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CONCEPT NOTE

The *Indian Journal of Law and Public Policy* is a peer reviewed, bi - annual, law and public policy publication. Successive governments come out with their objectives and intentions in the form of various policies. These policies are a reflection of the Executive's ideologies. Laws, concomitantly, become the means through which such policy implementation takes place. However, there might be cases of conflicts between the policy and the law so in force. These contradictions have given way for a continuing debate between the relationship of law and public policy, deliberating the role of law in governing and regulating policy statements of various governments.

This journal is our solemn effort to promote erudite discernment and academic scholarship over this relationship, in a way which is not mutually dependent on each of these fields but which is mutually exclusive an independent. The focus has been to give a multi – disciplinary approach while recognizing the various effects of law and public policies on the society.

(EDITOR IN CHIEF)

BEST WISHES

It gives me great pleasure to record my appreciation for the Editorial Board of the Indian Journal of Law and Public Policy on the successful completion of the second issue of the journal.

Though in its nascent stage, the journal has acquired quite a decent name which is evident from the number of entries which were received for this issue. I understand that the first issue of the journal had also been a great success. I wish the same for the current and all future issues.

The members of the Board will have to be very conscious of the sustainability of the venture so that the Journal continues its journey without interruption and benefit the readers. I also advise the Board to compile good articles on electoral democracy and various facets of electoral laws for benefit of the society and strengthening of democracy.

I appreciate the efforts undertaken by the members of the editorial board who are undergraduate students and are pursuing commendable erudite and academic enterprise. I wish all of them great success in their future endeavours.

Dr. Nasim Zaidi

Chief Election Commissioner,

Election Commission of India.

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CLASSIFICATION OF CONTEMPT OF COURT UNDER DIRECT AND INDIRECT HEADS – THE MYTH AND REALITIES

***DR. A.P. RAJEESH**

INTRODUCTION

Though the basic nature of all contempt of courts are ensuring due administration of justice, contempt of court is broadly classified under civil and criminal and direct and indirect contempt heads. If classification of contempt under civil and criminal is based on the content of the contempt, the distinction between direct and indirect contempt is based on procedural differences by which the common law punished certain contempt summarily and others only after following some procedures on the substance of the charge.[1] The advantage of summary action is that the proceeding could be taken and completed in an exceedingly short time and the offender could be tried and matter could be disposed within no time.[2]

It is often stated that direct contempt consist of acts or inactions or words in the presence of the court which interfere with the administration of justice in obvious usually physical ways.[3] On the contrary indirect contempt consists of acts or misconducts which by implication tend to interfere with the administration of justice. The court has no direct knowledge about the conduct

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[1] John C Fox, *The Nature of Contempt of Court,* CXLVI LQR, pp. 191, 199 (1921).

[2] Stanford Law Review Association, *Summary Contempt: A Sword or a Shield?* 2 Stan L Rev 763, 764 (1950).

[3] Ronald L. Goldfarb, *The Contempt Power*, p. 69 (1963). Nonetheless, there are serious concerns regarding the potential abuses of a power that permits the same individual, acting as prosecutor, judge, and jury, to impose criminal penalties summarily for direct contempt of court. Richard B. Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 Yale LJ, pp. 39, 42 (1978).

which leads to contempt under this category and evidence is required to establish this type of contempt.[4] Generally it has been treated that the distinction between direct and indirect contempt is based on the first hand knowledge of the court regarding the commission of the contempt.[5]

DIRECT AND INDIRECT CONTEMPT – THE U.S. APPROACH

Though the distinction between direct and indirect contempt is common law origin, it is given more importance in U S law.[6] In spite of the distinction being followed in U S for centuries, the classification of contempt under direct and indirect heads and the procedure followed for punishing direct contempt is subject to severe criticisms.[7] The objections are mainly against the summary

[4] All the contempts by publication are treated as indirect contempts. Similarly acts occurring when the court is not in session or disobedience to court process away from the court which tend to impede administration of justice are further examples of this type of contempt, Goldfarb, *supra* note 3, at 70.

[5] Gordon Borrie and Nigel Lowe, *The Law of Contempt*, p. 8 (1973). However, the chief danger of direct contempt is that the question of guilt and severity of punishment may be determined by the offending judge, whose attitude may fall short of impartiality and fairness. William R. Worth, *Punishment for Direct Contempt of Court,* 47 Mich L Rev 1218, 1219 (1949).

[6] In U S law, those acts committed in the presence of the court and actually tending to obstruct justice are called direct contempt and all other acts are classified as indirect contempts, William R. Worth, *Punishment for Direct Contempt of Court*, 47 Mich L Rev, pp. 1218, 1219 (1949).

[7] It was pointed out that the summary procedure followed in direct contempt is self dealing and doubts were expressed regarding the genuineness of such power. It was argued that although some power must exist for the sake of maintaining courtroom order, it need not necessarily be vested in the trial judge. The solution suggested in this regard is placing such control in the hands of another courtroom official, rather than the judge himself. But the practical costs and difficulties of creating a separate class of 'contempt judges' to maintain courtroom order may make such a solution administratively unfeasible. Further the plea of institutional bias can't be negated if the matter is dealt by contempt judge. Thus although separate contempt officials might produce some improvement by reducing the chance of self - dealing and deviance from the popular will, it is also possible that the decrease would be small compared to the costs of implementation. The suggestion made in this regard is that the power must be narrowly tailored to what is actually required to administer justice. Eric Fleisig - Greene, *Why Contempt is Different: Agency Costs and "Petty Crime" in Summary Contempt Proceedings*, 112 Yale L J 1223, 1246 (2003). At the same time contrary view also prevails. It was pointed out that the phrase 'direct' recognizes that, in fairness to the accused, only a judge who could observe the contemptuous nature of the conduct in open court

procedure followed in direct contempt cases.[8] However close judicial administration and the judge's personal knowledge of the offence reasonably disposed of the usual objections to summary treatments.[9] To classify contempt under direct and indirect heads, the issue which typically arises is whether the act is in the presence of the court or away from the court. Under U S law it is generally recognized that, for invoking the power for direct contempt, the act must be in the actual presence of the court or in the sufficient proximity to have an actual as opposed to a remotely casual effect on courts work. This test is often called as 'general presence of court test'.[10] Under this test the courts act directly against the contemnor, because any formal proof would be superfluous and merely ceremonial.[11] The personal knowledge of the court is said to supply the necessary proof for conviction.[12] The rationale for this conviction is the philosophy that the court needs no proof of what it already knows.[13]

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should be invested with this power. Paul V. Evans, *The Power to Punish Summarily for "Direct" Contempt of Court: An Unnecessary Exception to Due Process*, 5 Duke B J 155, 157 (1956). According to this view only the judge who has direct knowledge of the act may be permitted to deal with direct contempt.

[8] The main objection to direct contempt of court lies in the fact that the judge may proceed immediately without regard to the fundamental requirements of due process. Stanford Law Review Association, *supra* note 2.

[9] Two reasons are commonly suggested for the exercise of the extraordinary summary power. The first is, since the judge is personally aware of the relevant facts, there may be no need for a hearing. Second, punishment without the delay inherent in notice and hearing may be necessary to vindicate the court's authority or to prevent obstructions of justice to this type of contempt. Kuhns, *supra* note 3.

[10] Borrie and Lowe, *supra* note 5.

[11] The general approach of U S court is that even a counsel is not necessary in direct contempt cases. Kuhns, *supra* note 3, at 58.See also *Cooke v United States*, 267 US 517, p. 534 (1925).

[12] Goldfarb, *supra* note 3, at 71.

[13] *Id.* It was stated that the Summary contempt protects administration of justice in three ways: (i) Interferences with the functioning of the court can be quickly removed. For instance, noise by a spectator or abuse by an attorney can be stopped swiftly, without much interruption in the court's business. (ii) Disturbances in the case before the court can be discouraged. (iii) Misconduct in other cases is deterred by knowledge of the judge's great power. Stanford Law Review Association, *supra* note 2.

However, it is not clear for the application of this test, whether the act must be committed in the presence of the court when the court is in session or it is enough that the judge is having personal knowledge regarding its commission.[14] Thus 'in the presence of court' test which apparently seems simple sometimes turns to be unclear and complex. The problems involved 'in the presence of the court' test are remedied to a considerable extent by applying yet another test, 'impact on the court' test.[15] According to this test the actual rationale to assess whether a contempt is direct or indirect is not based on the question of presence of the court or the judge, but based on the consequence of the conduct.[16] In spite of the apparent similarities, it seems that the ingredients of these tests are different and to some extent inconsistent also. The actual personal knowledge of the court test approaches the matter from the standpoint of avoiding proof of the offence and condoning summary procedure. But the consequence of the conduct test approaches the matter on the basis of how far serious the conduct of the contemnor and its impact on the court proceedings. This leads to a situation that there is no clarity in the distinction between direct and indirect contempt of court. However, the distinction is important for the reason that, summary treatment should be withheld in cases where commission of contempt is only inferable, no matter how directly it related it to the court.[17] In U S law since the application of summary procedures and the dispensation of

[14] Goldfarb, *supra* note 3, at 72.
[15] *Id.*
[16] *Id*. In *U.S.* v. *Annonymous*, 21 Fed. 761, 769, it was held that to attract the principle of direct contempt the mere place of occurrence is not the absolute test of that question and it may depend on the character of the particular conduct in other respects also.
[17]William R. Worth, *Punishment for Direct Contempt of Court*, 47 Mich L Rev, pp. 1218, 1219 (1949).

certain constitutional rights follow the classification of contempt as direct, there is serious significance in paying strict adherence to this distinction.[18]

DIRECT AND INDIRECT CONTEMPT – THE ENGLISH APPROACH

The ingredients which constitute direct contempt of court in U S law is known in English law as 'contempt in the face of the court'.[19] The English law recognized this form of contempt from the very establishment of court system and the power to punish for words or acts which amount to contempt in the face of the court has been vested in every court of justice.[20] In *R. v Almon,*[21] regarding this type of power Wilmount, J. observed that this was a power vested with the courts in Westminster Hall for vindicating their own authority. It was further held that the power to impose fine and imprison for contempt is coeval with the very foundation of the institution of judiciary and was a necessary power without which the institution can't function.[22]Similarly justifying the power to instantly punish the wrong doer for contempt committed in the face of the court, in *Morris* v. *Crown Office,*[23] Lord Denning observed that to maintain law and order, the judges have, and must have, power at once to deal with those who offend against

[18] Goldfarb, *supra* note 3, at 73. The general explanation for summary contempt power is that it should be tolerated as a petty power to deal with petty offenses. However it was pointed out that the fact that the offences are petty should not be a justification for denying constitutional procedural rights. The only basis for such an exception is necessity; and, in absence of a necessity, the exception should fail. Paul V. Evans, *The Power to Punish Summarily for "Direct" Contempt of Court: An Unnecessary Exception to Due Process*, 5 Duke B J 155, 159 (1956). It was further argued that for efficient administration of justice, and to accord with the requirement of a fair trial, the power of direct contempt of court must be abolished. *Id.*, at 160.

[19] D. G. T. Williams, *Contempt of Court*, 27 CLJ 9, pp. 10-12 (1969). According to Phillimore Committee, the disruption of court proceedings by misconduct in a court or its precincts is known as contempt in the face of the Court. Report of the Phillimore Committee on Contempt of Court, Chapter - 3, Contempt in the Face of the Court, excerpted in Surinder K. Puri, *Iyer's Law on Contempt of Court*, p. 1267 (3rd Ed. 2004).

[20] John C. Fox, *The Nature of Contempt of Court*, CXLVI LQR, pp. 191, 192 (1921).

[21] (1765), Wilm, pp. 243, 254; 97 E.R. 94, 99.

[22] *Id.*

[23] [1970] 1 All ER 1079.

it. It is a great power – a power instantly to imprison a person without a trial – but it is a necessary power.[24]

Although the boundaries of this kind of contempt has not been precisely defined in English law, act of any person referring to the unlawful interruption of court proceeding, and to the misbehavior generally during the sitting of the court is treated as contempt in the face of the court.[25] But the difficulty regarding this approach lies in the fact that, there may be conducts which could be treated as interference with administration of justice in the presence of court but at the same time does not amount to misbehavior.[26] For instance, certain acts such as a witness refusing to answer a question, or a person impersonating a juryman, though committed in the presence of the court appear to fall outside the term misbehavior. Yet another problem is hybrid offences, i.e. where part of the act take place in the courts presence and part completely outside the court. Interrupting court proceeding in pursuance of an agreement made outside the court is the best example for a hybrid offence. It is doubtful whether these types of conducts could be treated as contempt in the face of the court.[27]

CANADIAN APPROACH TO CONTEMPT IN THE FACE OF THE COURT

The Canadian Supreme Court considered all these difficulties regarding defining contempt in the face of the court in *Mc Keown* v. *R.*[28] In this case a barrister while representing a client, failed to appear before a judge for a trial, and thus interrupted the continuation of trial. The question was whether this

[24] *Id.* at 1081.
[25] John Charles Fox, *The Summary Process to Punish Contempt*, XCIX LQR, p. 247 (1909). See also *Izora v R.*, (1953) A.C. 327. In this case it was held that it is not possible to particularize the acts which can or cannot constitute contempt in the face of the court *Id.* at 336.
[26] Borrie and Lowe, *supra* note 5, at 6.
[27] *Id.*
[28] 16 D.L.R (3d) 390. (1971)

conduct could be treated as contempt in the face of the court. In deciding the issue, Court defined contempt in the face of the court as follows:[29]

> Contempt in the face of the court is, in my view, distinguished from contempt not in its face on the footing that all the circumstances are in the personal knowledge of the court. The presiding judge can then deal summarily with the matter without the embarrassment of having to be a witness to issues of fact which may be in dispute because of events occurring outside.

