanie Spiteri, "Sentencing circles have introduced a move away from punishment of Aboriginal offenders towards rehabilitation of Aboriginal offenders. Such a move is one of core associations with the idea of Aboriginal justice. Sentencing circles are commonly described in terms associated with idea of Aboriginal justice such as community involvement, healing, restoration of balance, and rehabilitation. That is, they are cited as an example of an extension of justice, though it is recognized that they have evolved within the constraints of the criminal justice system and do not constitute an autonomous field of Aboriginal justice".
26. According to Centre for Justice and Reconciliation, a Program of Prison Fellowship International, "Consistent with the underlying purposes of restorative justice, prisoner assistance programs attempt to develop in prisoners capacities which allow them to function in the legitimate community. Prisoner assistance programmes provide opportunities for prisoners to make the transition from institutionalization to community membership, from stigmatized offender lacking social capital to restored individual possessing marketable skills."

cautioning and specialist courts such as Indigenous Courts and Drug Courts.

III. RESTORATIVE JUSTICE

ADR in criminal justice system is also called as Restorative Justice. Restorative justice is essentially concerned with restoration i.e. restoration of the victim, restoration of the offender to a law-abiding life and restoration of the damage caused by the crime to the community.[27] It seeks to promote justice, accountability, and healing by moving beyond punishment and condemnation in order to address the causes and consequences of the offenses.[28] Restorative justice has deep roots in the traditions of Pacific Islanders[29], the Maori[30] in New Zealand, and First Nation people in Canada, American Indians, and other indigenous people throughout the world.[31] It is a peacemaking and collaborative approach to resolving conflicts that can be used in various settings other than the judicial system, such as at home, school, and work. Various processes of Restorative Justice endeavor to involve, to the extent possible, individuals who have a personal wager in the incident in order to resolve their problems. It is also important to take note that these processes rely profoundly upon voluntary cooperation by the parties and therefore it must be carefully facilitated by skilled, specially trained mediators, whose prime responsibilities are to ensure a safe and comfortable environment

27. Tony Marshall, Home Office Research Dev. And Statistics Directorate, Restorative Justice: An Overview 7 (1999), available at*http://members.multimania.co.uk/lawnet/RESTRJUS.PDF*

28. Statement of Restorative Justice Values and Processes: Introduction, Tony Marshall, *Ibid*.

29. Pacific Islanders refers to geographic and ethnic term to describe inhabitants and diasporas of any of the three regions i.e. Micronesia, Melanesia and Polynesia. It is also sometimes used to refer inhabitants of Pacific Islands.

30. According to Walters, Richard in their article, Mass Migration and Polynesian Settlement of New Zealand, *Journal of World Prehistory*, 30(4), 2017, p.351-376, Maori are the indigenous Polynesian people of New Zealand who are settlers from eastern Polynesia and arrived in New Zealand in several waves 14th century.

31. M. Umbreit& J. Greenwood, U.S. Dep TOf Justice Office Of Justice Programs, Guidelines For Victim-Sensitive Victim-Offender Mediation: Restorative Justice Through Dialogue 2 (April 2000), available at*athttp://www.cehd.umn.edu/ssw/rjp/Resources/RJ_Dialogue_Resources/Training_Resources/Guidelines_Victim_Sensitive_VOM.pdf*

and firm ground-rules for a fruitful exchange. Considering the fact that there is several ADR process under the umbrella of Restorative Justice and the limitation of the scope of the paper, the present paper is focused on some important and more relevant such process.

Restorative justice theories differ from traditional retributive justice theory in many aspects. While retributive justice recognizes crime as an act against the state, restorative justice theories recognize crime as an act against the victim and the community. Retributive justice focuses on punishment of the offender while restorative justice emphasizes restoration of all affected parties like victim, offender, and the community. Retributive justice focuses on the past behavior of offenders and does not deal with the role of repentance or forgiveness. But the restorative justice emphasizes the harmful future and consequences of the offender's behavior. In essence restorative justice encourages repentance and forgiveness. Therefore, it seems that restorative justice is a new paradigm which requires achieving justice than quest for punishment. Restorative justice can and should be utilized in conjunction with traditional criminal adjudication and punishment.[32]

(i)Victim-Offender Mediation

Mediation is a form of Alternative Dispute Resolution (ADR) where a neutral third party facilitates a resolution between parties as an alternative to litigation.[33] VOM applies mediation and ADR techniques to criminal cases as one of the several practices rooted in restorative justice. One exception to the general rule that victims do not participate in setting the sanctions of their offenders is the use of Victim Offender Mediation (VOM) programs.[34]In Recent times the re-emergence of an ancient philosophy of justice referred to as restorative justice can be seen. In this philosophy a crime is viewed as an offense against a victim, and the emphasis is on resolving conflict, repairing harm to the victim, holding the offender accountable to the victim, and returning things as much as possible to

32. Larysa, Simms, Criminal Mediation is the BASF of the Criminal Justice System : Not Replacing Traditional Criminal Adjudication, Just Making it Better,*Oshio State Journal on Dispute Resolution,* Vol.22, No.3, 2007, 797-838

33. *Id*. at 789

34. Currently, there are over 1319 VOM programs in the world, with 302 in the United States alone. United States Department Of Justice, Directory Of Victim Offender Mediation Programs In The U.S. (2000).

the way they were before the offense occurred. According to the philosophy on which the current justice system in the United States is based, the emphasis on punishment in the model of retributive justice is now being replaced by an emphasis on personal accountability to the victim and the recognition of the harm done by the offender to the victim.[35]

Victim-Offender Mediation (VOM) is a process of restorative justice which provides to victims an opportunity to meet directly with their offenders in a safe and controlled environment. VOM can be used at various stages of the criminal justice process. Victim-offender mediation is an empowering process that provides opportunity to the persons involved to settle the conflict instead of becoming the subjects of decisions imposed upon them by the formal courts. Victim-offender mediation can be used as a complement or an alternative to the criminal justice system at various stages in the criminal justice process.[36]It would not be out of context to mention that it has also been a dominant thought that criminal mediation is not a cure-all for every crime, victim and offender, but it successfully supplements not supplants the traditional adversarial adjudicatory criminal process.[37]The introduction of traditional and indigenous legal systems into at least part of the criminal justice system may increase the existing alternatives to imprisonment, particularly where there is a need to involve the community in the healing of the victim's pain, the rehabilitation of offenders and their reconciliation with those they wronged and with society at large. Legislative intervention may be required to recognize aspects of customary law, but this should not prevent courts from investigating the possibility of introducing electrifying, vibrant and potential alternative sentences into the criminal justice system.[38]

In this process, with the help, assistance and support of trained mediators, the victims are given the opportunity to allow the offenders know how the crime affected them. They receive answers from offenders to their questions and involve themselves directly in developing a restitution plan. This restitution plan holds the offenders financially accountable for

---

35. Galaway, 1988; Umbreit, 2001; Zehr, 1990

36. Muntingh, The development of a victim-offender mediation programme, p. 1.

37. *Supra* note 32

38 *The State* v. *Joyce Malileke and others*, Case No. CC 83/04, Dated 13/06/06 , the High Court Of South Africa /Rb (Transvaal Provincial Division)

the losses they caused. Victim-offender mediation (VOM) is the oldest and most widely practiced method of restorative justice. Although there is no universal description of the type of crimes that VOM programs can handle but generally, VOM programs involve the victims and perpetrators of juvenile crimes, property offenses and minor assaults.There have always been efforts to broaden the scope of VOMto include adult offenders and serious violent crimes also.

The first victim-offender mediation program began as an experiment in Kitchener, Ontario in the early 1970's. A youth probation officer convinced a judge that two youths convicted of vandalism should meet the victims of their crimes. After the meetings, the judge ordered the two youths to pay compensation to those victims as a condition of probation. The program began as a probation-based post conviction sentencing alternative, inspired by a probation officer's belief that victim offender meetings could be helpful to both parties. The Kitchener experiment evolved into an organized victim-offender reconciliation program funded by church donations and government grants with the support of various community groups. Following several other Canadian initiatives, the first United States program was launched in Elkhart, Indiana in 1978. From there it has spread throughout the United States and Europe.[39]England initiated the first state supported Victim Offender Mediation Programs during the mid of 1980s to the mid of 1990s.[40]

A growing number of states within the U.S. are passing legislation that specifically allows for VOM, ranging from basic statutory provisions to comprehensive VOM programs.[41]In Germany, several provisions were included in the Criminal Procedure Code which refers to Victim Offender Mediation. After introduction of these provisions, now the prosecutors and judges are to verify in everystage of the trial if VOM between victim and offender is possible. If they found it possible and necessary they

---

39. Frida Eriksson Final thesis for Master of Law exam to University of Gothenburg, Sweden on Victim-offender mediation in Sweden and South Africa, 2008, p 12
40. Tony F. Marshall, Results of Research from British Experiments in Restorative Justice, in Criminal Justice, Restitution, and Reconciliation 83, 83-86 (BurtGalaway& Joe Hudson eds., 1990), available at *https://cardozojcr.com/vol8no2/511-564.pdf*.
41. Mark Umbreit& Marilyn Peterson Armour, *Restorative Justice Dialogue: An Essential Guide For Research And Practice* 112 (2010).

have to make attempts to fostering all such initiatives.[42]For that purpose the Criminal Procedure Code allows them to refer the case to a VOM-Program run by a criminal justiceAgency like a probation service or to a TOA-Program i.e. a dispute resolution program run by an association outside the criminal justice system.[43]

The objective of VOM is to support the healing process of victims by providing a safe and controlled setting for them to meet and speak with the offender on voluntary basis, to allow the offender to learn about the impact of the crime on the victim and to take direct responsibility for their behavior and to provide an opportunity for the victim and offender to develop a mutually acceptable plan that addresses the harm caused by the crime.The strongest ethical principle of the victim offender mediation process is that victims must not be again victimized by the actual mediation program. Encouragement of victim participation in the mediation process must not be confused with coercion.[44]

In the process of victim-offender mediation, the discussion between the victim andoffender is facilitated by a trained mediator.The opportunity is given to both the parties to express their feelings about the offence and anattempt is made to reach agreement as to what steps the offender can take to repair the harm.