The definition excludes all hybrid offences from the purview of contempt in the face of the court but all contempt within the knowledge of the court could be treated as contempt in the face of the court whether it is committed within or outside the court hall. Further there are decisions which laid down that, to attract contempt in the face of the court it is not mandatory that the acts or words must be inside the court. Thus in *Re Dakin,*[30] carrying on a noisy trade in the vicinity of the court, so as to obstruct court proceeding was treated as contempt in the face of the court. Similarly in *Bodden* v. *Commissioner of Police of the Metropolis,*[31] willfully interrupting the proceeding taking place in a court by conduct from outside was treated as contempt in the face of the court.[32] However if all disturbance to court proceedings are treated as contempt in the face of the court, the distinction between contempt in the face of the court and constructive contempts may turn to be meaningless. The difficulty in this regard was

[29] Borrie and Lowe, *supra* note 5, at 7.
[30] 13 V.L.R. 522 (1887), (Victorian Supreme Court).
[31] [1989] 3 All ER 833. In this case a person used a loudhailer outside a magistrates' court to address a crowd of demonstrators about a trial which was to be held at the court. The noise prevented the magistrate who was trying another case in a nearby court from hearing the evidence. The question arose was whether the magistrate had jurisdiction to deal with such conduct as contempt. *Id.*
[32] *Id.* at 838.

specifically brought to limelight in *Balogh* v. *Crown Court at St Albans.*[33] In this case, the preparation of the party to release laughing gas into the court hall with an object of making fun at court proceeding was not even noticed by the court. However a summary proceeding for contempt was initiated. It was specifically argued that the court had no jurisdiction to punish him summarily as the contempt was not in the face of the court and the circumstance of the alleged contempt were not in the personal knowledge of the Court.[34] But at the same time it may be noted that the attempt of the party was to cause disturbance to the court proceedings. Though a decision on this question was not specifically necessary for the acquittal of the accused for he was acquitted on some other technical grounds,[35] the court treated this type of conducts as contempt in the face of the court.[36] Giving a wide meaning to contempt in the face of the court, and suggesting a new test, it was observed that whenever a criminal contempt required "an immediate response to safeguard the interest of justice" it could be treated as contempt in the face of the court.[37] The new test of 'immediate response to safeguard the interest of justice' was again considered in *Director of Public Prosecution* v. *Channel Four Television Co. Ltd.*[38] In this case it was held that judge could act on his own motion in a matter of contempt only if the contempt was clear, the contempt affected a trial in progress or about to start, it was urgent and imperative to act immediately in order to prevent justice being obstructed and undermined and to preserve the integrity of the trial and no other

[33] [1974] 3 All ER 283.
[34] *Id.* at 286.
[35]The acquittal was on the ground that the conduct of the contemnor was only preparatory. *Id.* at 289.
[36] *Id.* at 290.
[37] *Id.* at 295.
[38] [1993] 2 All ER 517.

procedure would meet the ends of justice.[39] Thus in this case for dispensing with the normal procedure for contempt of court, the Court had not taken into consideration whether the conduct was within the court or within the actual knowledge of the court, but looked into the urgency to act immediately to prevent justice being obstructed and undermined.

Immediate response to safeguard the interest of justice as the basis of contempt in the face of the court does not demand that contempt must be committed in the view or presence of the court or the court must be having direct knowledge regarding the commission of the act. But what is relevant is a serious consequence of an act of a party on administration of justice. Thus it seems that regarding the question when contempt is committed in the face of the court, law is confusing between two conflicting principles viz. 'personal knowledge of the judge principle' and 'conducts directly and immediately obstructive of court proceeding principle'. The U S law and English law follow same principle and lead to same difficulties in this regard.

The contempt powers of the court when the contempt is in the face of the court is a very serious matter as the proceeding and punishment for contempt in the face of the court does not require any procedure to be followed[40]. The theoretical justification for this type of proceeding is that contempt prosecution is not aimed at protecting the judge personally but protecting the administration of justice mechanism.

[39] *Id.* at 521.

[40] See *Delhi Judicial Service Association Tis Hasari Court Delhi* v. *State of Gujarat and others*, (1991) 4 SCC 406. See also *In Re: Vinay Chandra Misra* (1995) 2 SCC 584, *Supreme Court Bar Association v Union of India*, AIR 1998 SC 1895. *Zahira Hasibulla Sheikh v State of Gujarat and others*, (2006) 3 SCC 374, *Laila David v State of Maharashtra and others*, (2009) 4 SCC 578.

Thus in English law, no consensus is reached regarding when contempt could be treated as contempt in the face of the court.[41] A practical approach followed by English courts to dilute the rigour of contempt in the face of the court is by invoking this type of jurisdiction only in exceptional situations.[42] Thus Lord Goddard, C.J., in *Parashuram Detaram* v. *R.*,[43], observed that the summary power of punishing for contempt should be used sparingly and only in serious cases[44]. It was further opined that though it is a power which a court must possess, its usefulness depends upon the wisdom and restraint with which it is exercised.[45] Thus it seems that the wisdom followed in English judiciary is strictly limiting ex facie contempts only to exceptional situations to avoid criticisms of lack of procedure and perplexities.

CONTEMPT IN THE FACE OF THE COURT – INDIAN POSITION

In India, contempt in the face of the court is dealt under section 14[46] of the Contempt of Courts Act, 1971.[47] The summary proceeding under section 14

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[41] See *Balogh* v. *Crown Court at St. Albans,* [1974] 3 All ER 283, 288.
[42] *Id*.
[43] (1945) A.C. 264.
[44] *Id.* at 270.
[45] *Id.*
[46] S. 14 of the Contempt of Courts Act, 1971 reads-: **Procedure where contempt is in the face of the Supreme Court or a High court:-** (1) When it is alleged, or it is appears to the Supreme court or the high court upon its own view, that a person has been guilty of contempt committed in its presence or hearing, the court may cause such person to be detained in custody, and, at any time before the rising of the court, on the same day, or as early as possible thereafter shall-

(a) cause him to be informed in writing the contempt with which he is charged;
(b) afford him an opportunity to make his defense to the charge;
(c) after taking such evidence as may be necessary or as may be afforded and after hearing him, proceed, either forthwith or after adjournment, to determine the matter of the charge; and
(d) make such order for the punishment or discharge of such person as may be just.

(2) Notwithstanding anything contained in sub-section(1), where a person charged with contempt under that sub-section applies, whether orally or in writing to have the charge against him tried by some judge other than the judge or judges in whose presence or hearing the offence is alleged to have been committed, and the court is of opinion that it is practicable to do so and that in

is limited to contempt committed in the presence or hearing of the Supreme Court and High Courts[48]. With regard to all other contempts, the usual procedures under Contempt of Courts Act are to be followed[49]. Even in cases where contempt is committed in the presence or hearing of the court, section 14 envisages some procedures to be followed.[50] The section provides that, though the judge in whose presence the contempt is committed could punish the wrong doer, if practicable, and if an application is made to that effect, the matter must

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the interests of proper administration of justice the application should be allowed, it shall cause the matter to be placed, together with a statement of the case, before the chief justice for such direction as he may think fit to issue as respect the trial thereof.

(3) Notwithstanding anything contained in any other law, in any trial of a person charged with contempt under sub- section (1) which is held, in pursuance of a direction given under sub-section (2), by a judge or other than the judge or judges in whose presence or hearing the offence is alleged to have been committed, to appear as a witness and the statement placed before the Chief Justice under sub-section (2) shall be treated as evidence in the case:

(4) pending the determination of the charge, the court may direct that a person charged with contempt under this section shall be detained in such custody as it may specify:

Provided that he shall be released on bail, if a bond for such sum of money as the court thinks sufficient is executed with or without sureties conditioned that the person charged shall attend at the time and place mentioned in the bond and shall continue to so attend until otherwise directed by the court:

Provided further that the court may, if it thinks fit, instead of taking bail from such person, discharge him on his executing a bond without sureties for his attendance as aforesaid.

[47] There were no provision to deal with contempt in the face of the court under the Contempt of Courts Act, 1926 and 1952 and the matter was dealt by applying common law principles. However, being courts of record, the power of Supreme Court and High Courts to deal with contempt committed in the face of the Supreme Court and High Courts were recognised under Article 129 and 215 respectively. For details regarding contempt power of Supreme Court and High Courts under Article 129 and 215 see Chapter 4, *Indian Constitution and Contempt of Court*, p. 107 – 143.

[48] In *Laila David v State of Maharashtra*, (2009) 10 SCC 337, it was observed that the expression contempt in the face of the court mean as incident taking place within the sight of judges and others present at the time of the incident, who had witnessed such incident. *Id.* at 345. For details see Chapter 4, Indian Constitution and Contempt of Court, pp. 120 - 121

[49] See *R.K.Anand v Delhi High Court*, (2009) 8 SCC 106.

[50] This minimum procedure includes, informing the person regarding charge of contempt as early as possible, affording him an opportunity to make his defense to the charge, providing opportunity to adduce evidence, chance for hearing etc. It has been observed in *Laila David v State of Maharashtra*, (2009) 4 SCC 578, that the steps under section 14 has been engrafted under the Contempt of Courts Act, following the common law tradition in other countries and also keeping in view of the age – old principle that in contempt proceedings, the court act both as judge and as accuser rolled into one, and the court must act with utmost restraint and caution since the liberty of person is involved. Id at 582

be dealt by some other judges other than the judge in whose presence or hearing the contemptuous act was done.[51] Thus the very philosophy of the Indian law indicates that, as far as possible, the matter must be dealt by some other judge other than the judge in whose presence or hearing the contempt was committed. Thus the concept of personal bias, which is not recognized under English law,[52] is recognized under Indian law at least to a limited extent.[53] Further the view laid down in *Wilkinson* case[54] was recognized by the Indian Supreme Court much before. Thus in *Sukhdev Singh* v. *Tega Singh*,[55] it was observed thus:[56]

> We consider it desirable on general principles of justice that a judge who has been personally attacked should not as far as possible hear a contempt matter which, to that extent, concerns him personally. It is otherwise when the attack is not directed against him personally. The judges should bear in mind the oft quoted maxim that justice must not only be done but must seen to be done by all concerned and most particularly by an accused person who should always be given, as far as that is humanly possible, a feeling of confidence that he will receive a fair, just and impartial trial by judges who have no personal interests or concern in his case.

In spite of the advantageous position regarding the procedure, the position relating to contempt in the face of the court is unsatisfactory in India. Primarily, as courts of record, the High Courts and Supreme Court can initiate contempt

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[51] S. 14 (2). It has been held that the safeguards statutorily engrafted under section 14 of the Contempt of Courts Act are basically reiterating the fundamental guarantee given under Article 21 of the Constitution and it protects the most precious fundamental right viz. deprivation of one's personal liberty except according to procedure established by law. *Laila David* v. *State of Maharashtra*, (2009) 4 SCC 578, *Id.* at 584.

[52] See *Wilkinson* v. *S and another*, [2003] 2 All ER 185, 193.

[53] It is applicable only to a limited extent for the reason that even if there is an application orally or in writing, it is not mandatory for the court to try the matter by some other judge other than the judge or judges in whose presence the offence is alleged to have been o committed. Such an application need to be allowed only if it is practicable to do so and that in the interests of proper administration of justice the application should be allowed. Section 14 (2).

[54] [2003] 2 All ER 184.

[55] AIR 1954 SC 186.

[56] *Id.* at 190.

proceedings under Articles 129 and 215 respectively for contempt committed either in the face of the court or contempt committed otherwise. When proceeding is initiated under the constitutional provisions for contempt which cannot be treated as contempt in the face of the court, none of the procedures under Contempt of Courts Act need to be followed and the only procedure to be followed in this regard is the compliance with the principles of fair hearing.[57] Thus the distinction between contempt which are on the face of the court and constructive contempts turn to be of little relevance when proceeding is initiated by High Courts and Supreme Court under Constitutional provisions. Further whether the contempt is in the face of the court or not, under Contempt of Courts Act, the maximum punishment is simple imprisonment which may extend to six months and a fine of two thousand rupees or with both.[58] But if contempt proceeding is initiated under Constitutional provisions no such restriction regarding punishment mentioned under the Contempt of Courts Act is applicable.[59]

In a number of cases Supreme Court and High Courts dealt with contempt in the face of the court. But in all such cases, Supreme Court and High Courts linked the matters with Articles 129 or 215 respectively. A typical example in this regard is *In re Vinay Chandra Misra.*[60] In this case all the ingredients of contempt in the face of the court mentioned under section 14 of the Contempt of Courts Act, 1971, were present. But instead of proceeding under section 14 of the Act, the Chief Justice of Allahabad High Court referred the matter to Chief Justice of India and the contempt proceeding was initiated by the

[57] *Id.* See also *Pritam Pal* v. *High Court of Madhya Pradesh,* 1993 Supp (1) SCC 529.
[58] S. 12 of Contempt of Courts Act, 1971.
[59] See *In re Vinay Chandra Misra*, (1995) 2 SCC 584, See also *Bar Council of India* v. *High Court of Kerala,* 2004 (2) KLT 485 (SC).
[60] (1995) 2 SCC 584.

Supreme Court under Article 129 of the Indian Constitution. It was the opinion of the Supreme Court that where contempt proceeding was initiated under Article 129, the limitations under Contempt of Courts Act were not applicable.[61] Thus the distinction between ex facie and non ex facie contempts incorporated under the Act was turned to be insignificant[62].