(ii)Family Group Conferencing

Family group conferencing originated in New Zealand in the 1980s and it has also been adopted in Australia.[45] Conferencing builds on victim-offender mediation programs by bringing together not just the individuals involved in the criminal offence but also members of their families and the broader community. In conferences, family members of victims and offenders can provide support and additionally can describe their secondary

---

42. Section 155a,StOP(German Code of Criminal Procedure) as cited in Thomas Trenczek, Victim-Offender Mediation in Germany – ADR Under the Shadow of the Criminal Law, *Bond Law Review,* Vol.13, Issue 2, 2001, available at *http // epublication.bond.edu.au/blr/vol13/iss2/6.*

43. Section 155 b, StOP (German Code of Criminal Procedure)), Thomas Trenczek, *Id*.

44. Mark S.Umbreit, Mediation Of Victim Offender Conflict, 1988 *J. Disp. Resol.* (1988) Available at:*https://scholarship.law.missouri.edu/jdr/vol1988/iss/5*.

45. Under Children, Young Persons and Their Families Act 1989 (NZ).

victimization.[46] The purpose of having support persons present at the conference is to demonstrate to the offenders that people care for them and to inculcate a sense of responsibility towards their family, social circle and the community in general. Conferencing is used in a number of countries around the world. Australia and New Zealand stands on different footing as these both have introduced statutory schemes for promoting family group conferencing unparalleled in other jurisdictions.[47]It is also important to see that conferencing model in Australia differs from that of New Zealand in several respects. In Australia, reforms were confined mainly to youth justice rather than child and family welfare decisions. The race considerations played a lesser role in the drive for reform in Australia whereas race and indigenous culture considerations play an important role in this regard in New Zealand.[48] In New Zealand, all juvenile cases with some exceptions such as homicide, are redirected by courts to Family Group Conferencing. As a result thereof there the fall incaseloads of up to 80 percent has been reported by the reports of judges.[49]A Family Group Conferencing is a meeting between family members and social network of victim and offender both, in which they discuss the problems and find out the possible solution for setting up a care plan. It is a decision-making model which is based on the thought that people have the right to make their own decisions and they, their family members and their social network bear the primary responsibility for the central person's problems and for finding solutions for these problems.[50]FGC involves the

46. P Condliffe, 'Difference difference everywhere' (2004) 6(10) *ADR Bulletin* 192, 192.

47. K Daly and H Hayes, *Restorative Justice and Conferencing,* in Adam Graycar and Peter Graybosky(eds) Handbook of Australian Criminology,Cambridge University Press,(2002) , available at *www.griffith.edu.au/school/ccj/kdaly_docs/kdpaper18.pdf*

48. *Ibid.*

49. Marks S Umbreit, *Family Group Conferencing :Implications for Crime Victims,*The document was prepared by the Center for Restorative Justice & Peacemaking (formerly the Center for Restorative Justice & Mediation) under grant number 96–VF–GX–K006, awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice, available at*www.ojp.usdoj.gov/ovc*.

50. Rosalie N. Metze, Rick H. Kwekkeboom, Tineke A. Abmab Rosalie N. Metze , Rick H. Kwekkeboom, Tineke A. Abma, The Potential Of Family Group Conferencing For The Resilience And Relational Autonomy Of Older Adults,*Journal of Aging Studies* 34 (2015) 68–81, available at *www.elsevier.com/locate/jaging,*

community[51] of people affected by the crime in finding out the resolution of a criminal or delinquent act. Both the affected parties are brought together by a trained facilitator for discussing that how they, their family and friends have been injured and pained by the offense and how that injury and pain might be repaired.The facilitator contacts and communicates with victim and offender to explain the process. He then invites them to the conference. The facilitator informs them to identify key members of their support systems for being invited to participate in the conference. Participation by all involved is voluntary in this process. Generally, the conference takes up with the offender explaining the incident. Followedby offender's explanation,each participant describes the shock and aftermath of the incident on his or her life. During all these discussions, the offender faces and realizes the human impact of his or her behavior on the victim, on family and friends to the victim and on the own family and friends of offenders. In the process of FGC victims find an opportunity to express and convey their feelings, ask questions and seek explanations about the offense. After a thorough, careful and meticulous discussion of the impact of the offense on the people present, the victim is asked to make out the preferred outcomes from the conference. It, thus, helps to outlinethe obligations which may be imposed on the offender. All participants contribute in determining how the offender might best restore the injury and pain which he or she has caused. The conference concludes with participants signing an agreement delineating their outlook, prospects and commitments.[52]

(iii) Community Crime Prevention

Community Crime Prevention Programs are grounded on the philosophy to change social conditions which are responsible for commission of crimes in residential communities. It includes initiatives intended to ensure such social change by the active participation and honest efforts of communities. Community crime prevention is an integral and inherent part of local public affairs. This is a local action plan which seems to be an adequate reaction to local crime and fear and apprehension

51. The victim, the offender and the family, friends, key supporters and social network of both

52. Maxwell, G., and A. Morris. (1993) *Family, Victims and Culture: Youth Justice in NewZealand*. Wellington, New Zealand: Social Policy Agency and Institute of Criminology,Victoria University of Wellington.

of such local crime. Community crime prevention is aimed at promoting the well-being and harmony in the society. It is to encourage a pro-social behavior with special emphasis on children and youth. It focuses on several risks and protective factors which are closely associated with crime and victimization.[53] It is believed that each constituent group or organization within the locality has unique resources which it can contribute to the effort for preventing crime in the society. It is also correct to assume that the responsibility to coordinate these resources and efforts falls to the law enforcement agencies and government institutions. And therefore for preventing the crime in the society, it is perfectly appropriate to ensure the active participation of all segments of the community under the coordination and supervision of state institutional mechanism.[54]

Community policing encompasses a variety of philosophical and practical approaches and is still evolving rapidly. Community Crime Prevention programs and strategies differ depending on the needs and responses of the communities involved. But certain basic principles and considerations are common to all community crime prevention efforts. Community policing is one of such programs intended to community crime prevention. Community policing is collaboration between the police and the community that identifies and solves community problems. As the police cannot be the sole guardian of law, order and peace in the society, all members of the community should take responsibility as active allies in the effort to ensure law, order and peace in the community and to enhance the safety and quality of neighborhoods. The expanded viewpoint on prevention and control of crime emphasizes on making community

53. KatalinGönczöl, *Strategy Of Community Crime Prevention In Practice As An Integrative Part Of Public Policy,*The National Strategy for Social Crime Prevention (Annex to the Parliamentary Resolution No. 118/2003. X. 28.), Hungary, available at*http://www.bunmegelozes.hu*.

54. *Crime Prevention Standards, Virginia Crime Prevention Association,* 1405 Westover Hills Blvd., Suite 6 Richmond, VA, 23225. (The Crime Prevention Center, covered within the Virginia Department of Criminal Justice Services, is the centre of attention for crime prevention initiatives and persuit in the Commonwealth. The Center is an active member of the National Crime Prevention Council in Washington, D.C. There are several resources and services being provided by the Center which can dispense tremendous assistance to law enforcement agencies interested in commencing, enhancing and intensifying crime prevention services.)

members more active participants in the process of preventing and controlling the crime in the society.[55]

It is realized that crime-control strategies need to be improved and amplified with plans and programs that prevent crime, reduce the fear of crime, and improve the quality of life in neighborhoods. Fear of crime has become a significant problem in itself. The fear of crime can limit individual activities, compel the residents to keep in their homes and create empty streets. It can result in even greater numbers of crimes. By getting the community involved, police will have more resources available for crime-prevention activities, instead of being forced into an after the fact response to crime. A highly visible police presence helps to reduce fear within the community.[56]

Community policing seems to be more democratic in action. It requires the active participation of local government, civil society, business leaders, public and private agencies, residents, churches, schools, and hospitals. It is the fact that all who share a concern for the welfare of the neighborhood and community should accept and bear responsibility for the same. Community policing has been advocated by the political leaders of highest integrity including Ex President Bill Clinton who described it as the "changing of policing." It has also been suggested that community policing can play a dominant role in changing the way of policing and providing government services at the community level.[57] It is important

---

55. Bureau of Justice Assistance *Understanding Community Policing A Framework for Action,* Bureau of Justice Assistance Response Center, 633 Indiana Avenue NW., Washington, DC. 20531 8. (This document was prepared by the Community Policing Consortium, supported by grant number 93–DD–CX–K005, awarded by the Bureau of Justice Assistance, U.S. Department of Justice.)
(The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime.)

56. Kelling, George L., and Mark H. Moore. The Evolving Strategy of Policing. Perspectives on Policing. Washington, D.C.: National Institute of Justice and John F. Kennedy School of Government, Harvard University. 1988:p.8. Based on The Newark Foot Patrol Experiment. Washington, D.C.: Police Foundation. 1981, available at *https://www.ncjrs.gov/pdffiles/commp.pdf*.

57. As quoted in Kelling, George L. *Police and Communities: the Quiet Revolution*. Perspectives on Policing. Washington, D.C.: National Institute of Justice and John F. Kennedy School of Government, Harvard University. 1988 at 2

to note that implementation of community policing certainly requires fundamental changes in the structure and management of police organizations. Community policing differs fundamentally from traditional policing in how the community is perceived and in its expanded policing goals. While crime control and prevention remain central priorities, community policing strategies use a wide variety of methods to address these goals. In the process of community policing, the police and the community become partners in understanding and addressing problems of disorder and ignorance. Though these problems seem not to be criminal in nature but can eventually lead to serious crimes. This would not be the wrong assumption that if links, relations and associations between the police and the community are strengthened over time, the ensuing partnership will be better able to locate, alleviate and mitigate the primary and core causes of crime in the society.