The perplexities in this regard and the very disregard of section 14 of the Contempt of Courts Act, when contempt is in the face of the Supreme Court became more clear, after the decision in *Leila David (6)* v. *State of Maharashtra and others.*[63] In this case the conduct of the contemnor was serious in nature and was committed in the face of the court, in the presence of Solicitor General of India, two Additional Solicitors, and large number of counsels including the President of the Supreme Court Advocates - on - Record Association. The conducts of the contemnor include shouting, using abusive intemperate language and even throwing a chapel at the judges.[64] Definitely it was necessary to deal with the matter seriously. But the crucial question in this regard was whether the procedures under section 14 of the Contempt of Courts Act, 1971, are to be complied with to punish the contemnor for contempt committed in the face of the court. No consensus was reached among the two judges who heard the matter. Dr. Arijit Pasayat, J, opined that as the contemnors stated in the open court that they stand by what they have said and did in the court, there was no need to issue any notice. Thus the contemnors were sentenced to three months simple

[61] See *Supreme Court Bar Association* v. *Union of India*, AIR 1998 SC 1895. *Zahira Hasibulla Sheikh* v. *State of Gujarat and others*,(2006) 3 SCC 374.
[62] *Id.*
[63] (2009) 10 SCC 337.
[64] The conduct of the contemnor was when the writ petition filed by them and the subsequent contempt petition against them was heard by the court. *Leila David* v. *State of Maharashtra*, (2009) 4 SCC 578, 579.

imprisonment.[65] However Ganguly J. did not agree with Arijit Pasayat J. The Hon'ble Judge adopted the view that the compliance with the procedures under section 14 of the Contempt of Courts Act is mandatory when contempt is committed in the face of the court.[66] As there was no consensus of opinion among the two Judges, the Chief Justice constituted a three judge Bench to decide the issue. The Bench reached the conclusion that though in normal circumstances the statutory requirements contained in Section 14 has to be followed, there are exceptional circumstances in which such procedure may be discarded as being redundant[67].

However the Court has not given any guideline to show when the requirements under section 14 need not be complied. Thus the distinction between contempt in the face of the court and contempts which are not in the face of the court is confusing and misleading and does not serve any effective purpose regarding punishment and procedure with respect to courts of record.

CONTEMPT IN THE FACE OF THE COURT AND INDIAN PENAL CODE

The power of lower courts to deal with *ex facie* contempts committed against lower courts is also not satisfactory in India. In India, this situation is covered by Indian Penal Code. Though Chapter X and X1 of I.P.C. contain a number of provisions dealing with interference with administration of justice either directly or indirectly, the only provision under Indian Penal Code which specifically deals with insult or interruption in the face of the court sitting in any stage of judicial proceeding is section 228.[68] The object of this section is to

[65] *Id.* at 580.
[66] *Id.* at 582.
[67] *Id.*
[68] S. 228 of Indian Penal Code reads-: **Intentional insult or interruption to public servant sitting in judicial proceeding.-** Whoever intentionally offers any insult, or causes any interruption to any

punish a person who intentionally insults in any way the court administering justice.[69] There is considerable interlink between section 228 of I.P.C. and Contempt of Courts Act for no High Court can take cognizance of a contempt under the Contempt of Court Act, if the alleged contempt is an offence punishable under the Indian Penal Code.[70]

To attract an offence under section 228 the insult must be against a public servant which include a judge sitting in any stage of a judicial proceeding[71]. The crucial question in all such cases is whether the conduct of a party is intended to insult or interrupt a public servant sitting in a judicial proceeding and not the words or conduct of the party alone.[72] The offence under section 228 is treated as something against the person sitting in judicial proceeding. Further the scope of section 228 is limited to insult or interruption when the public servant is 'sitting in any stage of a judicial proceeding'. The

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public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

[69] Justice D.A. Desai, Justice M.L. Jain & Dr. N.R. Madhava Menon, *Ratanlal & Dhirajlal's Law of Crimes*, 23rd Ed. (1993) p. 822, Bharat Law House, New Delhi.

[70] S. 10 of Contempt of Court Act, 1971 reads:- **Power of High Court to punish contempts of subordinate courts:-** Every High Courts shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of Courts subordinate to it as it has and exercises in respect of contempt of itself:

Provided that no High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian penal Code (45 of 1860).

[71] See *State of Madhya Pradesh* v. *Revashankar,* AIR 1959 SC 102.

[72] *Mustafa Khan* v. *The State,* (1954) Cri. L J, 1008. In this case, the applicant while appearing in a criminal case contended that the office staff of a court had not properly served a summons. The judge verified the documents and found the allegations were wrong. Still the applicant continued his complaint and argued that his complaint was true and did not stop even when asked by the court to do so. The Magistrate ultimately reached the conclusion that the conduct amounted to intentionally interrupting the business of the court and was punished under section 228 of I.P.C. and sentenced to a fine of rupees 50. The crucial question before the court was whether the conduct of the applicant could be treated as intentional insult of court or intentionally interrupting the business of the court. The court observed that the tone, temper, heat and anger of the accused are not enough to attract intentionally offering insult to the court. *Id.* at 1008 .

ordinary meaning of the words sitting in any stage of a judicial proceeding is from the opening to the rising of the court and the necessary interval between the conclusion of one case and the opening of another.[73]

Thus the jurisdiction of lower courts for *ex facie contempt* under section 228 is apparently simple. It empowers the lower courts to take criminal proceeding for *ex facie* contempt and to punish the wrong doer. But the apparently simple provision under I.P.C. becomes complex due to the operation of Section 10 of the Contempt of Courts Act. Section 10 of the Contempt of Courts Act deals with the power of High Courts to punish for contempt of subordinate courts. Under section 10[74] every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of courts subordinate to it as it has and exercises in respect of contempt of itself. The proviso to section 10 provides that, the High Court's power to take contempt proceeding could not be invoked for a contempt committed against courts subordinate to High Court if such contempt is an offence punishable under the Penal Code. Contempt of Courts Act, 1926[75] and 1952[76] contained similar provisions excluding the jurisdiction of High Courts regarding contempt committed against subordinate courts.

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[73] Justice D.A. Desai, Justice M.L. Jain & Dr. N.R. Madhava Menon, *Ratanlal & Dhirajlal's Law of Crimes*, 23rd Ed. (1993) p. 826, Bharat Law House, New Delhi.

[74] **Power of High courts to punish contempt of subordinate courts:-** Every High Court shall have the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of courts subordinate to it as it has and exercises in respect of contempt of itself :

provided that no high court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code (45 of 1860)

[75] S. 2 (3) of Contempt of Courts Act 1926 reads – No High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under Indian Penal Code.

[76] S. 3. **Power of High Court to punish contempt of subordinate courts** – (1) subject to the provisions of sub- section (2) every High Court shall have and exercise the same jurisdiction,

The question in this regard is whether the contempt jurisdiction of the High Court under the Contempt of Courts Act is excluded in all cases where the ingredients of section 228 dealing with contempt of court under Indian Penal Code are attracted. The overlap of jurisdictions of lower courts under section 228 of Indian Penal Code and the jurisdiction of High Courts under section 10 of the Contempt of Courts Act was considered in detail in State of *Madhya Pradesh* v. *Revashankar*.[77] In this case, when a criminal case was pending against the respondent before the Additional District Magistrate Court, Indore, an application was filed in the same court for the transfer of the case to some other court. The application contained some serious aspersions against the Magistrate including partiality, corruption, conspiracy etc.[78] The Magistrate reported the matter to the High Court and which led to the present contempt proceeding. The High Court held that the application was intended to offend and insult the Magistrate and it was treated as an application thrown in the face of the Magistrate himself.[79] The conduct was considered as not better than telling the magistrate in the face that he was partial and corrupt.[80] Thus the Court came to the conclusion that the act of the respondent consisted of all ingredients of section 228 of Indian Penal Code and the High Court would be precluded from

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powers and authority, in accordance with the same procedure and practice, in respect of courts subordinate to it as it has and exercises in respect of contempt of itself.

(2) No High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code (Act XLV of 1860)

[77] AIR 1959 SC 102.

[78] There were four allegations against the Magistrate. (1) the magistrate tried to favor one party to the proceeding, (2) from some of the opinions expressed by the Magistrate, the respondent was sure that he would not get impartial and legal justice from Magistrate, (3) The Magistrate had a hand in the conspiracy hatched by a party in the proceeding regarding a theft case with the object of involving the respondent and his brother in a false case of theft of ornaments (4) one party to the proceeding declared that he had bribed the Magistrate. *Id* at 103.

[79] *Id.* at 104.

[80] *Id.*

taking action for the contempt committed before the Magistrate by reason of section 3(2) of the Contempt of Courts Act, 1956 and the only proceeding possible in this case is a proceeding under section 228 of Indian Penal Code.[81]

On appeal a much serious basic question was considered by the Supreme Court and the Court looked into the meaning of the word 'insult or interruption' used in section 228 of Indian Penal Code. The question before Court was if the conduct on the part of an offender exceeds insult or interruption to public servant sitting in judicial proceeding, whether it could be treated as an offence under section 228 of I.P.C, and in such situation whether the jurisdiction of High Courts were ousted under section 3(2) of the Contempt of Courts Act, 1952.[82] Answering the question in negative, Court held that if the conduct of the offender assumed something more than 'insult or interruption to public servant sitting in judicial proceeding', section 228 is not attracted and it could be treated as an offence of scandalising the court. Once the conduct could be treated as scandalising the court, section 3 (2) of Contempt of Courts Act would not be applicable and High Court's jurisdiction was not ousted. The Court observed as follows:[83]

> The true test is: is the act complained of an offence under Sec. 228, Indian Penal Code or is it something more than that? If in its the true nature and effect, the act complained of is really "scandalising the court" rather than a mere insult, then it is clear that the jurisdiction of the high court is not ousted by reason of the provision in S. 3(2) of the Act.

The decision clearly laid down that the bar of jurisdiction of the High Courts under Contempt of Courts Act in punishing for contempt committed against lower court under section 228 of I.P.C. is only when the conduct could be

[81] *Id.*
[82] *Id.* at 105.
[83] *Id*. at 106.

treated as 'insult or interruption to public servant sitting in judicial proceeding'. If the conduct exceeds mere insult or interruption against a public servant acting in judicial proceeding, it could be treated as contempt of court and appropriate proceeding could be taken by the High Court under Contempt of Courts Act in spite of embargo contained in the Act regarding the powers of High Courts under section 3 (2).

The philosophy of the Contempt of Courts Act, 1952 was followed in 1971 Act also. The impact of section 228 regarding the power of High Court under the present Contempt of Courts Act was considered in *Daroga Singh* v. *B.K. Pandey.*[84] In this case the conduct which led to contempt was from some police persons. The whole incident started with the continuous non appearance of an investigating officer before a court as a witness. This led to the issuance of a non bailable warrant and the investigating officer was remanded to judicial custody. Attempts for release of the police officer on bail failed. Immediately on the dismissal of the bail application, a large number of police persons in civil dress, armed with weapons and shouting slogans against the judge barged into the court room and the judge was brutally assaulted. Contempt proceedings were initiated by the High Court under the Contempt of Courts Act and different punishments were imposed on the offenders. The main contention of the appellants on appeal before the Supreme Court was that the alleged offence was a contempt under section 228 of Indian Penal Code and the High Court's jurisdiction to take contempt proceeding under the Contempt of Courts Act was barred. Rejecting the contention and following the ratio laid down in *Revashankar's* cases, Supreme Court held that if the conduct exceeds insult to a judge or interruption to court proceeding, it would definitely attract criminal

[84] (2004) 5 SCC 26.

contempt and contempt proceeding could be taken by the High Court under Contempt of Courts Act.[85]The decision has changed the concept of contempt in the face of subordinate court. What is made punishable under section 228 is insult to a judge or interruption to court proceeding in the face of the court. It is treated as something lesser than contempt of court. If the conduct exceeds insult to a judge or interruption to court proceedings, the same is not dealt under section 228 but under Contempt of Courts Act. Thus the logical consequence of the present interpretation is that the concept of *ex facie* contempt is not applicable in India so far as subordinate courts are concerned.

Yet another point to note in this regard is that sections 175,178, 179, 180 or 228 do not require that the offences under these sections should be committed in the view or presence of the court. The only difference in this regard is that, a summary proceeding under section 345(1) of Criminal Procedure Code[86] is maintainable only if the offence under sections 175, 178,179,180 or 228 is committed in the view or presence of the court. However it seems that a contrary view was adopted by the Supreme Court in *Arun Paswan SI* v. *State of Bihar*.[87] This case also relates to contempt committed by some police officers. In this

[85] *Id.* at 41.

[86] S. 345 of Criminal Procedure Code reads- *Procedure in certain cases of contempt*:- (1) When any such offence as in section 175, section 178, Section 179, Section 180, or Section 228 of Indian Penal Code (45 of 1860) is committed in the view or presence of any civil criminal or revenue court, the court may cause the offender to be detained in custody and may, at any time before the rising of the court on the same day, take cognizance of the offence and after giving the offender a reasonable opportunity of showing cause why he should not be punished under this section, sentence the offender to fine not exceeding two hundred rupees, and, in default of payment of fine, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

(2) In every such case the court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence.

(3) If the offence is under section 228 of the Indian Penal Code (45 of 1860), the record shall show the nature and stage of the judicial proceeding in which the court interrupted or insulted was sitting, and the nature of the interruption or insult.

[87] (2004) 5 SCC 53.

case, for repeatedly disobeying the production of a case diary in one case on the direction of the court, the investigating officer, Arun paswan was ordered to remain present in the court till rising of the court at 4.30 P.M. Knowing about the order of the court, some police officers assembled in the precincts of the court and raised slogans against the District Judge who had issued the order directing Arun Paswan to remain in the court. The judge had not personally noticed the slogans and protests, but he got information from the court staff regarding the offensive conducts and language used. The matter was reported to High Court for contempt proceeding. The main objection against the contempt proceeding was that the proceeding was not maintainable as acts of the wrong doer's could have been dealt under section 228 of Indian Penal Code. Supreme Court rejected the contention raised by the appellant and observed as follows:[88]

> In the present case, the alleged slogan- shouting and leveling abusive language against the judge took place outside the court. Therefore, the District and Sessions Judge rightly has not taken any action under Section 345 of the Code of Criminal Procedure and, therefore, the jurisdiction of the High Court would not be ousted. The rationale behind it is quite obvious. There should be no reason why the High Court should invoke its jurisdiction when the court against whom the contempt is committed, in the view or presence of the court, can itself take action. Thus bar of the jurisdiction of the high court imposed by proviso to Section 10 of Contempt of Courts Act is not attracted in the cases where the offence under Sections 178,179, 180 and 228 IPC are not committed in the view and presence of the court.