(iv) Plea Bargaining

The methods discussed in the pressing sections are those which evolved and developed in certain developed countries. One method which may be termed as an ADR method and is used in criminal justice system and also finds place in India law is the process of plea bargaining.[58] It is a pretrial negotiation between the accused and the prosecution where the accused agrees to plead guilty in exchange for certain concessions by the prosecution. It may take two forms *viz.*charge bargaining and sentence bargaining. The 154th Report of the Law Commission recommended for inclusion of the concept of plea bargaining in Indian criminal justice system as an alternative method which may be introduced to deal with the huge pendency of case in criminal courts in India. It is relevant to note that in Indian context within the present framework criminal charges cannot be dropped against an accuse and thus charge bargaining is not possible. On the other hand, however, the possibility of discretion in the hands of courts to award lesser punishment in a given case provides the basis for sentence bargaining in India. It is also important to mentioned that Indian courts have on various occasions have warned against the misuse of the provision and also that the concept may have implication for fundamental

58. Section 265A to 265L, Chapter XXIA of the Criminal Procedure Code deals with the concept of Plea Bargaining. It was inserted into the Criminal Law (Amendment) Act, 2005.

rights under Article 21 of the Constitution.[59] On the other hand many arguments in the form of fast disposal of cases, easy conclusion oftrial etc. may be put forward in support of plea bargaining. The detailed discussion of the topic is beyond the scope of the present paper, however, it may be highlighted that the biggest problem associated with the concept is that if the concessional treatment of accused who is pleading guilty remains a discretion with the courts then the accused may never plead guilty. Thus a study may be undertaken to explore whether concessional treatment should be made a matter of right for those accused whose conviction is based on their pleading guilty.

IV. CONCLUSION

The aim of the present paper is to present an overview of some of the methods of ADR which are being used in criminal justice system in different countries. It may be concluded that the list of methods is not limited to ones that have been discussed in the paper. An understanding has to develop that the traditional notions attached with crime and criminal justice has to change so as to accommodate the methods of ADR. The presence of list of compoundable offences and plea bargaining in Criminal Procedure Code provides sufficient justification to argue in favour of ADR in criminal justice system. The court induced VOM and Family Group Conferencing can be explored in Indian context.

■

59. *MurlidharMeghrajLoya* v. *State of Maharashtra* (1976), *Kasambhai* v. *State of Gujarat* (1980), *Thippaswamy* v. *State of Karnataka* (1983),*State of Gujarat* v. *Natwar HarchandjiThakor* (2005).

NOTES AND COMMENTS

CHALLENGES FACED BY WOMEN DURING THE COVID PANDEMIC

*DEBDATTA DAS**

ABSTRACT : The sudden attack of this virus has completely changed the nature, scope and speed of all life. Men and women together form society. But the patriarchal nature of the society seldom genuinely treats women as the equal partner and appears to be more habitual in considering women as the 'weaker sex' as this probably makes the society feel more comfortable in executing the unequal and demeaning treatment towards women. Due to the current crisis that the world is facing, various incidents and statistics show that women have suffered not only economically, but also physically, emotionally, sexually and socially. This article attempts to discuss the various challenges in terms of sexual, economic, emotional etc, faced by women in their personal and professional life due to the sudden outbreak of the pandemic.

KEY WORDS : Pandemic, Abuse, Domestic violence, Economic, sexual, emotional.

I. INTRODUCTION

The sudden pandemic caused by corona virus has almost brought the life of people all over the world nearly to a standstill. It is such an enemy for whom we do not have a weapon to attack. To be true we do not even have any defense mechanism to ensure our safety and security. All that we have at this moment is hope and complete reliance on prevention and protection. But this enemy is immensely potential to transform a busy and active world into a graveyard and make all of us believe that

* Assistant Professor, & Teacher-in Charge, Department of Law, University of Burdwan, (W.B.), India

time has suddenly come to a halt. The sudden attack of this virus has completely changed the nature, scope and speed of all life. It has completely dismantled the life that we all were leading. It does not recognize first world and third world. The social distinction of 'haves' and 'haves not' is unknown to it. It is oblivious to the norms of a patriarchal society. This virus is the flag bearer of destruction and cause of complete dismantling of society at micro and macro level, at social and economic level.

Certain sections of the society are regarded as vulnerable groups and these groups are most prone to Victimsation of any kind. Lack of power in terms of economic resources physical strength, social taboos and acceptance, social norms etc make these groups most vulnerable. Elderly people, backward community, children, women are such kind of vulnerable sections. India being highly populated and having a very high density of population, the potential risk for India due to COVID-19 virus was always extremely high. In such situation, India, like most of the other countries, had no other alternative but to impose lockdown since the month of March, 2020. Initially the lockdown was imposed in three phases.

During the course of this time, people were affected at macro and micro level. With the government attempting to flatten the rise of corona virus curve, it actually led to various other rising curves like those related to loss of job, financial insecurity, domestic violence etc. Men and women together form society. But the patriarchal nature of the society seldom genuinely treats women as the equal partner and appears to be more habitual in considering women as the 'weaker sex' as this probably makes the society feel more comfortable in executing the unequal and demeaning treatment towards women. In a recent article (2019) in EPW, the observation made by Flavia Agnes has been documented as under:

> "*The Protection of Women from Domestic Violence Act* (PWDVA or Domestic Violence Act) was enacted in 2005. But, as Flavia Agnes wrote in 2019, "even after a decade and a half, the assurances made in the act have not been actualised when we examine the cases which are filed under this act." Citing individual cases from her experience working with women's rights organisations, Agnes argued that though the act itself expanded the definition of domestic

> violence to include not just physical but also verbal, emotional, sexual and economic violence and provided the scope for urgent, protective injunctions, along with economic rights including maintenance and compensation, its fruitful implementation was impeded by cultural factors that informally guide the functioning of the police and the judiciary, as this case demonstrates".[1]

During the COVID Pandemic, if any section of the society irrespective of economic status has suffered immensely, then it is surely women of our society. Women in today's changing dimension of the society is not restricted to the four walls of the household but has, as a result of an ongoing struggle, ventured out into the wide world and is a bread earner, a corporate executive, a mother, a home maker or in other words one frame with various manifestations. Due to the current crisis that the world is facing, various incidents and statistics show that women have suffered not only economically, but also physically, emotionally, sexually and socially. Challenges faced by women are mainly due to the following reasons:

II. ABUSE: PERSONAL AND PROFESSIONAL

Personal abuse includes their vulnerability to their kith and kin for being abused and exploited physically, emotionally, sexually and also economically. Professional abuse includes insecurity of employment, economic instability, and acute work pressure along with household obligations during work from home apart from psychological stress and potential sexual abuse.

In words of sociologist Marianne Hester, "domestic violence goes up whenever families spend more time together, such as the Christmas and summer vacations." This hypothesis has been completely proved during this period of lockdown. Domestic violence and partner abuse has witnessed a remarkable escalation during the pandemic globally. United Nations Secretary-General Antonio Guterres, on 6th of April 2020, called for a "ceasefire" to address the "horrifying global surge in domestic violence." Rise of intimate partner violence (IPV) cases were witnessed

1. Available at https://www.epw.in/engage/article/covid-19-domestic-abuse-and-violence-where-do, last visited on 25th June, 2020

around the globe associated with lockdown policies, from the United States and United Kingdom to France, China, and India.[2] In the opinion of Aparna Joshi, Project Director of iCall, a mental health helpline, the present situation is "a brewing pot". "Frustrated, unemployed, and/or struggling to access tobacco and alcohol, several men are unloading their anger through physical, verbal and sexual assault. The surge of violence is affecting millions of women of all classes".[3]

Since the announcement of lockdown, the number of complaints related to domestic violence received by national Commission for Women has doubled.[4] According to the reports of Al Jazeera, National Commission for Women (NCW) in India registered 587 cases between March 23 and April 16, up from 396 cases between February 27 and March 22.[5] Other agencies including Childline, which has recorded twice the number of calls it receives on an average day, have recorded rise of cases of domestic violence.[6]

Though, we have not witnessed any concrete policy to combat this remarkable rise of domestic violence and abuse but the State governments in India have been encouraging reporting of such cases of violence and India's Women and Child Development Minister Smriti Irani asked the states to ensure that women's helpline numbers are functional. The NCW also launched a WhatsApp number making it easier for women to ask for help, alongside a helpline and email option.[7]It was stated by the Chairperson of National Commission for Women that frontline health workers along with ASHA and Anganwadi workers were making best efforts to prevent such abuse through counseling and victims could report cases of domestic violence to them.[8]

The Delhi High Court in this context, directed the Government to

2. Available at https://thediplomat.com/2020/04/indias-covid-19-gender-blind-spot/, last visited on 25th June, 2020
3. Available at https://indianexpress.com/article/opinion/coronavirus-gender-inequality-india-6414659/, last visited on 25th June, 2020
4. Supra n.1
5. Supra n.2
6. Available at http://southasiajournal.net/covid-19-indias-response-to-domestic-violence-needs-rethinking/last visited on 24th June, 2020
7. Supra n.2
8. Supra n.6

ensure effective implementation of the Domestic Violence Act, 2005 and take necessary measures for the same. In its response, State Government replied, "it has put a protocol in place where a survivor once calls the helpline, the tele caller will take the complaint and will forward it to the counselor who will establish a phone communication with the survivor during the lockdown". It is very pertinent to mention here that Jammu & Kashmir took suo moto cognizance of the issue and issued directions towards creation of special funds and designation of informal spaces like grocery shops, pharmacy etc for women to report cases of such abuse. In reply to enquiry of Karnataka High Court on this issue, State Government stated, "helplines, counselors, shelter homes and protection officers are working round the clock to help victims of violence." In Tamil Nadu, protection officers appointed under the Domestic Violence Act 2005 are allowed to move during the lockdown and some women in dangerous situations are being rescued and have been moved to shelter homes.[9] The Uttar Pradesh State Government initiated a special helpline, 'Suppress Corona not your voice' for victims of domestic abuse.