The decision reached by the Supreme Court in this regard is unfortunate. The High Court or Supreme Court had not reached the conclusion that the conduct exceeded insult or interruption to public servant sitting in judicial

[88] *Id*. at 63.

proceeding. Thus the ratio laid down in *Madhya Pradesh* v. *Revashankar*[89] was not applicable in the present case. For constituting an offence under section 228 of Indian Penal Code, the court need only to look into whether there was intention, insult or interruption to a public servant sitting in any stage of a judicial proceeding. If these ingredients were present and the conduct did not exceed insult or interruption, High Court's jurisdiction was excluded. However to invoke the summary proceeding under section 345 of Cr.P.C the offence must have been committed in the view or presence of the court. In the present case as the act was committed not in the view and presence of the court a summary proceeding under section 345 of Cr.P.C was not maintainable. But it would have been possible to initiate appropriate proceeding under section 228 without invoking section 345 of Cr.P.C. Further the decision was contrary to the ratio laid down in *Daroga Singh* v *B.K. Pandey.*[90] In *Daroga singh's* case Supreme Court observed thus-:[91]

> What is made punishable under S.228 is the offence of intentional insult to a judge or interruption of court proceedings but not as a contempt of court. The definition of criminal contempt is wide enough to include any act by a person which would either scandalise the court or which would tend to interfere with the administration of justice. It would also include any act which lowers the authority of the court or prejudices or interferes with the due course of any judicial proceedings. It is not limited to the offering of intentional insult to the judge or interruption of the judicial proceeding.

Thus, the Supreme Court in this case acknowledged that the contempt jurisdiction of the High Court is wider than section 228 and the proceeding could be initiated by the High Courts for those offences which fall outside the scope of section 228 or any such other sections dealing with contempt of court. But in

[89] AIR 1959 SC 102.
[90] (2004) 5 SCC 26.
[91] *Id.* at 41.

Arun Paswan's case a contrary view was adopted by the Court by coming to a conclusion that the High Court's jurisdiction is excluded only when the contempt is committed in the view or presence of the court. The interpretation is not only against the spirit of section 228 but also diminishes the scope of lower courts to deal with interference with administration of justice committed in the face without referring the matter to the High Courts.

CONCLUSION

The present position relating to *ex facie* contempt of lower courts is unsatisfactory and misleading in India. It seems that the difficulties in this regard are the after product of overlap of contempt powers under Indian Penal Code, Contempt of Courts Act and contempt powers of High Courts and Supreme Court under the Indian Constitution. The situation has become more complicated by the inconsistent interpretations adopted by the Supreme Court and High Courts regarding various provisions under Indian Penal Code dealing with interference with administration of justice and exclusion clause contained in the Contempt of Courts Act. It seems that not only the higher courts but also the lower courts must be in a position to deal with contempt whether the conduct of the offender is insulting or more than insulting, if it is committed in the face of the court. It is unnecessary to deal with such situations by the High Courts under Contempt of Courts Act especially the punishment for contempt under Contempt of Courts Act and punishment for the offence under section 228 of Indian Penal Code are virtually same[92]. Thus, though the classification of contempts under *ex facie* and *non ex facie* heads is time honored, it is not based on any clear rationale and does

[92] Under section 12 of the Contempt of Courts Act punishment for contempt of court is six months simple imprisonment and a fine of rupees two thousand. The punishment for offence under section 228 of I.P.C. is six months imprisonment, or a fine of rupees one thousand, or both.

not serve any effective purpose.[93] What is required in India is a change in law clearly defining *ex facie* contempts and clearly stating that *ex facie* contempts could be dealt with by the lower courts by a different judge.

[93] Recently the courts are somewhat completely disregarding the individual interest of enforcing the court order or undertaking given to the court and the element of upholding due administration of justice by complying with the court order or undertaking given to the court is given priority. This has destroyed the essential distinction between civil and criminal contempt. See *Horilal* v. *Bhajanlal*, AIR 2010 M.P. 144. In this case the Madhya Pradesh High Court held that when decree and judgment passed can be executed in accordance to the law, contempt petition is not maintainable. When the Code of Civil Procedure provides for instituting proceeding for execution of judgment and decree, then contempt application under Article 215 read with section 12 of the Contempt of Courts Act is not maintainable as the statute provide for mechanism for execution of decree passed. *Id*.

LEGAL GLITCHES FACING SURROGACY AGREEMENT IN INDIA

***SONALI KUSUM**

LEGALIZATION OF COMMERCIAL SURROGACY & SURROGACY AGREEMENT - JUDICIAL & STATUTORY DEVELOPMENTS:

The Supreme Court of India formally legalized commercial surrogacy in the landmark case *Baby Manaji Yamanda v. Union of India.*[1] In this case the Court defined "commercial surrogacy as a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb" and the related aspects as surrogacy agreement, the stakeholders or parties who may enter, and directed for enactment of a statutory law on the same. The supreme court admitted not only the void in law but also the irregularities taking place in the absence of law by calling surrogacy as money making racket. In this case of *Baby Manji*, a surrogacy agreement was entered into between the biological father and biological mother on one side and the surrogate mother on the other side. But subsequently in this case there were issues raised on the legality of the surrogacy agreement but the court allowed the same.

In another case *Jan Balaz v. Anand Municipality and Ors.*[2], it may be significant to note that that surrogacy agreement was entered in the name of intending father and the second respondent, surrogate mother whose name is mentioned as the wife of intending father which led to vexatious legal issues in the issue of birth certificate for the surrogate child. However the common truth in

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[1] (2008) 13 SCC 518.

[2] AIR 2010 Guj 21.

both the cases surrogacy agreement was entered into whose sole purpose of the agreement is to ensure hand over of the surrogate child to the intending couple in return for a fixed payment of money and that the surrogate child would derive all inheritance of a child of biological parents from the intending parent".

However during the course of adjudication of both these cases the court opined that there was an absence of a regulatory statutory law to address issues and concerns arising out of or related to the conduct of surrogacy in India. The Court directed for the early enactment of a statute for the same considering its large scale commercial practice in India. Following the Court's direction, the Indian Council of Medical Research (ICMR), under the aegis of Ministry of Health & Family Welfare, Government of India, formulated the Assisted Reproductive Technologies (Regulations), ART Bill, 2008[3] providing for the legal regulation, conduct of surrogacy and control of misuse of this technology in India. This ART Bill has been subject to deliberations and scrutiny and accordingly the Bill has undergone periodic revisions and necessary changes as the ART Bill 2010[4] and lately the ART Bill is also revised in the year 2013[5] submitted for the consideration of cabinet but the detail draft of the same is not made available.

[3] Indian Council of Medical Research, The Assisted Reproductive Technology (Regulation) Bill – 2008 (Draft) Ministry of Health and Family Welfare, Government of India, *available at:-* <http://icmr.nic.in/art/Draft%20ART%20(Regulation)%20Bill%20&%20Rules%20-%202008-1.PDF>. (Last visited Feb. 15, 2015) [hereinafter Draft Bill 2008].

[4] The Assisted Reproductive Technologies (Regulation) Bill – 2010 (Draft), Ministry of Health & Family Welfare, Govt. of India, New Delhi & Indian Council of Medical Research New Delhi, *available at:-* <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf>. (Last visited February 15, 2015) [hereinafter ART Bill, 2010].

[5] Assisted Reproductive Technology (Regulations) Bill 2013, (Tentative Draft) Date Jun. 27, 2013, Legislative Department, Ministry of Law & Justice, Government of India [hereinafter ART Bill 2013].

DEFINITION & MEANING OF SURROGACY AGREEMENT:

Though these case laws mention about it but there is no definition for the same under the judgments. Surrogacy agreement is defined as "a contract between the person(s) availing of assisted reproductive technology and the surrogate mother" under Section 2(cc), ART Bill 2010. In simple terms surrogacy agreement means "a comprehensive document that lays the foundation for governing relation between the commissioning couple and the surrogate including rights, liabilities, responsibilities details about the need for surrogacy, purpose and situation of both parties, the terms under which the surrogate has agreed, compensation, payment schedule, etc".[6]

SIGNIFICANCE & PURPOSE OF SURROGACY AGREEMENT:

The ART Bill lays down the purpose and significance of this surrogacy agreement. Surrogacy agreement enlists the minimum number of parties to the agreement and makes it legally binding enforceable and sought to be governed by the Indian contract Act. The ART Bill expressly provides for entering into surrogacy agreement between the surrogate mother and the couple who is seeking surrogacy through the use of assisted reproductive technology and that the surrogacy agreement shall be legally enforceable.[7]

The most significant attribute of surrogacy agreement is that in the absence of an effective binding law surrogacy agreement is the only regulatory instrument that regulates the terms and conditions of surrogacy agreement, defines rights and obligations of parties to contract and states the monetary

[6] Mother & Baby, Womb in your heart, News.advisen, 09/03/2014, *available at:-* <http://news.advisen.com/documents/AMX/20140903/08/201409030816CONTIFY_NEWS_0012073484.xml>. (Last visited Feb. 15, 2015).

[7] *Supra* note at 5, §34 (1).

compensation for agreeing to act as surrogate mother[8], all expenses, including insurance related to pregnancy and after delivery for the surrogate mother[9] and most importantly handing over of custody of surrogate child by the surrogate mother to the intending parent[10]and other crucial aspects related to arrangement. The nature of this agreement is purely personal arrangement as all the particulars or particular details of the agreement are left to the will of the parties to be determined. In many of the international surrogacy cases namely in *Re The Matter Of TT* (A Minor)[11], *Re P (Surrogacy: Residence)*[12] the utmost significance of the case is summed up by stating that "the surrogate child is born as a result of the surrogacy agreement" thus implying all the conditions, situations, stakeholders or parties, the promises undertaken by them respectively leading to the birthing of surrogate child.

LIMITATIONS & LOOPHOLES IN SURROGACY AGREEMENT UNDER ART BILL:

Though the ART Bill defines and lays down provisions providing for entering into surrogacy agreement by the parties or stakeholders to surrogacy along with this, the Bill gives it legal binding effect and enumerates some of the basic requisite contents of the same but the Bill leaves out many gaps which are criticized as limitation and loopholes in the Bill and leads to many irregularities and illegalities in the practice or conduct of surrogacy in India, some of which are identified and briefly discussed as below.

[8] *Supra* note at 5, §34 (3).
[9] *Supra* note at 5, §34 (2).
[10] *Supra* note at 5, §34 (24).
[11] [2011] EWHC 33 (Fam).
[12] [2008] 1 FLR 177.

I. NO UNIFORM STANDARD MONETARY COMPENSATION:

Though the ART Bill clearly states that the monetary compensation may be provided to the surrogate mother but neither the ART Bill, Rules lay down the minimum or the maximum quantum of monetary payment for same. The Bill is silent on the nature of legally approved expenses that may be covered under the agreement for reimbursement and otherwise. Therefore the payment to the surrogate mother varies and the amount to be determined remains arbitrary in each case. Rather there has been arbitrary and varying payment among the surrogate mothers.

It has been found that in the absence of a standard, specified payment, the payment to surrogate mother also differs based on their fair skin complexion, caste background, education, fluency in English speaking, economic class of the surrogate mother[13]. Additionally such surrogate mother are paid a bonus sum of money (around 25%) who bear twins, who show eat well show gainful increase in weight, healthy or positive test reports or such symptoms of health pregnancy.[14] It has also been found that the payment to surrogate mother differs from state to state and there is no uniformity rather there is discrimination and arbitrariness in payment to the surrogate mother.[15]

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[13] Rahi Gaikwad, *They need the baby, she needs the money*, The Hindu, September 28, 2014, *Available at*:-
<http://www.thehindu.com/sunday-anchor/they-need-the-baby-she-needs-the-money/article6453307.ece>. (Last visited Feb. 15, 2015).

[14] *Ibid*.

[15] Dipen Hiranwar, *Study finds surrogate mothers in India face discrimination, health risks* November 2012, *available at:-*
<http://www.indusbusinessjournal.com/ME2/dirmod.asp?sid=&nm=&type=Publishing&mod=Publications%3A%3AArticle&mid=8F3A7027421841978F18BE895F87F791&tier=4&id=B8D41AEFE24E428F9A9F9FC135AB979D>. (Last visited Feb. 15, 2015).

II. NON ENFORCEABILITY WITHIN INDIA:

The legal enforceability of such surrogacy agreement is a questionable issue as evident in the case of *Baby Manji Yamnda* v. *Union of India* where in it was found that the surrogacy agreement entered between the parties is held null void or without any legal effect. As this agreement did not bear the signature of either the Japanese intending father and mother and there was long delay of six months in entering the surrogacy agreement following the date of embryo implantation in the surrogate mother.[16]

III. NO PROCEDURAL MECHANISM:

There is no prescribed procedural mechanism of entering into the surrogacy agreement, there is silence in the ART Bill or Rules on the administrative legal compliance including the attestation, stamp value, requirement of witness, approval and scrutiny as necessary among others. Taking unfair advantage of this the surrogacy agreement are entered as a fake sham documents usually in bond paper of as petty a value of Rs. 50 with mere scribbling of one or two paragraphs with provisions on transfer of custody of surrogate child from surrogate mother to the intending couple in return for money this is as per the research findings contained in the report titled as Surrogacy Ethical or Commercial by Center for Social Research a leading women right advocacy group in Delhi.[17] Besides, there is no defined time period or stage of entering into surrogacy agreement, it has been observed that surrogacy agreement are signed after the confirmation of

[16] Swati Vashishtha, Baby Manji faces another legal hurdle , CNN-IBN, Aug 15, 2008 *available at* http://ibnlive.in.com/news/baby-manji-faces-another-legal-hurdle/71068-3.html (Last visited Feb. 15, 2015).