A 28 years old homemaker of West Bengal stated, "My husband could not go to his office during the lockdown and was required to do a few household chores. Following this, he vented out all his frustration on me. The longer, he stayed at home, the more he started beating me up."[10] The woman lodged a complaint with Swayam, an NGO working for the cause of such woman in Bengal. In the words of authorities at Swayam, "Normally we handle nearly 1,000 to 1,200 cases every year. Since March 20, we started receiving more domestic violence complaints over the phone. Earlier, we used to have three helpline numbers and one email id. With more and more complaints pouring in, we now have nine helpline numbers. In the last two months, we have received nearly 1,100 complaints, and they still are flowing in every day," Couple of more very interesting and pertinent observation made by *Swayam* was, "Men are usually not taught to do household chores, but they were compelled to take them up in absence of domestic workers. They had to spend 24 hours with their family members under the same roof, as they could not

9. Ibid

10. Available at https://indianexpress.com/article/cities/kolkata/domestic-violence-cases-see-a-spike-during-lockdown-in-bengal-6466190/, last visited on 25th June, 2020

step out to work. They channeled their frustration on women, be it their daughter, wife or mother in way of physical, emotional or sexual violence", "complaints came not only from women from economically weak families. Many complaints were from educated and financially independent women from the upper strata of the society, including doctors, engineers and private sector employees".[11] A similar observation was also made by another NGO 'Sapho for Equality'.[12]

The West Bengal Commission for Women has reported an increase in domestic violence during the lockdown imposed to contain the Covid-19 pandemic. The panel has received 162 cases of crimes against women, including 38 complaints of domestic violence, during the period. Leena Gangopadhyay, Chairperson, The West Bengal Commission for Women, told, The Indian Express, "The commission has been receiving applications and has been taking immediate actions on that basis, through applications received through helpline numbers, WhatsApp numbers and emails. Other than this, quite a few NGOs have been using and circulating our helpline number to assist the survivors reach out to the Commission,"[13] NALSA chairman Justice N V Ramana, had asked the heads of State Legal Service Authorities to provide immediate help and assistance to such women victims along with other victims like evicted tenants etc.[14]

Another dimension of abuse which women are facing during this time is in the nature of online abuse. As per reported statistics, there has been a sharp rise in cases of online abuse faced by women. The National Commission for Women has recorded 54 cybercrime complaints received online in April in comparison to 37 complaints received online and by post in March, and 21 complaints in February. Akancha Srivastava, the Founder of Akancha Foundation, an organization which imparts knowledge about cyber security, stated, "We received a total of 412 genuine complaints of cyber abuse from March 25 till April 25. Out of these, as

---

11. Supra n.10
12. Available at https://www.deccanherald.com/national/east-and-northeast/bengal-witnessing-spurt-in-domestic-violence-cases-during-lockdown-womens-commission-836172.html, last visited on 27th June, 2020
13. Supra n.10
14. Available at https://timesofindia.indiatimes.com/india/least-covid-affected-state-reports-highest-domestic-violence-and-eviction-cases/articleshow/75797029.cms, last visited on 27th June, 2020

many as 396 complaints were serious ones from women, (and these) ranged from abuse, indecent exposure, unsolicited obscene pictures, threats, malicious emails claiming their account was hacked, ransom demands, blackmail and more," Srivastava further stated, "Men are morphing images and threatening women. There is a whole racket going on where women are getting these emails that your phone and laptop has been hacked, and if you don't deposit money my account I will send your morphed images, and share it with all your contacts," Founder and President of Cyber Peace Foundation, Mr. Vineet Kumar also expressed his concern over the rise in case of 'sextortion' during the period of lockdown. He expressed, "People are getting into relationships online as they are under lockdown and sextortion cases are being reported to us."[15] The period of lockdown has made women and children more vulnerable to such kind of cyber crimes. Lack of sufficient awareness about online security and at the same time complete dependence on online services is making them fall easy victim to such predators. The cyber criminals too while being confined are exploring the cyber world to harass and bully more and more people. Isolation and depressive social environment with severe restrictions on social life men and women are being keener in leading a social life through the virtual medium and this at times is giving scope and opportunity to such cyber offenders.

III. ACCESS TO HELP AND SERVICE PROVIDERS

During this period of lockdown, women are confined within their homes and mostly share the same house with those who abuse. Under these conditions it becomes rather a remote possibility for these women to reach out to their near and dear once or the service providers for assistance. Under Indian conditions, it has also been reported that getting access to mobile phones for communication in privacy has also been a challenge. According to Jaya Valenkar of the women's rights organisation, Jagori, "If a woman has to complain or seek help from a helpline about her family being abusive, she needs to have a landline or mobile phone while being 100% sure that she is not being overheard—whether it is her

15. Available at https://cio.economictimes.indiatimes.com/news/digital-security/significant-increase-in-cybercrime-against-women-during-lockdown-experts/75500549 , last visited on 27th June, 2020

marital home or natal home."[16]

As documented in an article in EPW, almost 57% of the women in India do not have access to phones, their options for registering complaints under the lockdown have become limited. Sometimes, women rely on other family members to report on their behalf. But due to the lockdown they cannot always reach to them.[17] Lack of mobility and independence both in physical and financial terms leads to complete control and lack of minimum privacy. "Exposure and opportunity for abuse increases as there is no one to intervene to protect women. Locked with their abusers in situation of restricted mobility, and limited privacy, women are constantly facing grave dangers. Abusers are taking advantage of isolation measures and abusing their powers. Hence, the very technique that is being used to protect people from virus is making an adverse impact on women and children in violent homes as the abuser is getting more opportunities to unleash violence."[18]

As reported in National Family Health Survey (NFHS) (2015-2016), "less than 1 percent of the victims of domestic abuse sought help". Lack of mobility and access to helplines and the internet facilities for women, greatly limit the scope of reporting such cases by them. "In New York City, while calls to domestic violence helplines dropped, organizations helping women find emergency shelter observed a steep increase with one showing a 35 percent increase in calls from women looking for shelter. However, shelters for victims of abuse in India remain unsafe and inadequate".[19]

IV. WORK- HOME BALANCE

Another big factor which has led to immense stress on women during this lockdown has been work home balance. This factor has two aspects. First, as all the members of the family are all confined within the household the quantum of work and the quality of expectation from the female member or the home maker also rises. Especially, with domestic helps also abstaining from work due to lockdown the quantity of work stretches

16. Supra n.1
17. Ibid
18. Supra n.6
19. Supra n.2

from cleaning to cooking. Though in some households we have witnessed that all the members of the family have tried to share the burden of work but this is not the scenario in many cases. Second aspect is specifically about working women. These women find it really tough to match up to the expectation of the family members during lockdown and at the same time also cope up with the pressure at work as most of them work from home. In such cases, for example, children who hardly find mothers at home try to get maximum attention and at the same time, even mothers try to spend and devout maximum time for their children by spending quality time. Apart from this, as the lady stays back home, she is expected to perform all her household duties and then manage her professional assignments and commitments. Urvashi Gandhi, director of a global women's rights organisation observed, "The load of work [during the lockdown] has increased in houses because everybody is at home. With housekeeping staff being unavailable, the expectation is for women to bear the load, and chances of violence increase if she fails to do so." [20]

V. HEALTH AND MEDICAL CONSTRAINTS

Women have been faced with stiff medical challenges during this *COVID* crisis. Lack of proper medical support and policy for health related issues concerning women has been a major concern. Lack of proper medical facilities for pregnant women specially the migrant workers[21] apart from lack of proper supply of contraceptives either due to the break of supply chain as a consequence of lockdown or due to unavailability of various social workers and para medical workers supplying the contraceptives in the rural sector apart from the difficulty in approaching the center for abortion are some of the reasons behind the rise in issues concerning health.

---

20. Supra n.1

21. Supra n.6

    Also, another aspect that has not received attention is increasing number of cases where migrant women, along with men, are walking hundreds of miles, some in their advanced stage of pregnancy along with their children, without food. Some are being forced to deliver babies on the roadside while others are receiving devastating news of migrant men being dead while walking on roads. Deprivation and denial of health and other services to women and children during the COVID crisis is aggravating the disaster.

In India, the nationwide lockdown to flatten the *COVID*-19 curve has been followed by reports of increasing domestic violence, mirroring the global trend, and which has been termed by UN Women as "shadow pandemic". This places women at an increased risk of unwanted pregnancies with fewer means to assert their bodily autonomy. There is a pre-existing issue with contraception access, especially in rural areas, which could become aggravated as public health workers responsible for distributing contraceptives are engaged with *COVID*-19 issues. Further, disruptions in pharmaceutical supply chains are likely to impact the availability of contraceptive methods and medical abortion drugs." "A public health crisis of this scale renders invisible the rights of those already at the margins. Reports have begun to emerge of women struggling to access abortion services during the lockdown even though the health ministry has classified abortion as an essential service. Even otherwise, India has a poor record in sexual and reproductive health services."[22]

As per the National guidelines for infection prevention and control in healthcare facilities, issued by Ministry of Health and Family welfare, Pregnancy is one of the susceptible factors for the infection.[23]According to the guidelines published by the ICMR and NATIONAL INSTITUTE FOR RESEARCH IN PUBLIC HEALTH for management of pregnant women during COVID 19, "Pregnant women do not appear more likely to contract the infection than the general population. However, pregnancy itself alters the body's immune system and response to viral infections in general, which can occasionally be related to more severe symptoms and this will be the same for COVID-19…. The *corona virus* epidemic increases the risk of prenatal anxiety and depression, as well as domestic violence. It is critically important that support for women and families is strengthened as far as possible; that women are asked about mental health at every contact"[24]

A PIL was filed in the Delhi High Court for directions to the Centre

---

22. Available at https://thewire.in/health/covid-19-pandemic-women-reproductive-rights-abortion-access last visited on 28th June, 2020
23. Available at https://www.mohfw.gov.in/pdf/National%20Guidelines%20for%20IPC%20in%20HCF%20-%20final%281%29.pdf last visited on 27th June, 2020
24. Available at https://www.icmr.gov.in/pdf/covid/techdoc/Guidance_for_Management_of_Pregnant_Women_in_COVID19_Pandemic_12042020.pdf visited on 28th June, 2020

to ensure access to medical services for pregnant women by charitable trust SAMA - Resource Group For Women and Health claiming denial of healthcare and delivery / child birth services to pregnant women in Delhi and the barriers faced by them and their families in the wake of COVID-19 pandemic and the lockdown declared by the Central and state governments. "The Delhi High Court directed the Centre and the Delhi government to work in tandem to ensure that pregnant women and their family members in corona virus hotspots face no barriers during the lockdown. A bench of Justices Hima Kohli and Subramanium Prasad, which conducted the hearing through video conferencing, directed the Delhi government to ensure that the helpline number proposed to be set up within two days for assisting senior citizens during the pandemic is also made available for pregnant women". The court ordered that the helpline number should be adequately publicized in the newspapers and the social media and also by involving the Delhi Police.[25]

In rural sector, the health of young girls is severely affected as a result of the lockdown. The schools being closed they are deprived of the mid day meals and due to the economic crisis, poor families may not be in a position to feed all the members of the family equally. Further, being patriarchal in nature, the chance of a girl child being fed to satisfy her hunger and basic nutritional needs are always at the bottom of priorities. Lack of inclusion of sanitary napkins in the original list of essential items by the Government was a big concern for women and girls. Due to this production units were initially shut and supply was a big issue.[26] Further, with government schools being closed, supply of sanitary napkins to girl students in many of these government schools was also not available and as a result menstrual hygiene of young girls has been deeply affected.

In addition to daily one-time meals, schools also regularly offer provisions such as sanitary napkins. These are essential services for adolescent girls, especially given the extreme barriers they face for maintaining basic menstrual hygiene. Menstruation taboos, particularly in

25. Available at https://economictimes.indiatimes.com/news/politics-and-nation/high-court-asks-centre-delhi-govt-to-ensure-pregnant-women-face-no-barriers-duringlockdown/articleshow/75347854.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, visited on 28th June, 2020
26. Available at https://www.bloombergquint.com/business/government-expands-list-of-essential-items-to-include-hygiene-products, visited on 28th June, 2020

rural India, bring with them increased censorship and restrictions on girls' mobility, concerns of sexual violence, early marriage and serious health risks. The official notification for essential services and products during the lockdown was only recently expanded to include the production of sanitary napkins."[27]

Apart from the physical health, even the mental health of women is equally affected. Continuous abuse both physical and mental coupled with extreme stress of domestic and professional commitment badly affects the mind of a woman often leading to depression. Men often tend to reinvent themselves during this lockdown by pampering their hobbies and old interests during their free time but in many cases, women get so exhausted after matching with all the expectations that they lose interest in nurturing their hobbies and even if they do, they mostly do it find some solace for themselves and vent out their subdued emotions.

VI. WOMEN EMPLOYMENT AND ECONOMIC SECURITY

This challenge too is faced by women at various levels of the society. It is not confined to the lower or the higher strata exclusively. However, the manifestation of the issue varies. Women in the organized as well as unorganized sector are affected due to this current crisis. Women engaged as domestic helps are unable to attend to their work due to the restrictions of lockdown and in order to maintain the preventive measures. As a consequence of this fact, in many cases they have faced pay cuts or loss of jobs. Though to an extent it is natural consequence of the economic crisis that every household belonging to mostly all the economic categories are facing, nevertheless, consequential impact on these poor households are immense. These women not only look after the family but in many cases are also the main bread earners. This is the fact for not only such domestic workers but many other women as well who were employed in such type of jobs mainly in the unorganized sector.

"The lack of political and legal recognition has left domestic workers structurally and procedurally vulnerable to the conditions of poverty and at the mercy of their employers, exposing them to potential harassment,

27. Available at https://msmagazine.com/2020/04/14/coronavirus-fallout-impact-of-school-closures-on-girls-in-india/, visited on 27th June, 2020

discrimination, and exploitation. With the stifling of economic activity brought on by the prolonged nationwide lockdown, Indian domestic workers are now being confronted with increased hardships and financial challenges…..Adding to the problems of income loss and lack of social security is the prospect of domestic workers having to face harassment and eviction from their rented accommodations. This could either be due to their inability to pay rent or due to the social stigma attached with these workers that labels them as potential carriers of the virus." [28]

As reported by International Labour Organisation, "81 percent of Indian women work in the informal economy. The informal sector, which makes up a majority of the Indian economy, is the worst hit by the coronavirus-imposed economic slowdown and requires targeted economic policies, government bailouts, and support measures. The economic costs of the lockdown may be disproportionately borne by women in the end."[29]

It is also anticipated that once normalcy is restored and economic activities regain the momentum, and various measures are resorted to tackle the loss and economic constraints in the form of cost curtail, women labour force will be the first to bear the axe. "As the pandemic worsens India's unemployment problem, women will often be the first to let go when firms start cutting costs given cultural norms devaluing women's work and also because women are less likely to work in sectors where telecommuting is possible"[30]

VII. CONCLUSION

In spite of these facts it is also very encouraging to know that women have emerged as great leaders during this period of crisis. K.K.Shailaja, Health Minister of Kerala was invited By United Nations to deliver a talk as a panelist on World service Day, 2020 to honour her efforts to combat the spread of corona virus in her state. She was in fact consulted for combating COVID crisis, by other states like Maharashtra also. Various female leaders[31] globally have excelled in their fight against this deadly

28. Available at https://thediplomat.com/2020/05/covid-19-lockdown-india-needs-laws-to-protect-domestic-workers/ visited on 28th June, 2020
29. Supra n.2
30. Supra n.2
31. Female leaders of Denmark, Finland, Germany, Iceland, New Zealand, Norway, Iceland, Finland, Germany, Taiwan and New Zealand have managed the crisis

virus. In an article by Giulia Carbonaro, it has been stated, "I think what differentiates them firstly is empathy, putting health and human security at the very heart of their response. They have been driven by values. It hasn't been 'We've got to save the economy.' They've been wise enough to know you can't save an economy if your people are ground down by a pandemic. They've stuck to a plan. They've listened to experts. They've acted on advice, using good judgment. They've communicated extremely well. They've engaged the population of the countries in a journey with them."[32] In India, the Self Help Groups of women[33] have also made a remarkable contribution in this crusade against corona virus. These groups are producing face masks, running community kitchens, delivering essential services, sensitizing people about health and hygiene etc.[34] In spite of all these challenges that women have been forced to face during this period of lockdown to fight corona virus, there have been some positive consequences as well. Though there has been rise in cases of domestic violence and cases of potential divorces during this period but in some cases this period has also brought close individuals who had drifted far away from each other being engrossed in the race to excel professionally or at times when either of the partners or both the partners did not find the time or space to mend the misunderstandings or communication gaps. Lockdown provided a second chance to such relationships to further build or rebuild emotional and physical dependency and close family bonding.

However, adoption of certain measures may probably improve the plight that the women are currently facing.

1. Apart from the whattsapp number provided by NCW along with

---

better than many other leaders. Available at https://scroll.in/article/962057/why-women-leaders-are-doing-better-than-men-in-fighting-the-coronavirus-pandemic, visited on 28th June, 2020

32. https://newseu.cgtn.com/news/2020-06-06/Why-have-female-leaders-been-so-successful-in-handling-COVID-19—R6upTUoNTa/index.html, visited on 28th June, 2020

33. With World Bank's association for over two decades, India's SHG movement has evolved from small savings and credit groups that sought to empower poor rural women, into one of the world's largest institutional platforms of the poor.

34. Available at https://www.worldbank.org/en/news/feature/2020/04/11/women-self-help-groups-combat-covid19-coronavirus-pandemic-india, visited on 28th June, 2020

provision for making online complains, efforts should be made to provide healthy and safe shelter homes for women where they may be rescued.

2. Extension of MGNREGS[35] for the urban poor is very welcome. This will bring some security to the women who work as Domestic Workers.

3. Government should make efforts to revive activities like tailoring, food processing etc which absorb good number of female workers to ensure their economic security and women entrepreneurship. Policies should be adopted to provide interest free loans to this sector and not restrict the approach to just extension of moratorium.[36]

4. Proper policy should be adopted catering to the health and needs of pregnant and lactating mothers.[37] Supply of necessary items like sanitary napkins, contraceptives etc along with proper mechanism like active helpline services, online medical consultations etc to avail the option of abortion in cases of forced or unwanted pregnancies[38] should be made available.

5. Efforts must be made to seriously increase activities related to family counseling and victim support services. The mediation centres can take up this task in cooperation with NGOs, police and educational institutions. Sharda University in Greater Noida has adopted a very noble step of setting up a Family Dispute Resolution Clinic in Gautam Budh Nagar (UP) for addressing such issues in cooperation with Gautam Budh Nagar Police.

6. Finally, Government should ensure to adopt a wholesome welfare policy to cater to the needs and challenges of women during the pandemic involving participation from common man and applying the principle of decentralization. Policies should not be applied relying on its economic viability but should also be analyzed from social perspective. The

---

35. The move to increase the MGNREGS wage to Rs 202 per day from Rs 182 per day and an additional allocation of Rs 40,000 crores are steps in the right direction. Available at https://www.orfonline.org/expert-speak/need-gender-sensitive-response-covid19-66580/, visited on 28th June, 2020
36. Ibid
37. Ibid Some states like Jharkhand have started a 24/7 maternity/pregnancy helpline to help access necessary medical assistance during the lockdown
38. UP's Ballia district amidst concerns of a population boom delivered family planning kits

Government policy of opening liquor shops to generate revenue had very bad impact on abuse of women.

At the end, it is very pertinent to remember, as it generally stated, "William Shakespeare and Isaac Newton did some of their best work while England was ravaged by the plague, because none of them had childcare responsibilities".[39] Though this statement cannot be nullified but 2020 pandemic has also brought before us example where women have challenged the challenge before them and have emerged successful.

■

39. Available at https://qz.com/india/1826683/indias-approach-to-fighting-coronavirus-lacks-a-gender-lens/, visited on 28th June, 2020

REHABILITATION AND SOCIAL RE-INTEGRATION OF JUVENILES : AN ANALYSIS OF SOUTH ASIAN LEGAL SYSTEMS

NUZHAT PARVEEN KHAN*

ABSTRACT : In recent years, the issue of children in conflict with the law has become an increasing concern for countries in South Asia, and significant reform initiatives are underway in most countries in the region. While all countries have some differentiated procedures for children who commit crimes, as yet no country in the region has fully implemented a separate and distinct juvenile justice system to ensure that children in conflict with the law are treated in a manner substantially different than adults at all stages of the proceedings. The low age of criminal responsibility in most countries in the region remains serious cause for concern, as is the absence, in some countries, of juvenile justice protections for children between the ages of 16-18, or who have committed serious crimes. In most countries, some steps have been taken to introduce specialised juvenile police units or special procedures for the arrest of children, as well as some form of differentiated court proceedings. However, implementation of this special juvenile protection has been far from universal. In several countries, children continue to be subject to arbitrary police arrest for vagrancy, prostitution and other status offences, and complaints of police abuse of children persist. This paper tries to analyse this concourse of the juvenile justice mechanisms prevalent in the South Asian Countries.

KEY WORDS : Juveniles, Age, Criminal Responsibility, Abuse, Juvenile Justice.