[17] Center for social Research Delhi, Surrogate Motherhood - Ethical or Commercial, *available at* <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>. (Last visited Feb. 15, 2015).

surrogate pregnancy or by the end of the first trimester of surrogate pregnancy or around the middle of the second trimester or the 4th month of pregnancy by the infertility clinic thus during this time period woman is already pregnant and she has no choice but to be compelled to sign the surrogacy agreement. This is another glaring procedural irregularity brought out by the research study. It may be rightfully mentioned that during this intervening period from the time of inception or conceiving of pregnancy till the confirmation of pregnancy the surrogate mother's reproductive health is exposed to serious health risks without any legal onus on either the couple or the clinic which is gravely unjust.

IV. NON ENFORCEABILITY OF SURROGACY AGREEMENT IN FOREIGN LEGAL JURISDICTION:

One of the most significant features of the surrogacy agreements as stated in the ART Bill is its enforceability within the geographical territory of India not outside taking after the relevant provision of the ART Bill which imposes territorial limitation on the legal effect of agreement. Therefore a surrogacy agreement providing for pertinent concerns as legal parentage, custody rights of couple over surrogate child entered by the foreign intending couple in India though may receive the legal approval in India but the same agreement may have no legal effect in their respective foreign jurisdiction. This held true in the case of *Baby Manji*[18] where Japan out rightly refused the surrogacy arrangement and the agreement to this effect entered in India between the Japanese couple and the Indian surrogate mother for violation of the legal definition of motherhood

[18] *Supra* note at 2.

that inheres in the birthing mother as contained in the Japanese civil code 1896.[19] Similarly in case of *Jan Balaz* [20] Germany rejected legal recognition to surrogate motherhood as a means of attaining parenthood, and any such surrogacy agreement to this effect as Germany bans commercial surrogacy under its laws.[21] In *Re TT* Case[22] the UK court held that "Surrogacy agreements are not binding Surrogacy contracts". In this case the surrogate mother originally promised to relinquish or hand over the custody of the surrogate baby under the relevant provision of surrogacy agreement but subsequent to the birth the surrogate mother changed her mind due to emotional attachment with child during her gestation and thereby she retracted from her performance of contractual promise. However, the Court at the very outset held the surrogacy agreement as non binding, unenforceable contract accordingly the provisions of the same were similarly held non binding, unenforceable. Therefore the court did not hold the refusal by surrogate to be any breach of the agreement on the contrary the court vested the custody of child with the surrogate mother finding her befitting capacity to care and meet the emotional needs of the child. Another UK Case, In *Mr. and Mrs. W case*[23], the couple, as Mr. and Mrs. W entered into surrogacy agreement with Ms. N surrogate mother to pay her £10,000 for carrying on the

[19] Japaneese Civil Code, (Japanese: 民法 Minpō) , Government of Japan, Ministry of Justice, Government of Japan, Act No. 89 of April 27, 1896, *available at* <http://www.moj.go.jp/content/000056024.pdf>. (Last visited Feb. 15, 2015)

[20] *Supra* note at 3.

[21] Germany Federal Embryo Protection Act 1990., 13th December 1990 *available at* <http://www.auswaertiges-amt.de/cae/servlet/contentblob/480804/publicationFile/5162/EmbryoProtectionAct.pdf>. (Last visited Feb. 15, 2015).

[22] [2011] EWHC 33 (Fam).

[23] Louise Eccles, *Couple are ordered to pay surrogate mother £568 a month for the baby they will never see*, DAILY MAIL , 12 April 2011, *available at* <http://www.dailymail.co.uk/news/article-1375861/Child-custody-Couple-ordered-pay-surrogate-mother-monthly-baby-wont-meet.html#ixzz3UpcKvvaN>. (Last visited Feb. 15, 2015).

pregnancy and exchange of custody of child but in this case depending on the facts of the case, the court held Surrogacy agreements not legally binding in court, despite being a formal written contract. This resulted in the couples losing the custody of their surrogate baby to her surrogate mother along with an additional burden of payment of maintenance for the same. In this case, Mr. Justice Baker opined that "there are "Considerable risks" of entering into a surrogacy agreement and that Surrogacy agreements are not legally binding in court, even with a formal written contract" [24].

However, differing from these cases, the Wisconsin Supreme Court the surrogacy agreement or parentage agreement was "largely enforceable" and not void as against public policy after laying down necessary conditions to be satisfied for holding the same. *In re Paternity of F.T.R25.*, the Wisconsin Supreme Court dealt at length with the issue of enforceability and non enforceability of surrogacy or parentage agreements that came for consideration before the court, wherein the Wisconsin Supreme Court ruled that in the absence of binding statutory law in Wisconsin the parentage agreement in this case as just a contract, more or less like any other contract. The Wisconsin supreme court held that in order to make the surrogacy agreement enforceable such agreement satisfy the other requirements for a valid contract, in the furtherance of same, the court held that like All contracts require consideration." the consideration is the promise to pay the surrogate's medical expenses and to relieve her of obligations was enough or the consideration is money given exchange for undergoing pregnancy and relinquishing or handing over the custody of baby to the couple and the surrogacy agreement must comply with the best interests of the child.

[24] *Ibid.*
[25] (2013) WI 66.

The Wisconsin Supreme Court opined that there are compelling interests in support of enforcement of surrogacy agreement as enforcement of surrogacy agreements promotes stability and permanence in family relationships and reduces contentious litigation. Therefore, the Wisconsin Supreme Court concluded that the surrogacy agreement or parentage agreement was "largely enforceable" and not void as against public policy. Taking after the enforceable effect of surrogacy agreement, the court directed the legislature to enact a statute addressing the enforceability of surrogacy agreements. In addition to these, surrogacy agreement entered online between the couple and the surrogate mother raise complex issues in terms of their legal validity enforceability.

V. NON APPLICABILITY OF CONTRACTUAL LEGAL REMEDIES:

Fourthly, though the surrogacy agreement is sought to be governed by the contract law of India namely Indian Contract Act, 1872 but there is a major limitation in applicability of contractual remedies for breach of contract to the surrogacy agreement. The Indian contract Act[26] under relevant section enumerates the consequences, remedies for the breach of contract namely compensation for loss or damage caused by breach of contract[27]. In addition o the contract Act, the contractual legal remedies as suit for specific performance are provided under relevant Section Specific Relief Act[28]. But in case of surrogacy agreement neither the remedies provided under the Indian Contract Act nor the remedies provided under the Specific Relief Act may be applicable. Firstly with regard to the contract Act imposing legal liability or damages under the statutes may be difficult in such case where the surrogate refuses to hand over the

[26] The Indian Contract Act, 1872 (Act no. 9 of 1872) [25th April, 1872.] [hereinafter ICA].
[27] *Ibid.*, § 73 to 75.
[28] Specific Relief Act, 1963 (Act No. 47 OF 1963) [13th December, 1963.] § 10.

custody of child subsequent to birth or she changes her mind. One such case was reported by a leading surrogacy law firm based in Mumbai which the surrogate mother refused to hand over the custody of surrogate child to the couple but the lawyers claimed to have necessarily "sorted" the issue. But it is not disclosed if the same amounted to breach of surrogacy agreement by the surrogate mother and if she was sued against or any other legal proceeding or legal action taken by either the intending couple, law firm against the surrogate mother for the same.[29] Besides, the establishment of deficiency of services or any breach of contractual performance on the part of surrogate mother is not only very difficult but also the ascertainment and quantification of damages if at all any for imposing legal liability on surrogate mother is equally cumbersome. It is even absurd to illustrate a hypothetical cases related to imposing damages on surrogate mother for any defect or deficiency in health of the newly born child, as this would clearly amount to commodify the child or equally making women's reproductive labor or gestational capacity as any other mechanical service availed on hire for money thus both propositions prima facie unethical and against public policy as they amount to commercializing and sale of human life and at the least commercializing human body and parts and offer for sale in market. This inference is taken after the New Jersey SC decision in *Baby M New Jersey Case*[30]. Along with this considering the economically strained condition or poor plight of surrogate mother payment of damages may not be imposed on the surrogate mother due to her inability to pay. Whereas on the other hand, any attempt to impose imposing Specific performance of contractual promise would

[29] Mother & Baby, Womb in your heart, news.advisen , 09/03/2014, *available at:-* <http://news.advisen.com/documents/AMX/20140903/08/201409030816CONTIFY_NEWS___0012073484.xml>. (Last visited Feb. 15, 2015).

[30] 537 A.2d 1227, 109 N.J. 396 (N.J. 1988).

amount to forced pregnancy on the surrogate other against her will which would per se amount to violation of right to her person dignity, bodily autonomy, bodily integrity which are the core of constituent of right to life, liberty of person thus the violation under article 21 of constitution of India[31]. In *Re P (Surrogacy: Residence)*[32] the court was met with grave difficulty to impose any penal liability on the surrogate mother. Coleridge J., held that the court has nothing to do with penalizing the mother for breaking her agreement or for her prolonged deception. On the contrary, it is observed by the court that she entered the surrogacy agreement in good faith although she has behaved in a deceitful way in a number of respects, which is take into account by the court. Thus this case indicates the non applicability and non imposition of penal liability on the surrogate mother despite proved breach.

VI. LACK OF THE SPECIFIED JUDICIAL FORUM FOR DISPUTE RESOLUTION:

Another related issue is the lack of the specified forum for dispute resolution arising out of complaints related to disputes and disagreements related to enforceability and non enforceability of surrogacy agreement or performance or non performance of the contractual obligation or breach of contractual provisions. The ART Bill does not mention any specific forum for the same. This assumes greater significance in case of surrogacy agreement entered by foreign couples or surrogacy agreement in foreign legal jurisdiction as the choice or forum of dispute resolution and the effect of judicial pronouncements remain ambiguous and unascertained. These issues defeat the very object and purpose of surrogacy agreement. The issue of common uniform, global forum and consistent

[31] M.P. Singh, *V.N. Shukla's Constitution of India*, p. 131 (2008), Art 21.
[32] [2008] 1 FLR 177.

binding laws at the inter country level appeared in the cases of *Baby Manji*[33], *Jan Balaz*[34] as both these nations namely Japan and Germany had under their respective laws prohibited surrogacy where as India permitted surrogacy thus the differences and inconsistencies were apparent among these nations due to such differences, these case faced legal deadlock with absence of any specified applicable law in such cases where countries differ markedly on their laws. Consequently there was the indeterminate issue of a universally binding forum where such disputes may be submitted for adjudication and resolve and another related issue is the legality and enforceability of such judicial decisions at the inter country level among the differing nations with mutually inconsistent laws on the same . considering this legal void at the global level , the Permanent Bureau of the Hague conference on Private International Law's Council on General Affairs and Policy law initiated a project titled as "the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements" during the period of year 2011-2014.[35] The primary mandate of the Permanent Bureau is to construe comprehensive international and multinational agreement providing for uniform rules on the jurisdiction of courts and applicable binding law governing the surrogacy arrangement and to the establishment of legal parentage within such legal regime across different foreign legal jurisdictions.[36] The Bureau is presently

[33] *Supra* note at 2.
[34] *Supra* note at 3.
[35] Hague Conference on Private international Law, Statute of the Hague Conference on Private International Law, HCCH , 15 July 1955 *available at:-* <http://www.hcch.net/index_en.php?act=conventions.text&cid=29>. (Last visited February 10, 2015).
[36] Anne-Marie Hutchinson OBE, The Hague Convention on Surrogacy: Should we agree to disagree? ABA Section of Family Law 2012 Fall CLE Conference, Philadelphia, Dawson Cornwell, London, United Kingdom, October 2012, *available at:-* http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf (Last visited February 10, 2015).

during this year working towards a multilateral international instrument and submission of final report in the coming year 2015.

VII. INCONSISTENCY & DIFFERENCES WITH OF OTHER STATUTORY LAWS:

Another major limitation of the surrogacy agreement is the Inconsistency & differences with of other statutory laws which prima facie raises legal issues. While the surrogacy agreement lays down the entire process of conduct of surrogacy arrangement and defines the rights and obligations of parties to the agreement but in the course of this certain provisions in the surrogacy agreement seek to satisfy the vested interest of a particular party or stakeholder of the agreement for attaining the ultimate objective of the agreement which in many cases results at the cost of defiance of existing established laws, policies and in the same also results in unequal treatment of parties and inequitable allocation of rights and liabilities, denial of rights among the stakeholder of the agreement. Some of these are identified and discussed as below.

VII.A. INCONSISTENCY WITH RIGHT TO MEDICAL TERMINATION OF PREGNANCY[37]:

The provisions in the surrogacy agreement take away from the surrogate mother the guaranteed legal rights namely the reproductive right to seek termination of medical pregnancy subject to the terms and conditions under the Medical termination of Pregnancy Act 1971[38]. The provisions in the surrogacy agreement are so termed to signify that pursuant to the signing of the agreement the surrogate mother relinquishes her right to seek medical termination of

[37] Medical Termination of Pregnancy (MTP) Act, 1971. (Act No. 34 of 1971) 10th August 1971.
[38] *Ibid.*, §§ 3(2), 3(b).

pregnancy in consideration of monetary payment and any effort to seek or abortion on her side would amount to breach of contractual obligation for which may invite legal action against the surrogate mother including suit before the court of law thus it denies her the most fundamental reproductive right. In the same light , many provisions of the surrogacy agreement imposing impose strict servile behavior on the surrogate mother including compulsory stay of surrogate mother at the clinic premises away from home, the restriction on the movement of the surrogate mother and denial of right to visit home, denial of right to enjoy conjugal life, companionship and impose life style restrictions, such provisions may be contested before the court of law for violation of right to privacy , family, dignity and integrity which is constitutive of life, liberty of a surrogate mother.

VII.B INCONSISTENCY WITH HUMAN ORGAN TRANSPLANT ACT[39]:

Commercial surrogacy is based on the primary premise that involves payment provided to surrogate for her making use for her womb or uterus for conceiving pregnancy, undergoing embryo implantation, carrying the gestation to full term or precisely put for her gestational service accordingly it is popularly called as "womb renting business". The ART Bill[40] under relevant provision provides for monetary payment to the surrogate mother for the same and accordingly the surrogacy agreement in its first and foremost provisions provide for the monetary payment to the surrogate mother as per the Bill. It must be noted here that the term "womb" is a popularly used term for the uterus which is defined in the medical terminology as a female reproductive muscular body organ responsible for the development of the embryo and fetus during

[39] Transplantation of Human Organs Act, 1994, (Act No. 42 of 1994), 8th July, 1994, Section 19.
[40] *Supra* Note at 5, § 34 (2), (3).

pregnancy[41], thus commercial surrogacy essentially amounts to use of human body part for commercial gain which is strictly prohibited under the national law, international convention. The Human Organ Transplant Act as well as the European Convention on Human Rights and Biomedicine or "Oviedo Convention"[42] uses a broad and general terminology of "prohibition on financial dealings or transaction in human body''. This also raises potential issues of commercial use of human organ for sale or hire leading to vexatious issues related to legalizing or permitting kidney sale, legalizing prostitution, there is another incidental issue related to bringing back fears of illegal market in human bodies or organs and threats of human trafficking in women for serving as gestational carriers or for forced pregnancies, procuring or sourcing gametes if commercial surrogacy is legalized on large scale. These are some of the concerns raised by the biomedical ethical groups globally. On these lines, it may be appropriate to mention such case of human trafficking under the garb of commercial surrogacy at both national and international level. It is reported that two of the infertility clinic doctor at Porbander, Gujarat were arrested for charges with human trafficking under the garb of conduct of commercial surrogacy under relevant sections of IPC[43]. Another such case s reported from California, USA. Theresa Erickson an internationally renowned reproductive law attorney based in

[41]Medicinenet, *Definition of Womb*, *available at:-* <http://www.medicinenet.com/script/main/art.asp?articlekey=8833>. (Last visited February 15, 2015).

[42] The Council of Europe, Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine Oviedo, 4.IV.1997 **,** Oviedo, Spain 4 April 1997, Article 3, 4.

[43] TNN Another doctor booked in human trafficking case TNN | Feb 2, 2013 *available at:-* <http://timesofindia.indiatimes.com/city/ahmedabad/Another-doctor-booked-in-human-trafficking-case/articleshow/18299048.cms>. (Last visited February 15, 2015). See also DNA, Human trafficking: Gujarat doctor sold two babies, not one, DNA Agency, Ahmadabad. 1st February, 2013, *available at* <http://www.dnaindia.com/india/report-human-trafficking-gujarat-doctor-sold-two-babies-not-one-1794934>. (Last visited February 15, 2015).

California was running a baby-selling scheme under the garb of commercial surrogacy[44] and she pleaded guilty to charges of human trafficking, conspiracy, fraud and subject to criminal sanctions at the Federal Court in San Diego[45].

VII.C. INCONSISTENCY WITH INDIAN EVIDENCE ACT 1872[46]:

The ART Bill under relevant provision provides for parentage to be vested in the intending couple who commissions such surrogacy and avails the services of surrogate mother after necessary payment[47]and the Bill also states the names of the couple to mentioned as the legal parents in the birth certificate issued to the surrogate child to the exclusion of surrogate mother[48]. There is a legal obligation cast on the surrogate mother to hand over the custody, guardianship right of the child immediately after birth on to the couples[49]. In conformity with this the provisions of the surrogacy agreement are so drafted which in most clear terms stipulates that the parentage to be vested with the intending couple to the complete exclusion of nay right of the surrogate mother over the child and correspondingly the duty of surrogate mother to handover or relinquish the custody , rights over the child. But this scheme and determination of parentage as conceptualized under the ART Bill runs counter to the established ground rule of parentage as specified under the Indian Evidence Act.

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[44] FBI San Diego Division , U.S. Attorney's Office, Baby-Selling Ring Busted, U.S. Attorney's Office Southern District of California, San Diego Press Releases 2011, August 09, 2011, *available at* <http://www.fbi.gov/sandiego/press-releases/2011/baby-selling-ring-busted>. (Last visited February 15, 2015).

[45] Jennifer Lahl, Surrogacy Attorneys Caught Exploiting Women, Selling Babies, life news, August 19, 2011, *available at* <http://www.lifenews.com/2011/08/19/surrogacy-attorneys-caught-exploiting-women-selling-babies/>. (Last visited February 15, 2015).

[46] The Indian Evidence Act, 1872 (Act No. 1 of 1872) [15th March, 1872].

[47] *Supra* Note at 5, § 34(1), (10).

[48] *Supra* Note at 5, §34(10).

[49] *Supra* Note at 5, § 34(4).

The Indian Evidence Act under its relevant section establishes the parentage of the child and sets the presumption of legitimacy of birth for all legal purposes under the Indian law. This rule in very simple terms states that "a child born during the continuation of a Marriage, the husband of the woman giving birth is presumed to be father of the child"[50]. Following this law, the women giving birth during the continuation of valid wed lock is held as the mother in the eyes of law and her then husband is held to vest in a person who is the husband of the mother. As per the same, the surrogate mother and her husband may be legally presumed to be the legal mother, father of the surrogate child and accordingly legal parentage may be vested in them. On the same lines, the Birth Registration Act [51] also provides for recognition of birthing mother as "natural mother" or "natural parent". But contrary to this, the ART Bill under its relevant provision states that the Intending father or the intending couple shall be the parent of the child not the surrogate mother or her husband[52]. Thus these are mutually antithesis. These complex issues related to parentage determination surfaced in the case of German surrogate twins whose biological father was German but given birth by Indian surrogate mother in Anand, Gujarat in *Jan Balaz*[53] where the where the Gujarat High Court held the surrogate mother as held as one of the parent following the legal presumption established under the Indian Evidence Act and also under the Birth Registration Act that permits the recognition of birthing mother as natural mother or natural parent, hence under the force of existing laws surrogate mother is recognized as the legal mother and accordingly the name of the birth or surrogate mother was mentioned as the legal mother along with the name of German national as biological father in the birth

[50] *Supra* Note at 47, § 112.
[51] The Registration of Births and Deaths Act, 1969 (Act No. 18 of 1969) (1st February 1993).
[52] *Supra* note at 5, § 34(10), 35 (1).
[53] *Supra* note at 3.

certificate of the surrogate child. The Gujarat High Court held that "In the absence of any legislation to the contrary, we are more inclined to recognize the gestational surrogate who has carried the embryo for full 10 months in her womb, nurtured the babies through the umbilical cord and has given birth to the child as the natural mother, as legal mother".[54] This however led to complications in the vesting of legal parentage of surrogate child as it differs from the prescribed tenets of ART Bill. Thus the provisions concerning determination and vesting of legal parentage don't resolve issues rather add complications to the same.

VIII. ISSUES OF LEGAL VALIDITY & ENFORCEABILITY OF SURROGACY AGREEMENT:

There are many vexatious legal issues striking at the very foundational legal basis of surrogacy agreement, its legality, validity and enforceability of the agreement. First, commercial surrogacy agreements by their inherent nature permitting monetary payment for availing on hire women's gestational service, child birthing coupled with exchange of custody, guardianship rights over child faces strong criticism for its non compliance with the tenets of public policy. Secondly, many aspects of surrogacy agreement do not comply or satisfy the statutory essential requirements prescribed under the contract law in India. There are other ancillary related issues as well which raise other concerns. These are identified and briefly discussed as below.

[54] *Ibid.*, ¶ 10.

VIII.A. COMMERCIAL SURROGACY AGREEMENTS & INCONSISTENCY WITH PUBLIC POLICY:

Though there is no such fixed definition of public policy but Public policy in simple terms means larger public interest or welfare of society at large or greater good of society. In the context of contract law, "a contract is said to be in consonance with public policy when the proposed contract promotes and protects general interest, welfare of society or complies with existing law and on the other side, a contract is said to be against public policy when it defeats or goes against the existing law or causes breach of law or negates the general interest, welfare or causes harm to the society at large".[55] One such instance of a pertinent subject matter of public interest in this regard may be illustrated here.

The fact of motherhood and childhood has been established as matter of public interest accordingly provided constitutional protection under relevant provisions of Directive Principles of State Policy (DPSP)[56] and international conventions namely International Covenant on Economic, Social and Cultural Rights[57] which state that motherhood and childhood must be provided special protection as there is inherent socio-legal or public interest in the same. With these understanding of public interest , it is said that "there are some things that should not be exchanged for money like human beings, criminal justice, marriage rights, citizenship, and certain other forms of human labor for instance sexual

[55] Duhaime, *Legal Dictionary*, 2002 (8th edition) of *Williams on Wills, available at:-* <http://www.duhaime.org/LegalDictionary/P/PublicPolicy.aspx>. (Last visited February 15, 2015).
[56] M.P. Singh, *V.N. Shukla's Constitution of India*, p. 131 (2008), "Arts. 36 - 51".
[57] International Covenant on Economic, Social and Cultural Rights , United Nations, General Assembly resolution 2200A (XXI) of 16 December 1966, UN Treaty Series, Vol. 993, p. 3 ,(3 January 1976) *available at* <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>. (Last visited February 15, 2015).

and procreational labor"[58]. Accordingly, certain subject matter cannot be made legally valid subject matter for contract. It is therefore established that there should be no market or financial transaction in exchange and relinquishment of reproductive rights and parental rights, this is the very basic principle which is implicit in all laws prohibiting the sale of human organs, laws prohibiting prostitution, laws prohibiting the sale of children. For the same, it has been held that commercial surrogacy causes negation of social or community harm, unethical precedent - the breach of public policy. The New York State Task Force[59] concluded that governing reproduction by contract and purchase will inflict social harm, fragmentation of culture. Thus commercial surrogacy set a wrong social precedent.

The provision in the ART Bill providing for monetary compensation in return for her agreeing to be surrogate and for availing gestational service of surrogate mother and for handing over custody of child as specified under the provision of ART Bill[60] and accordingly similar provision is drafted under the terms of surrogacy agreement. This effectively amounts to market transaction in commercial hiring and reproductive labour or gestation in the process or means while both are questionable in terms of its legality, permissibility as a subject matter and objective of a valid legal contract under the existing contract law. Similarly, the provision in the ART Bill providing for surrender or hand over of custody of surrogate child immediately after birth to the intending couple in

[58] Alan Wertheimer, *Two Questions About Surrogacy and Exploitation, Philosophy & Public Affairs*, Vol. 21, No. 3 (Summer, 1992), pp. 211-239, Wiley, *available at:-* <http://www.jstor.org/stable/2265356>. (Last visited February 15, 2015).

[59] NewYork State, Department of Health, Task Force on Life and the Law, 1988 November 2012, *available at* <https://www.health.ny.gov/regulations/task_force/>. (Last visited February 15, 2015).

[60] *Supra* note at 5, § 34 (4).

return for monetary payment, as the final objective of the surrogacy agreement also goes against the public policy. It is evident that the end purpose of surrogacy agreement is to give birth to the child for the sole purpose of giving away the child or hand over the custody, guardianship of the surrogate child immediately after birth to another individuals in compliance with the terms of the pre birth agreement in return for a fixed sum of monetary payment to the birthing mother for the same. This effectively amounts to commodification and sale of child and equally sale of parental rights as the fulfillment of surrogacy agreement. These issues also raises issues of lawfulness of considerations and objects under the existing laws namely under relevant sections of Indian Contract Act[61]. Thus the very legality of the subject matter, objective of entering into surrogacy contract remains shaky. Besides such provision of handing over or surrender of child primarily stands inconsistent with the surrogacy laws of many leading foreign legal jurisdictions and also stands as breach of the specific statutory law namely the Hindu Adoptions and Maintenance Act[62], and the international human right convention the Hague Convention on the Protection of Children and Co-operation in Respect of Inter country Adoption[63], both these instruments prohibit payment in consideration of the adoption of any person. As per these legal instruments state that any provision in the agreement or any agreement providing for a stipulated sum of money as a pre birth arrangement with a negotiated sum of money as a consideration between two parties in order to gain custody, guardianship parental rights amounts to child selling and breach of public

[61] Supra Note at 27, § 23 .
[62] The Hindu Adoptions and Maintenance Act, 1956 [Act No.78 of 1956][21st December, 1956], § 17.
[63] Hague Conference on Private International Law, *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, (Article 3, 4) 29 May 1993, 33, 1 May 1995, *available at* <http://www.refworld.org/docid/3ddcb1794.html>. (Last visited February 15, 2015).

policy. This is also established by the ruling of the New Jersey Supreme court in the trailblazer case of *Re Baby M case of New Jersey* [64] the New Jersey supreme court held that the commercial surrogacy contract effectively constitutes as "the sale of a child," thus held as unenforceable under New Jersey statutory law and that it violated public policy for the same reason that it was banned under state adoption law *o*r it amounts to the sale of a child for adoption or taking unfair advantage of a women needing money who might be coerced into giving up their children for the need for money or economic coercion. As an aftermath of this epoch making judgment of New Jersey court, finding upon similar reason of breach of public policy, a host of US states similarly prohibit commercial surrogacy and render commercial agreements unenforceable. These US states are namely New York[65], Indiana[66] Arizona67 , Nebraska[68], Louisiana[69] Michigan[70], hold surrogate parenting contracts are contrary to the public policy of this state, void and unenforceable. Thus it is evident that the provisions of the surrogacy agreement seek to breach the existing statutes or law as well as go against the general public interest of society.