---

* LLM, PhD, Professor and Former Dean, Faculty of Law, Jamia Millia Islamia, New Delhi

I. INTRODUCTION

Children can be in contact with the justice system as a victim, witness or offender. Yet the justice system is often structured to deal with adults, not allowing the necessary space for the child to participate. A child, particularly as a victim requires additional safeguards to understand the proceedings, and if an alleged or convicted perpetrator, the balance between the punishment and the rehabilitation must lean towards rehabilitation. In South Asia, the focus is on punishment with countries in the region permitting physical and corporal punishment, as well as long-term detention, with few options for diversion or alternatives to detention.[1]

Children's cases are often processed through justice systems designed for adults that are not adapted to children's rights and specific needs.[2]The present article, seeks to address one of the burning issues South Asian countries are facing today i.e. mal-administration of juvenile justice system and terrible conditions of inmates in Juvenile Homes. The Juvenile Justice System deals with two types of children- Juveniles in conflict with law; and the Juveniles in need of care and protection. This article is focused on laws relating to the juveniles, who are in conflict with law and issues relating to them, such as, conditions of juveniles in Juvenile Homes.

Had the youngsters showing tendency to commit a crime cured at the early age, they could have been saved from turning into hardened criminals. Juvenile delinquency is a problem that affects the entire society. It is a problem that has been causing a serious concern all over the world. For resolving this issue there is urgent need to find out ways and means to prevent juvenile delinquency Juvenile in conflict with the law are those children who are deviated from their path. They are misguided and unfortunate children. These children are vulnerable and dependent to the other for realization and protection of their rights. Juvenile delinquency is a deep serious social issue and it is a critical problem. To deal with this problem most of the SAARC[3] Countries have separate juvenile justice laws

---

1. Justice for Children, UNICEF, Available at https://www.unicef.org/rosa/what-we-do/child-protection/justice-children
2. Ibid.
3. SAARC (The South Asian Association for Regional Cooperation) includes Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka)

and legal system. The objective of juvenile justice system should be to rehabilitate and reintegrate the juvenile in the society and not to punish them. Juvenile justice system is a criminal justice system adopted for children. It covers a vast range of issues related to the juvenile. It deals with the arrest of juvenile, their conditions in detention and their rehabilitation and social reintegration.

II. INTERNATIONAL CONVENTIONS AND PRINCIPLES

International standards require countries to promote the establishment of laws, procedures, authorities and institutions that respect the rights of children in conflict with the law and are directed towards their rehabilitation and reintegration into society.[4] There are some International standards that must be fulfilled by the South Asian countries in enacting and implementing their juvenile justice laws. These guidelines are provided in United Nations Convention on the Rights of the Child[5] (UNCRC) of 1989, which has been ratified by every country in South Asia. The UNCRC is complemented by relevant international standards such as the UN Guidelines for the Prevention of Juvenile Delinquency (the 'Riyadh Guidelines'), the UN Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules') and the UN Rules for the Protection of Juveniles Deprived of their Liberty. International standards require South Asian countries to promote the establishment of laws, procedures, authorities and institutions that respect the rights of children in conflict with the law. It also needed that laws should be directed towards juvenile's rehabilitation and reintegration into society.

Under these instruments, children should be treated by the justice system in a manner consistent with their rights, their inherent dignity as human beings and which takes into account their needs and targets their reform. The administration of juvenile justice should be directed towards their rehabilitation and reintegration into society and not their punishment.[6]

4. Improving the Protection of Children in Conflict with the Law in South Asia: A regional parliamentary guide on juvenile justice, UNICEF (2007). Available at https://www.refworld.org/pdfid/51e7b5e24.pdf

5. Hereinafter CRC

6. Improving the Protection of Children in Conflict with the Law in South Asia: A regional parliamentary guide on juvenile justice, UNICEF (2007). Available at https://www.refworld.org/pdfid/51e7b5e24.pdf

Torture or other cruel, inhuman or degrading treatment or punishment is prohibited. The death penalty and life imprisonment without possibility of release cannot be imposed for offences committed by persons below 18 years. Deprivation of a child's liberty should never be unlawful or arbitrary and should only be a measure of last resort and for the shortest appropriate period of time.[7]

In any judicial or administrative proceeding affecting them, children have the right to be heard and to have their views taken seriously. Alternatives to court procedures and to detention or institutionalization are encouraged. When detained, every child should have contact with his or her family and access to prompt legal or other appropriate assistance. Application of the death penalty for those under 18 is unequivocally prohibited.[8]

According to international standards, a juvenile justice system shall aim at encouraging specialisation in child justice practices and developing a distinct system of criminal justice that treats children in a manner appropriate to their age and level of maturity.[9]

III. THE AGE OF CRIMINAL RESPONSIBILITY

The age of criminal responsibility means that age attaining which child has mental capacity to commit crime. It means child has attained the emotional, mental and intellectual maturity to be held liable for their conducts. If a child is under the age of criminal responsibility he cannot be charged for an offence. He is considered *doli-incapex*[10].

There is no clear international standard regarding age of criminal responsibility. The United Nations Convention on the Rights of the Child(CRC) requires that the States parties should establish at least a certain age of criminal responsibility under which children are presumed not to have capacity to violate the law. The UN Standard Minimum Rules for the Administration of Juvenile Justice (1985) says that age of criminal

---

7. Ibid.
8. Ibid.
9. Ibid.
10. Section 82, Indian Penal Code 1860, It states that *"a child below the age of seven years is doli-incapex"*

responsibility should not be very low. At the time of deciding age of criminal responsibility children's emotional, mental and intellectual maturity should be considered. The age of criminal responsibility is different in different countries. It varies from six to eighteen years.

The age of criminal responsibility in South Asian region is very low and below the international standards. It is harmful and against the interest of the child. Except Afghanistan and Bhutan, the minimum age of criminal responsibility in South Asian countries is lower than international norms. It is seven years in Pakistan and India, eight years in Sri Lanka, nine years in Bangladesh, ten years in Maldives and Nepal and Twelve years in Afghanistan and Bhutan. Age of majority or age of complete responsibility in most South Asian countries is 18 years. In India age of majority in heinous offences is 16 years[11].

IV. CONDITIONS OF JUVENILE IN JUVENILE HOMES

The purpose of juvenile homes is to give shelter to juvenile and work as a correction homes. Its main aim is to encourage rehabilitation and social reintegration of juveniles, but most of the juvenile homes in South Asian countries have failed to fulfill their responsibility. Cases of physical abuse of children in these institutions are very common in this region. Lack of necessary infrastructure and staff are major issues. Basic amenities are not available in these institutions. Due to long period of institutionalization many children do not have basic living skills.

In South Asian countries juvenile homes which are made to implement protection, rehabilitation and restoration of juveniles seems to have become a terrible place. In these homes inmates are subjected to sexual assaults. The children are forced to live in inhuman situations and treated very badly in these correction homes. Judiciary has always insisted that children should not be kept in the juvenile homes for too long but in reality, situation is different. Most juvenile homes in South Asian region are in a very bad condition. These places display ramshackle standards of hygiene. Basic facilities such as bathroom and cleaning facilities are very bad. The clothing and food provided are of poor quality.

---

11. Section 15, the Juvenile Justice (Care and Protection of Children) Act, 2015

Out of all the children placed in Juvenile Homes, only less than 10 percent actually get reformed and most get exposed to more violent surroundings and are drawn towards committing more serious crimes in the future.

There is a lot of difference between the Juvenile Justice systems as given in statutes and as exist in practice. The aforesaid information reveal, that the systems of governance are neither sensitized about the situation of children and the necessities of juveniles nor do they take sufferings of children sincerely. As a result, there is no noticeable change in the situation of children, in spite of protection provided under the juvenile law.

V. ADMINISTRATION OF JUVENILE JUSTICE SYSTEM IN SOUTH ASIAN COUNTRIES

(i) India

The Indian Juvenile Justice system is based on the principles of promoting, protecting and safeguarding the rights of children. The juvenile justice system seeks to deal with children in the matters of investigation, trial and correctional process. The philosophy behind establishing the juvenile justice system is to give differential treatment to the juvenile delinquents than the adult offenders, so that they may not learn the mechanics of the crime commission from the hardened criminals. The first uniform legislation on juvenile was the juvenile justice Act 1986.In the year 2000, the Act was comprehensively revised based on the United Nations Convention on the Rights of the Child (CRC), which India had ratified in 1992. This Act included the provisions of Indian Constitution and the four broad rights defined by the UN CRC: Right to Survival, Right to Protection, Right to Development, and Right to Participation.

The Juvenile Justice (Care and Protection of Children) Act, 2000, is the primary legal framework for juvenile justice in India. The JJ Amendment Act, 2006, brought substantive changes to the JJ Act, 2000.This Act repealed the earlier Juvenile Justice Act of 1986 and has been further amended in years 2006 and 2011.

Under the JJ Act 2000, juvenile who commits an offence punishable under any law are not subject to imprisonment as the adult but instead will be subject to advice/admonition, counseling, community service, payment of a fine or, at the most, be sent to a remand home for three

Years. **But Juvenile Justice (Care and Protection of Children) Act, 2000, had many issues and lacunas. For the purpose of removing these lacunas and improving juvenile justice system the** Juvenile Justice (Care and Protection of Children) Act, 2015 has been passed by Parliament of India. It aims to replace the existing Indian juvenile delinquency law, Juvenile Justice (Care and Protection of Children) Act, 2000, so that juveniles in conflict with Law in the age group of 16–18, involved in Heinous Offences, can be tried as adults[12]. The Act came into force from 15 January 2016.

Children are the precious for every country and it is the responsibility of everyone to ensure that they have a safe atmosphere to survive. But the last decade has seen a huge increase in the rate of Juvenile crime in a developing country like India. Today, Juvenile crime is like a disease to our society. We should try to improve this situation.

(ii) Bangladesh

The situation of juvenile delinquency in Bangladesh is very critical in nature. In Bangladesh "Bangladesh children Act 2013" deals with juvenile in conflict with law and juvenile in need of care. This Act is in line with CRC and other guidelines. These acts establish child development centers for accommodation, reformation and development of children who have been ordered to be detained or are under trial. (Sec. 59 to 69)[13].In Bangladesh there is a provision of separation of children from adults in jails under The Bengal Jail Code and Prisons Act of 1894. Children are important for any country, so it is the duty of the state to protect them from stigmatization and delinquency. The main objective of the Act is to ensure juvenile's rehabilitation as well as their smooth reintegration within the society. Most of the juvenile home's conditions are not satisfactory in Bangladesh. It shows that there is still much remains to be done for fully and proper implementation of juvenile law.