VIII.B. COMMERCIAL SURROGACY AGREEMENTS & INCONSISTENCY WITH THE ESSENTIALS OF VALID LEGAL CONTRACT:

The legal validity of surrogacy contract has come to be questioned in terms of its compliance with essential of legal valid contract stipulated under the Indian Contract Act. Under the ART Bill surrogacy agreement is defined as a

[64] *Supra* note at 31.
[65] NY Dom. Rel. Law § 122 (McKinney).
[66] IND. CODE § 31-20-1-1 (1988).
[67] ARIZ. REV. STAT. ANN. § 25-218(A) (1989).
[68] NEB. REV. STAT. § 25-21, 200 (1988).
[69] LA Rev. Stat. Ann. § 9:2713.
[70] MICH. COMP. LAWS §§ 722.851–.863 (1988).

contract but the cardinal legal pre requisites for an agreement to be called as contract namely the free consent of the parties as stipulated under the of the Indian Contract Act[71] is not met with the surrogacy agreement. Primarily there is no free, informed voluntary consent on the part of surrogate mother rather there is compulsion, particularly economic coercion and it is only for the monetary compensation woman surrogate agrees to be surrogate mother not otherwise, these women due to their own illiteracy, disadvantaged socio economic background they are not in a position to comprehend the provisions of the agreement which include an array of legal, medical jargons and the implications of the same under the agreement therefore without such the knowledge and understanding of the provisions of the agreement the surrogate mother signs the agreement only in the dire need for monetary sum this states that the very legal foundation of the agreement is flawed for the want of free consent and consent caused by economic coercion or financial inducement hence negating the consent altogether. Due to want of informed consent on the part of surrogate mother, the parties lack *consensus ad idem i.e.* agreement between the parties upon the same thing in the same sense or meeting of the minds of the parties on the understanding and performance of the agreement.[72] This is held as one of the fundamental pre requisite for the legal validity and enforceability of surrogacy agreement.

Secondly, under the surrogacy agreement the parties do not have equal status rather unequal status in terms of rights and obligations imposed on them while the surrogate mother is placed with strict onerous legal obligation of threat of legal action against the surrogate mother for non performance or dereliction of

[71] *Supra* note at 27, § 10.
[72] *Supra* note at 27, § 2 (h).

duty but there are no such obligations imposed on the couple for non-payment of monetary sum promised to the surrogate mother. The two parties to the surrogacy agreement namely the intending couple and the surrogate mother are not equally positioned in terms of rights and obligations arising under the surrogacy agreement. The parties to the agreement do not have the same equal status or same standing, socio economic educational background, the surrogate mother typically comes from poor marginalized sections of society who illiterate, poor, usually living below poverty line, unemployed or petty wage earners, not in a position to get a gainful employment where as the intending couples are from the affluent section of society who are educated, with gainful employment and economically well off to afford paying few lakhs for the surrogacy arrangement. In addition to this, the surrogate mother has no legal counseling where as the intending couple is provided with legal counseling with necessary explanations by legal experts who are made available by the clinics as a part of the surrogacy arrangement programme which is paid for by the couple to the clinic. Thus, the surrogate mother is placed in a disadvantageous position and the intending couple is placed in rather advantageous position respectively. Thus the surrogacy agreements for reasons related to non compliance with the prerequisites of the contract Act stands questionable.

VIII.C. COMMERCIAL SURROGACY AGREEMENTS & INCONSISTENCY WITH THE TENETS OF DISTRIBUTIVE JUSTICE:

The provisions in the surrogacy agreement provide for the surrogate mother to undergo or bear all risks arising out of such surrogate pregnancy and make her legally liable for all consequences flowing from the same. The surrogate mother bears the sole burden of fatal health risks but there are no such corresponding risks for the intending couples. It may be of relevant to mention

here that There are certain provisions in the surrogacy agreement which expressly provide for subjecting the surrogate mother to the risk to the extent of death for instance the contract under relevant section provides that the surrogate mother may be subject to life support in case of her life threatening condition to save the life of surrogate child, the provision in the surrogacy contract provide that the surrogate mother must agree to undergo abortion at the will of intending couple, or the clinic irrespective of her will, refusal by the surrogate to comply with the same constitutes breach or violation of legal contract at the instance of surrogate mother for which she may be held legally liable or prosecuted or legal action may be brought against the surrogate mother for the same. Thus the preferences, interests of the intending couple are imposed as a binding legal obligation on surrogate and performance is compelled from the surrogate mother under the threat of legal action for non compliance. The surrogate mother under the contract is burdened with undergoing all legal, medical or health risks even at the cost of her risking her own life. Whereas the intending couple is the right bearing party who is subject to none of these health risks, exempt from all legal liabilities rather conferred with right to avail the services of surrogate mother, infertility clinic, for monetary sum under the Bill law and under the agreement. Thus the surrogate is held as solely responsible for bearing all the risks arising there form exempting the intending couple altogether. This is breach of the principle of distributive justice which implies equal and fair the allocation of the benefits and burdens or advantages and disadvantages among the parties to the contract73 but from the provisions of the surrogacy agreement stated above, it appears that the surrogacy agreement defeats the principle of distributive justice. On the contrary, the provisions in the surrogacy agreement cause flagrant breach

[73] U.S. LEGAL , *Distributive Justice Law & Legal Definition available at:-* <http://definitions.uslegal.com/d/distributive-justice/>.

distributive justice by allowing the intending couple to unfairly benefit at the cost of exploitation of surrogate mother who is subject to all risks, liabilities. Surrogacy agreements are apposite to the tenets of distributive justice in principle and practice.

IX. LEGALITY &VALIDITY OF TERMS & CONDITIONS OF SURROGACY AGREEMENT:

There are certain provisions in the surrogacy agreement which merit consideration for their provisions have the effect of taking away or denying basic human rights and freedoms from the surrogate mother. The surrogacy agreement provide for compulsory stay the surrogate mother within the hospital premises or the so called Surrogate hostels as provided for by the clinics for the entire duration of gestation at the same time the surrogate mothers are not allowed to visit their homes. There are restrictions imposed on their day to day movement and these surrogate mothers are kept under regular supervision by hospital attendants, these provisions are defended on the ground of successful surrogate pregnancy, to prevent any miscarriage or any other hardships and delivery of surrogate child. Besides there are restrictions on the private access and exercise of conjugal rights between the surrogate mother and her husband during this period. As a consequence of same the surrogate mothers right to family, conjugal rights are kept in suspension. But the legal validity of these provisions may be questioned as these provisions amount to denying established guarantee of legal and human rights in return for fixed sum of money which may be contested. Such provisions in the agreement would amount depriving the surrogate mother from care, custody of child namely the right to family marital life and could be

possibly be challenged as agreement in restraint of marriage[74]. It may be pertinent to mention that there can be no such legally enforceable contract which would be opposed to the existing statute or law or in contravention or denial of rights guaranteed under the existing law. As stipulated in the relevant section of contract Act that "the object of an agreement is lawful, unless…it is if permitted, it would defeat the provisions of any law"[75] thus such contract may be challenged for its legality and under the existing Indian contract Act.

X. INCONSISTENCY WITH INTERNATIONAL STATUTES:

In keeping with the above mentioned reasoning, several other foreign legal jurisdictions have prohibited commercial surrogacy amounting to child trafficking or baby selling , commercialization of women's body being unethical, ante public policy namely UK Under the UK Human Fertilization and Embryology (HEFA) Act[76] 2008, New South Wales, Australia Surrogacy Act[77] 2010, Canada Assisted Human Reproduction Act[78]. In many European nations as France under its French Civil Code[79], Germany Federal Embryo Protection Act[80],

[74] *Supra* Note at 27 § 26.
[75] *Supra* Note at 27 § 23.
[76] UK Human Fertilization and Embryology Act 2008, (c 22), Introductory Objective, *available at* <http://www.legislation.gov.uk/ukpga/2008/22/introduction>. (Last visited February 15, 2015).
[77] Australia, New South Wales Surrogacy Act 2010, No. 102, Part I, Preliminary, *available at* <http://www.legislation.nsw.gov.au/xref/inforce/?xref=Type%3Dact%20AND%20Year%3D2010%20AND%20no%3D102&nohits=y>. (Last visited February 15, 2015).
[78] Government of Canada , Ministry of Law & justice, Canada, Assisted Human Reproduction Act, S.C. 2004, c. 2 , Assented on 2004-03-29 , *available at* http://laws-lois.justice.gc.ca/eng/acts/A-13.4/page-1.html**,** (Last visited February 15, 2015).
[79] French Civil Code (1804) Decreed 8th of March, 1803**.** Code Napoleon; or, the French Civil Code. Literally Translated from the Original and Official Edition, Published at Paris, in 1804.
[80] Centre for German Legal Formation, Germany The Embryo Protection Act 1990, Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz – ESchG), no. 35/ 1988, 13th December 1990 *available at* <http://www.auswaertiges-amt.de/cae/servlet/contentblob/480804/publicationFile/5162/EmbryoProtectionAct.pdf>. (Last visited Feb. 15, 2015)

Italy Medically Assisted Procreation Act[81] , Sweden Genetic Integrity Act[82] commercial surrogacy is not only prohibited but also entering into such commercial agreement or facilitating the same is strictly penalized under the statutes. In recent years, even some the south Asian nations namely China under an 'Administrative Rule' issued by Ministry of Public Health in 2001 prohibits commercial surrogacy[83] and Thailand has banned commercial surrogacy for foreigners as a law passed by Thai parliament in the present year 2015[84].

SUGGESTIONS & CONCLUSION:

In the light of legal issues associated with commercialization and financial contract of surrogacy, the first and the most fundamental suggestion is the rephrasing of the term commercial and replacing it with compensated surrogacy arrangement as feasible with the law and policy makers. The term compensated surrogacy means such surrogacy arrangements providing for reimbursement and reinstatement of health of surrogate mother for undergoing gestation and child birthing and for any sickness related to same and nothing beyond this amount of reasonable cost may be paid to the surrogate mother. Thus, it may be distinguished from commercial surrogacy arrangements. Compensated surrogacy is legal in many foreign legal jurisdictions namely UK[85]

[81] Italy Medically Assisted Procreation Act 2004, Act No 45, February 24, 2004 *available at* <http://www.ieb-eib.org/en/pdf/loi-pma-italie-english.pdf>. (Last visited February 15, 2015).
[82] The Genetic Integrity Act (2006:351), Swedish Code of Statutes no 2006:351, 18 May 2006, *available at* http://www.smer.se/news/the-genetic-integrity-act-2006351/ (Last visited February 15, 2015).
[83] Jie Qiao, Huai L. Feng, *Assisted Reproductive Technology in China: Compliance and Non-compliance*, Vol. 3, No. 2 (April 2014) *available at* <http://www.thetp.org/article/view/3545/4408>. (Last visited February 15, 2015).
[84] Australian Associated Press Thailand bans commercial surrogacy, The Guardian, 20 February 2015 *available at* <http://www.theguardian.com/world/2015/feb/20/thailand-bans-commercial-surrogacy>. (Last visited February 15, 2015).
[85] *Supra* note at 77.

, New South Wales Australia[86], Canada[87] as well as in many other nations. In all these nations only payment of "reasonable expenses" are legally permitted under these statutes. In many UK cases namely *Re the Matter of TT* (A Minor)[88], *Re P (Surrogacy: Residence)*[89] the courts have permitted and upheld only such reasonable payment as reiterated above. Accordingly compensated surrogacy agreements may be drafted mainly seeking to provide in keeping with the same providing for legally sanctioned expenses or reimbursements.

Though the ART Bill provides for the agreement but there are many lacunas which raise a host of legal complications that needs to be urgently addressed. There are certain suggested safeguards recommended by the Government of India, Law commission Report (No. 228, August 2009) to be included in order to better the provisions providing for surrogacy agreement[90]. The commission recommends for inclusion of the provisions in the agreement on securing consent of surrogate mother, her husband and other family members to bear child, reimbursement of all reasonable expenses including medical procedures, allowing medical contingency as abortion regulated under the Medical termination of pregnancy Act, social security measures as life insurance cover for the surrogate mother and child. These recommendations are tendered by Law Commission may go in long way in restoring the legal rights to surrogate mothers which are taken away under the agreement.

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[86] *Supra* note at 78.
[87] *Supra* note at 79.
[88] *Supra* note at 12.
[89] *Supra* note at 13.
[90] Union Minister of Law and Justice, Ministry of Law and Justice, Government of India , Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy, Report No. 228, August 2009, *available at* <http://lawcommissionofindia.nic.in/reports/report228.pdf>. (Last visited Feb. 15, 2015).

Another significant piece of suggestion may be incorporation of Indian Society for Third-Party Assisted Reproduction **(**INSTAR[91]) Guidelines. These are recommendations are formulated by a group of self conscious and motivated doctors, lawyers, experts whose main purpose is to protect the interest of surrogate mothers. The recommendations for the first time stipulated a fixed sum of compensation around 2.5 lakhs to be all the surrogate mothers at the state and national level throughout India. The Guidelines lays down monetary compensation to be paid to the surrogate mother in case of health eventualities or health risks arising out of surrogate pregnancy. Thus these Guidelines may suitably supplement the relevant provision of ART Bill which provides for monetary payment to surrogate mother but does not specify the amount of compensation[92]and therefore may fill up the gap.

It may also be suggested that while the ART Bill is in the pendency to effectuate as a statutory enactment the Women's, Child commission and the concerned Women & Child Ministry may take the Bill into consideration and suggest measures for the better protection of rights and interest of surrogate mother. It may be observed that the Supreme Court in *Baby Manji* case had mentioned about the involvement of child commission in the issues related to surrogate children. Hence these commissions may lay down necessary recommendations. It may also be suggested that the proposed ART Rules under the ART Bill may set out the procedural rules specifying the appropriate stage of

[91] President Dr. Bavishi, Vice President Dr. Rita Bakshi, Indian Society for Third-Party Assisted Reproduction INSTAR Key Recommendation, 5th October, 2013 Guwahati, *available at* http://instarorg.blogspot.in/2013_10_01_archive.html (Last visited February 10, 2015); See also, Radha Sharma, Surrogacy stakeholders draw up guidelines, TNN , Oct 22, 2013, *available at* http://timesofindia.indiatimes.com/city/ahmedabad/Surrogacy-stakeholders-draw-up-guidelines/articleshow/24504259.cms (last visited Feb. 15, 2015).