(iii) Nepal

Juvenile delinquency is a matter of worldwide concern. In south Asian region, Nepal has relatively fewer juvenile delinquency problems, but these have been growing very fast over the years. Nepal is signatory

12. The Juvenile Justice (Care And Protection)Act,2015, Section 18
13. The Bangladesh Children Act, 2013

of UNCRC Convention and to follow this convention Nepal enacted Children's Act in 1992 as a separate juvenile Law. The children's Act has recognized the rights and welfare of the children. In the children's Act there are many provisions to safeguard children involved in the juvenile delinquency but in reality scenario is quite different. Most of the provisions of the act are worthless. Nepal juvenile justice system has many issues and challenges for example, Lack of infrastructure, staff, awareness and understanding of juvenile delinquency etc.

Although government has started various programmes for rehabilitation of juvenile and NGOs are creating awareness of child rights. In spite of these there are various loopholes which should be taken into consideration. There is lack of active political will to implement the juvenile law. Most commitments made by government have not materialized in practice. It is the responsibility of all the stakeholders to provide a child –friendly system of justice in order to ensure an efficient restoration and re-integration into the society.

(iv) Afghanistan

In 2005 Afghanistan has passed the Juvenile Code of Afghanistan. Main aim of this code is to protect the rights of Afghan children. The Juvenile Code focuses on rehabilitation and social reintegration of juvenile. The Juvenile Code categorized juvenile in three parts, "those who come in conflict of the law," "at risk", or "children need of care and protection."Afghanistan is a signatory state of the UN Convention on the Rights of the Child ("CRC") and has drafted its code on the basis of this convention. The juvenile code of Afghanistan deals with both child in conflict with the law and children in need of care and protection (Chapters 1-3). It also covers their rights with respect to procedures in court and investigations, the functions of juvenile correction and rehabilitation centres and other social services (Chapter 4), a code of conduct for children with irregular behaviour (Chapter 5), procedures for assistance to children in need of care and protection (Chapter 6) and guardianship (Chapter 7).The main objective of this code is rehabilitating and educating the children and also protecting their rights.

(v) Sri Lanka

Sri Lanka's Juvenile justice system is one of worlds earliest and Asia's first. Sri Lanka is the first Asian colony to enact a comprehensive

Child Protection Ordinance in 1938. In Sri Lanka this Law is still the *Magna-Carta* of child protection. Juvenile Justice Law of Sri Lanka regulates how a Court should deal with children when they appear before it. Juvenile Justice is administered through Juvenile Courts. If a Juvenile Court is not available, a Magistrates' Court will function as a Juvenile Court.

An important legislation on juvenile delinquency is Children and Young Persons Ordinance 1939 (as amended).The main objectives of the Ordinance as stated in the preamble are the establishment of Juvenile Courts, supervision of juvenile offenders, protection of children and young persons and realization of other related purposes. In all contexts, the Court will give primary consideration to the welfare of the child. There are several statutes that deal with children specifically in Sri Lanka.

1. Adoption of Children's Act 24 of 1956 which had several amendments subsequently.

2. Children and Young person's Act (CYPO) 48 0f 1956- the main instrument that deals with juvenile justice

3. Convention on Prevention and combating trafficking in women and children for prostitution 30 of 2005.

4. Employment of Women Young persons and Children 47 of 1956.

Since Sri Lanka has ratified the CRC, it is bound to comply with the provisions of the CRC.In Sri Lanka legislations are sufficient to deal with juvenile delinquency. What required is only proper implementation of law.

(vi) Pakistan

Juvenile Justice System Act 2018 get assent of the President on May 18, 2018, which was passed by the Parliament earlier this year. JJSA 2018 removes the shortcomings which were present in Juvenile Justice System Ordinance 2000, and provides a much better system for criminal justice and social reintegration for juvenile offenders. Pakistan is signatory of UNCRC so the Act defines a child according to the definition of UNCRC as 'a person who has not attained the age of eighteen years'.[7] JS Act 2018 classifies the criminal offences into following three different categories: 1) Minor, which means an offence for which maximum punishment under the Pakistan Penal Code, 1860 is imprisonment for up to three years with or without fine. A juvenile is entitled to bail in minor

offences, with or without surety bonds by Juvenile court. 2) Major, which means an offence for which punishment under the Pakistan Penal Code, 1860 is imprisonment of more than three years and up to seven years with or without fine. Bail shall also be granted in major offences with or without surety bonds by juvenile court. 3)Heinous, which means an offence which is serious, brutal, or shocking to public morality and which is punishable under the Pakistan Penal Code, 1860 with death or imprisonment for life or imprisonment for more than seven years with or without fine. A juvenile of less than sixteen years of age is entitled to bail in heinous offences, but a bail is on discretion of court if juvenile is more than sixteen years of age. Following are further some more rights of children, Right of legal assistance: every juvenile or child victim of an offence shall have the right of legal assistance at the expense of the State. A juvenile shall be informed about his right of legal assistance within 24 hours of taking him into custody. Observation home: this means a place where a juvenile is kept temporarily after being apprehended by police as well as after obtaining remand from juvenile court or otherwise for conducting inquiry or investigation. Observation Homes shall be made separately from police stations. The provisions of this new Act will go a long way in re-integrating juvenile delinquent into society and improving Pakistan's compliance with international human rights standards. However, all this depends on proper implementation of these provisions. Lack of implementation of key provisions of JJSA 2018 will ultimately render the legislation ineffective and will deprive young offender from their constitutional right of fair trial.

(vii) Bhutan

There is no separate juvenile justice legislation in Bhutan. However a proposed Administration of Juvenile Justice Act was drafted in the late 1990s, with the intention of introducing a uniform legal framework for juvenile justice but the Act has yet to be approved. The new Civil and Criminal Procedure Code, 2001 includes a short separate Chapter (Chapter 44) dealing with children in conflict with the law. Bhutan's judicial system consists of district courts and a High Court in Thimphu. There is no separate juvenile court, or specialized juvenile units within the existing courts. There is a provision of establishing Youth Development and Rehabilitation Center (YDRC).Juvenile offenders are sent to these centers for reformation and rehabilitation. In addition, the Prison Act 1982 states

that prisoners below 18 years of age are to be kept separately from adults, and should not be given work beyond their capabilities. Female and male prisoners are also to be kept separately in jail. There is no comprehensive juvenile law in Bhutan which is essential for rehabilitation of juveniles. It is suggested that steps should be taken to develop a more comprehensive juvenile justice system which fully integrates international standards. This does not necessarily require the creation of costly separate juvenile courts and new institutions. Bhutan could effectively accomplish a more specialized approach to children in conflict with the law through the effective efforts.

(viii) Maldives

The Maldives legal system is based mainly on common law principles, such as the principle of *shariah*. Historically, the most effective means of punishment was considered banishment and was used far more than incarceration. The Maldives is a signatory to the United Nations Convention on the Rights of the Child. So to give effect to this convention the Maldivian parliament in 1991 enacted the Law on the Protection of the Rights of the Child. Sections 8 9 and 29 of the said Law[14], prescribes a separate criminal justice system for minors accused of criminal wrongdoing. The new Penal Code of the Maldives reinforces the requirement of a specialized justice system for juvenile offenders. The Maldives took an important step by establishing a modern juvenile justice system in 1991, with the enactment of 'Law on Protection of Child Rights'. The Maldivian Juvenile Justice System has gradually improved during these years but we still have a lot to do. There are issues and challenges with regard to implementation and enforcement of laws as well.

VI. REHABILITATION AND SOCIAL REINTEGRATION OF JUVENILE IN SOUTH ASIAN COUNTRIES

"Rehabilitation" means to restore someone to a useful life through treatment and education. Juvenile homes are meant for reformation and rehabilitation of juveniles. It provides care and protection to juvenile and ensures their smooth reintegration and rehabilitation into the society. It

14. The Law on the Protection of the Rights of the Child, 1991.

gives to the juvenile physical and custodial care, medical treatment, recreation, instructions and religious services. Every nation is duty bound to provide education, health care, sanitation and housing to every child. But conditions of juvenile homes in south Asian region are not pleasing. There are instances of torture, ill treatment and sexual exploitation with the juvenile in these homes. Here an important question arises that whether rehabilitation centers are performing their responsibility appropriately or not? Various studies show that conditions of juvenile homes are not good. It lacks infrastructure and there are shortage of staff. Juveniles are kept in very awful situations which is harmful for their proper development. The main purpose of "Rehabilitation" is to reform the juvenile but in reality it does not leads to a reformation in the child. In spite of the presence of the welfare laws for juveniles, there is increase in the number of Juvenile offenders in south Asian region. These homes should try to avoid an atmosphere of fear and oppression. However, many juvenile homes in these region lacks employment of trained personnel, a superintendent, teachers, case workers, group workers and supervisors.

From the above discussion we can say that Juvenile delinquency cannot be stopped only through the proper implementation and amendments of Juvenile Justice Act. In order to reform the juvenile in conflict with law, the juvenile system as a whole needs to be reformed first. The ramshackle conditions of juvenile homes and juvenile justice boards need to be addressed right away. The nation must strike to provide education, health care, sanitation and housing to every child. There are many other problems at the grassroots level apart from multiple laws governing children. Government-sponsored juvenile homes are often unable to accommodate juvenile in conflict with law. Children are sometimes even kept in jail. Thus, there is a problem in the execution of laws pertaining to children and the maintenance of children's homes due to both a lack of awareness of child rights and growing child population.

We should understand that Juveniles involved in crimes are not criminals, in fact, they are victims of society. For curbing juvenile delinquency at an early stage a special effort is required at home and in school levels. Parents and teachers play a significant role in nurturing the mind of a child. Labeling them as criminals or delinquents is not the right approach; steps need to be taken to give them a scope of rectification and reformation. We should understand that juvenile delinquent needs the

compassion and understanding of our society and not the heavy hand of the law. More research should be conducted to understand the reason behind juvenile delinquency and problem faced by juvenile in juvenile homes. Juvenile delinquency is not only penal problem but it also social problem. The juvenile delinquents should not be put behind the bars and treated through the normal channel of penal system. What they need is guidance, sympathy, help and proper humane treatment in juvenile homes. Considering all these dimensions of juvenile delinquency, an urgent need is felt to make an in-depth study on administration of juvenile justice system and issues faced by them in juvenile homes.

VII. CONCLUSION

Firstly, as parties to the Convention on the Rights of the Child (CRC) and other international instruments, States are bound by the provisions enshrined in those treaties. Despite the States' commitments and obligations, children experience arbitrary arrest, torture and ill-treatment while in custody in South Asia.[15]All the countries must abide by the principles enshrined in the CRC.

Secondly, the CRC requires that every juvenile deprived of liberty must be treated with humanity and respect for their inherent dignity, and in a manner which takes into account the needs of persons of his or her age. Juveniles must be separated from adults in all places of detention.[16]In India this is followed, however, we need to be more cautious and avoid any interaction of the two groups. The principle should be applied by all the countries, not just in theory, but also in practice.

Thirdly, as yet, no country in the region has fully implemented a separate and distinct juvenile justice system that ensures that children in conflict with the law are treated in a manner substantially different than adults at all stages of the proceedings.[17]There should be completely separate

---

15. Improving the Protection of Children in Conflict with the Law in South Asia: A regional parliamentary guide on juvenile justice, UNICEF (2007). Available at https://www.refworld.org/pdfid/51e7b5e24.pdf
16. Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law, UNICEF (2006). Available at https://www.unicef.org/tdad/unicefjjsouthasia06.pdf
17. Ibid.

law and procedure for both children in conflict and the adult criminals. Some countries in South Asia, like India, have been able to implement this to a large extent, however, the system is still not fully equipped to follow this rule in spirit.

Fourthly, States need to promote Conceptual Separation between Children in Conflict with the Law and Children in Need of Protection. Increasingly, these two categories of children are dealt with under completely separate pieces of legislation (UK, South Africa, Namibia, Canada, U.S., most Australian States) or at the very least two clearly delineated Parts of the same legislation, with separate decision-making bodies and procedures for each (India, New Zealand, some Australian states).[18]

Fifthly, significant reforms are necessary throughout the region to ensure compliance with the CRC and UN Guidelines. A high-level, inter-agency task force must be established in each country to promote ongoing dialogue and coordination, and to ensure a consistent and coordinated response to children in conflict with the law at each stage of the process.[19] The State must act as the *parens Patrice* not just to children in the need of care and protection, but also to those came in conflict with law.

Finally, a comprehensive juvenile justice legislation be developed that is: grounded in a child-centred, restorative approach; that represents a complete and binding code for the treatment of all children under the age of 18 who are in conflict with the law; that establishes an appropriate age of criminal responsibility; and that draws clear distinctions between child offenders and children in need of protection.[20] The existing laws need to be revised further in the line of the international standards as to the maximum age for considering as a child. It should not be fixed at lesser than 18 years, and rather than punishing, focus should be on their rehabilitation.

■

18. Ibid.
19. Ibid.
20. Ibid

BOOK-REVIEW

Judicial Process by Rabindra Kumar Pathak, Thompson Reuters, 2019

Judicial process is an integral part of legal systems.[1]The *process* rests primarily on established principles of constitutional governance and responsibility. In the last ten years, the dynamism within *judicial institutions and the judicial process* has gained considerable attention. The dynamism is often viewed in light of the diversity of claimsbeing addressed, the openness of courts to foreign material, and the use of non-legalstudies and findings in court proceedings. How one views *judicial process* in the *traditional sense* and in light of the *new experiences* is an important question today. Also, what new theories explain and explore this *public sphere* of activity?

In this regard, Dr. Pathak's *Judicial Process* is a noteworthy contribution. The book explores the complex nature of the *judicial process*, along with its wider constitutional, political, and social relevance. In the eight chapters of the book, the author uses a jurisprudential, constitutional and legal lens to understanding *judicial process* in general and in context of India. By discussing sub-topics like *stare decisis*, judicial discretion, judicial review, constitutional governance, judicial activism and separation of powers, the book provides a vibrant landscape for study.

The backdrop

The book builds on an understanding that the judicial process, the courts, and the judges are central to constitutional governance. With that

---

1. According to Atiyah, *judicial process* in principle serves two purposes; it is the means *of settling disputes by fair and peaceful procedures*, and it *forms part of a complex set of arrangements designed to provide incentives and disincentives for various types of behaviour*. P.S. Atiyah, "From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law", 65 *Iowa Law Review*, 1249 (1980).

backdrop, it engages with fouraspects of the judicial process, including (1) the nature of judicial process, (2) the engagements and interactionswithin the judiciary, (3) the engagements and interactions between the courts and other institutions, and (4) the *protection of rights* and *redressal of violations* function performed by courts.

Chapter Insights

The book includes a detailed discussion on key concepts, practices, tests and principles.The following chapters and discussions are particularly interesting.

Chapter one *Introduction* involves a *jurisprudential take* on the subject while referring to works of Blackstone, Holmes and Cardozo. Particularly relevant in the chapter one are Indiancases which have employed Cardozo while determining important judicial matters. [2] Further, the chapter includes foreign case law which has been used by Indian courts to discuss the nature of judicial process.[3]

Chapter three *Judicial Review* discusses the scope of judicial review in India and its centralizing force in the constitutional governance. The author carefully explores the expansion in*judicial capacity* for review. The chapter highlights the dynamism attached to the practice of judicial review, moving from review of constitutional amendments, to that of laws, administrative actions and policy.[4]Further, the chapter includes a discussion on the basic structure of the Indian Constitution. The refers to the structure as a *judicial creation*for the *consolidation of*power of judicial reviewand the independence of judiciary[5].

Chapter four *Law of Precedent* includes a discussion on *stare decisis*, which the author refers to as a principleconferring legitimacy and stability to the judicial system. Recent scholarship on the nature of *obiter dicta* of higher courts and *persuasive* quality of foreign case law in domestic cases

2. Rabindra Kr. Pathak, *Judicial Process* Thompson Reuters, 2019, at 23.
3. *Ibid*. at 27
4. *Ibid*. at 115
5. *Ibid*, chapter 5 at 178.

has been cited.

Chapter five *Independence of Judiciary* brings on board debates from India. It discusses the issue of post-retirement appointments of judgesand recusal from judicial matters. The chapter also covers the includes a discussion on*independence of subordinate courts*. The author views independence of subordinate courts *integral* to the overall working of the judicial system.

Chapter eight *Judicial Activism* traces the development of the concept from its *early days* to the present times. The chapter adopts the *five core meanings* offered by Keenan Kmiec to substantiate the old and the new avatars of judicial activism.[6] The chapter discusses the role of social action litigation in India and its hand in defining the judiciary as a *protector of rights* and *constitutional values*.

The unexplored

The book provides sufficient guidance to study the nature of judicial process. It also makes one curious about the changing nature of the judicial process and the new waves of constitutional ethics and governance. The following are some of the themes not attended to in the book.

First, the *judgments* of the courts. The *written judgments* constitute an integral part of the judicial process. The judgments constitute *public law* reaching out to beneficiaries including litigants, people at large, as wellas foreign institutions and courts. That being said, a discussion on judgments and the written or un-written standards governing the same needs attention. Also included in this point is the role of *dissenting* judgments. How should one view or study dissent in judgments of constitutional significance? A normative framework to study the same is much needed.

Second, the tools and indicators to measure judicial impact. Judicial impact can include (a) the impact of judicial decisionson law, policy and society (b) the impact of law/legislation on the judicial process, and (c)

6. *Ibid*. at 260.

the impact of technological and scientific advancements on the judicial process.Tools like *judicial impact assessment*[7] have been widely argued to be important to the working of the courts. Further, parameters to study *compliance*, *policy integration and impact* of judicial decisions on other state institutions have gained attention.[8]

Deepa Kansra*

■

7. See Supreme Court Intervention for Judicial Impact Assessment 2008. See, GS Bajpai, "The Judicial Impact needs an Urgent Assessment", Hindustan Times, 2019. https://www.hindustantimes.com/analysis/the-judiciary-s-impact-needs-urgent-assessment/story-34MkVoP8OVo2uPW1GXNlJL.html;
8. Jeffrey K. Staton, Alexia Romero, "Rational Remedies: The Role of Opinion Clarity in the Inter-American Human Rights System", *International Studies Quarterly* (2019) 63, 477–491. The authors (in light of the Inter-American Court on Human Rights) draw attention to the role of judicial orders, and the integration of such orders in policy decisions. The authors provide a lens to understand compliance, resistance and effectiveness of judicial decisions. The authors make a strong case to discuss on implementation, effectiveness and compliance through identifiable parameters and criteria.

* Assistant Professor of Law, Human Rights Studies Programme, School of International Studies, Jawaharlal Nehru University. Curator and Editor, *Classroom Series: Reading Human Rights*, Research Resource Network for Human Rights, www.betheclassroomseries.com

STATEMENT OF PARTICULARS UNDER SECTION 19D(B) OF *THE P.R.B.* ACT READ WITH RULE 8 OF THE REGISTRATION OF NEWSPAPER (CENTRAL) RULES, 1956

FORM IV

1. Place of Publication	:	**Law School,** **Banaras Hindu University** Varanasi
2. Periodicity of its publication	:	**Biannual**
3. Printer's Name and Address, Nationality	:	**Dee Gee Printers,** Khojwan Bazar,Varanasi-221010 (INDIA), Indian
4. Publisher's Name, Address, Nationality	:	**Prof. R.P. Rai,** Head & Dean, Faculty of Law on behalf of Law School, BHU, Varanasi-221005, Indian
5. Editor's Name, Address, Nationality	:	**Prof. R.P. Rai** Head & Dean, Law School, BHU, Varanasi-221005, Indian
6 .Name and Address of individual who own the Papers and or shareholders holding more than one per cent of the total capital	:	**Law School** Banaras Hindu University, Varanasi-221005

I, **Prof. R.P. Rai** hereby declare that the particulars given are true to the best of my knowledge and belief.

Edited and Published by**Prof. R.P. Rai** for Law School, Banaras Hindu University, Varanasi-221005.

Composed and Printed by
Raj Kumar Jaiswal, Dee Gee Printers,
Khojwan Bazar, Varanasi-10(India) Mob. 09935408247