[92] *Supra* note at 5, § 34 (1) (3).

entering into surrogacy agreement, along with an illustrative enumeration of such legally approved reimbursements, the legal, administrative procedures including stamp fees, bond paper, notary, witness, signatures among such other particulars as necessary. Another unaddressed issue in the ART Bill is the legal counseling provided for surrogate mother it is suggested that there should be Legal counseling provided for surrogate mother, this helps forming better informed consent, better decision making on the part of surrogate mother. A provision to this effect may be included under the ART Bill. It may be noted that these suggestions are not exhaustive but a few concerns submitted for consideration and incorporation as feasible in the present draft of ART Bill to make the surrogacy agreement better along with the enactment of the ART Bill may bring effective regulation and uniformity in practice.

FINDING SWADHINTA, SWARAJ AND DHARMARAJYA

- *DEVYANI TEWARI

INTRODUCTION

Do the Gandhian ideals, viz. *Swadhinta, Swaraj and Dharmarajya* still command a place, a place of reverence? *Swaraj*, according to Gandhi, implied decolonisation of an individual's mind and rule of mind over self. *Swadhinta* and *Dharmarajya* mean independence, self rule and rule according to precepts of Dharma respectively. To elaborate on *Dharmarajya*, this concept was borrowed from Buddha's concept of *Dhamma*[1]. It essentially implies a rule which sustains all. It provides the notion of an ideal society. Mahatma Gandhi stated that a just rule should be one which is concerned about interests of the weakest sections of the society. I aim to dwell upon the historical context in which they evolved and thence, analyse their position and relevance in the present times.

At a time when the tribal structure of Early Vedic period was getting corrupted, private property and coins had made their appearance, caste structure and its accompanying evils had become firmer, oppression and subjugation of the *vis* (commoners), especially the *shudras* had begun, Buddhism rose to counter this injustice borne out of a shallow concept of birth related inequalities. Buddhism was the first revolutionary religion, the primeval form of egalitarianism, directing people to be ruled in accordance with *Dhamma* so that concerns of the subaltern are upheld. Buddha told all and sundry to have the right resolve which will enable them to be independent of the dominant classes and

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[1] This entails causes of suffering and the necessary course of action to be taken to eliminate suffering.

castes. This was true independence, self rule and *Dharmarajya* in its most vivid form. *Jataka* stories are a testimony of overthrowing of corrupt, cruel and unjust rulers by the masses.

History continues to repeat itself in manifold instances, be it the freedom struggle or the present. Gandhi said, "*It seems that the attempt made to win Swaraj is Swaraj itself. All natural and necessary work is easy. Only it requires constant practice to become perfect, and it needs plodding. Ability to plod is Swaraj. Nor need the reader be frightened of the monotony. Monotony is the law of nature. Look at the monotonous manner in which the sun rises. And imagine the catastrophe that would befall the universe, if the sun became capricious and went in for a variety of pastime. Bur there is a monotony that sustains and a monotony that kills. The monotony of necessary occupations is exhilarating and life-giving. An artist never tires of his art. And when India has monotonously worked away at turning out Swaraj, she will have produced a thing of beauty, which will be a joy forever.* " For Mahatma Gandhi the attainment of *Swaraj* and *Swadhinta* were the immediate goals and the establishment of *Dharmarajya* was the ultimate one[2]. Have we attained the eternal joy?

The present is an evidence of Gandhi's belief that the modern civilisation has corrupted mankind. In his thought, civilisation is that mode of conduct which points to the path of duty. Gandhi said: "*Performance of duty and observance of morality are convertible terms. To observe morality is to attain mastery over our mind and our passions. So doing, we know ourselves.*" This may seem an unusual definition of civilisation, but Mirabeu, who was the first person in the world to use the word, civilisation, said something similar: "*Civilisation does nothing for*

[2] Hargopal Singh, *Swaraj under a Cloud?,* MAINSTREAM, VOL. L., NO. 37 (Sep. 2012).

society unless it is able to give form and substance to virtue[3]." The present is an antithesis to the past. Inequalities pervade the country because there is discrimination on the basis of income, religion, region, sex, caste and disability. Resources of our nation have emerged to be the property of a privileged few. There is erosion in the value of public services, thus depriving the disadvantaged, which comprise the majority. It is imperative that history repeat itself.

GLIMPSES OF PAST

When Gandhi reached India, he was distressed by the plight of his fellow countrymen and more so, of the *Kaliparaj* (dark people) who were low caste untouchables and tribal inhabitants[4] and *Dalits* whom he named *Harijans*. He roused the people to wage Satyagraha by enabling them to dream of *Swaraj, Swadhinta and Dharmarajya* and more importantly, by reminding them of their strengths which they had forgotten because of colonial exploitation and the oppression meted by the British Raj.

Gandhi's dream for India facilitates a nuanced understanding of the research question and its far reaching deeper consequences. He stated: "*I shall work for an India in which the poorest shall feel that it is their country in whose making they have an effective voice, an India in which all communities shall live in harmony. Women will enjoy the same rights as men.*"[5] His dream for a free India, effectively, is the trinity of *Swaraj, Swadhinta and Dharmarajya*. This is echoed by Constitutional provisions, namely, the Preamble, Fundamental Rights, Directive Principles of State Policy and Fundamental Duties.

[3] Raj Narayana Das, *Gandhi's Model of Civilisation and its Present Relevance,* MAINSTREAM VOL. LI, NO. 17 (April 2013).
[4] Interview with Kalyanji V. Mehta: Shirin Mehta, The Peasantry and Nationalism, PP.88-9 (1st ed. 1984).
[5] Ambuj Sharma, *Gandhian Strain in the Indian English Novel*, p. 172 (1ST ed. 2004).

During the Non-Cooperation Movement, he wrote in 'Young India', "*Liberty of speech means that it is unassailed even when the speech hurts….Freedom of association is truly respected when assemblies of people can discuss even revolutionary projects*[6]*."* In furtherance, he wrote, "*Civil liberty consistent with the observance of non-violence is the first step towards Swaraj. It is the breath of political and social life. It is the foundation of freedom."*[7]His views towards casteism are well known. He wrote that nothing could be accepted as the word of God if it were contrary to reason. All are good and equal in status, be it a Brahmin or a scavenger[8]. He was a staunch believer in Hindu-Muslim unity. On the eve of Quit India Movement, in his speech before All India Congress Committee, he spoke that since boyhood he had striven for Hindu-Muslim unity. India was undoubtedly the homeland of all Muslims inhabiting it[9]. Congress is for Indians, be it Muslims or *Harijans*[10].

Gandhi's basic outlook was that of social transformation. He was committed to basic changes in the existing socio-economic system and believed in social and economic equality. In 1933, he wrote that "*without a material revision of vested interests the condition of masses can never be improved."*[11]

The first Independence Day had been celebrated in 1930. Gandhi wrote in 'Young India' on how the day should be celebrated, "*It would be good if the declaration (of independence) is made by whole villages, whole cities even…It would be well if all the meetings were held at the identical minute in all the places.*" The day would be spent in doing some constructive work, be it,

[6] Collected Works of Mahatma Gandhi, Vol. 22, pp. 142, 176-7.
[7] Collected Works of Mahatma Gandhi, Vol. 69, p. 356.
[8] Collected Works of Mahatma Gandhi, Vol. 63, pp. 134-36, 153-54.
[9] Collected Works of Mahatma Gandhi, Vol. 76, pp. 385-91.
[10] Collected Works of Mahatma Gandhi, Vol. 90, pp. 37-42.
[11] Collected Works of Mahatma Gandhi, Vol. 55, p. 427.

spinning, serving untouchables and Hindu-Muslim reunion.[12] Participants would pledge that "*it was the inalienable right of the Indian people, as of any other people, to have freedom and to enjoy the fruits of their toil"* and that "*if any government deprives people of these rights and oppresses them, the people have a further right to alter it or abolish it."*[13]This is ironical as this statement of Gandhi evokes rule of law, human rights and duties of a government which is being annihilated day by day.

IS THE PRESENT BIDDING FAREWELL TO THE PAST?

The key question remains: have we actually achieved *Swaraj, Swadhinta and Dharmarajya* in its true sense or has it disappeared along with the courageous martyrs who sacrificed their life at the altar for this dream? Is the current milieu in which unequal power equations mock the rule of law and constitutional morality, a reflection of his dream? The present times defy the principles of governance, accountability and the spirit of the Constitution. It is today when we should dream the same dream that our forefathers dreamt of many years ago.

Are we independent of covetousness, abhorrence for the marginalised, discrimination, bias, systemic violence, callousness and corruption? We may have knowledge of our rights but we certainly do need to be taught about our duties. Every right leads to a corresponding duty. The Preamble resonates the Objectives Resolution[14] which essentially was Gandhi's vision. The Preamble

[12] Ramchandra Guha, *India After Gandhi: The History of the World's Largest Democracy*, 4(1st ed. 2007).
[13] Collected Works of Mahatma Gandhi, Vol. 42, pp. 398-400.
[14] Objectives Resolution was moved by Jawaharlal Nehru on 13th December, 1946 in the Constituent Assembly.

provides for a Socialist Secular Democratic Republic and aims to secure to its citizens "*Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all Fraternity assuring the dignity of the individual.*" With just a faint silhouette of secularism, liberty, fraternity and dignity remaining and that too fading away, it is a precarious situation. Equality has vanished in all but name. Article 15 (2) of the Constitution provides that no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to- (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. Even on a literal construction of the aforementioned provision, it can be easily discerned that it imposes a duty on all not to discriminate on the basis of religion, race, caste, sex, place of birth in relation to access to public places or services meant for public use. Article 17 abolishes untouchability. Article 19 guarantees to every citizen freedom of speech and expression and various other freedoms. Right to life and personal liberty as ensured by Article 21 entails an inexhaustible list of rights. Right to dignity, marry, procreate, education (before Article 21A was introduced), health, clean environment, speedy trial, etc. comprise Article 21. It essentially implies freedom to choose to do or not to do anything. Right against exploitation is provided by Articles 23 and 24. Articles 25, 26, 27, 28, 29 and 30 guarantee freedom of religion. Despite these Fundamental Rights and the all powerful voice of the Preamble, why is there no respect for the law, which essentially, is the vision of our Constitution makers and Gandhi? Why is there *paradhinta* and rule of the powerful majority over the marginalised minority, thus leading to

Adharmarajya? The answer is simple. We fail to comply with law and thus subvert the rule of law.

Article 51A of the Constitution entails a list of Fundamental Duties. Every citizen is obliged to abide by the Constitution, to cherish and follow the noble ideals which inspired our national struggle for freedom, to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women, to value and preserve the rich heritage of our composite culture, to protect and improve the natural environment, to develop a scientific temper, humanism and the spirit of inquiry and reform and to abjure violence. When extremist elements in our society endeavour to curtail the liberty of religious/ethnic minorities and commit acts of violence against them, is it realisation of the ideal of secularism which was cherished by our freedom fighters? When someone attempts to confine the autonomy of women and/or commits an offence against women, it derides the ideal of dignity of an individual and thus, deprives women of their personhood. When sexual minorities are ostracised, seen as subjects to be "cured" and subjected to systemic violence, is it in compliance with Article 51A (h) and (i)? When legislative impunity is handed out by framing laws promoting discrimination against people afflicted with a malady[15], is this the manner of paying homage to our forefathers?

[15] Rules framed under Factories Act 1948 allow the employer to terminate the services of the employee if he/she is 'medically unfit', the term being couched in a vague manner, thus open to many constructions, mainly majoritarian. This leads to discrimination against persons with diseases, particularly those illnesses which do not find a mention in Persons with Disabilities Act, 1995.

"*Be the change that you want to see in others.*"- Mahatma Gandhi. It is the individual who has to subvert and end this vicious cycle of oppression against humanity. If we conform our conduct to the law, only then we can achieve true *Swaraj*. The true battle is within, our conscience conflicting with our avarice and lust. Thus, it comes as no surprise that the Chapters on 'Health' and 'Women and Children' in the Twelfth Five Year Plan[16] lay emphasis on social mobilisation to alleviate stigma related to any ailment and patriarchal sex stereotypes and gender norms respectively. The key statutory right to vote should be exercised in accordance with the merit of the candidate rather than bags of cash, liquor and other "gifts" being distributed before the election. The 'Education' Chapter of the current Five Year Plan, address of the President and Prime Minister of India on Teachers' Day, 2014 highlight the significance of instilling good values in children so that they become good citizens leading to alleviation of all evils afflicting our society. Hence, anyone, by adopting the right resolve and truth can become an agent of change. It was Buddha who was the proponent of this missive and later, it was Gandhi. Presently, it is the whole country that has to adopt this value system which has the power to change the chauvinist, bigoted mindset and the hegemonic societal structure. It is then that the individual and the society will be truly independent and the conscience will be ruling over the faculties.

The government has to play a major role and have reverence for the ideals of the nation's founding father. Is it true democracy when votes are bought or people are asked to vote on the basis of religion and caste? If this is not fission, then is it working towards securing fraternity, unity and integrity of the nation? A government comes to power by taking an oath under the Third

[16] Available at: <http://planningcommission.gov.in/plans/planrel/12thplan/pdf/12fyp_vol3.pdf>.

Schedule of the Constitution and itself forgets to abide by the Constitution. In the midst of clamour for Hindu Rashtra, rancour against Mother Teresa, attack on churches, deletion of "Secular" and "Socialist" from the Preamble, screams against '*love jehad*', silence of the government towards diktats of *khap panchayats*, 'missions' of *ghar wapsi* and *bahu lao, beti bachao* and the misleading advertisement before the Republic Day depicting an un-amended Preamble (which is an offence under Prevention of Insults to National Honour Act, 1971), the government subverts the rule of law and therefore, subverts accountability and governance. The fundamental truth remains that secularism and socialism compose the basic structure of the Constitution (as enunciated in *Kesavananda Bharati* v. *State of Kerala*[17]) and are an inextricable component of the spirit of the Constitution. Gandhi died for the cause of secularism and Jawaharlal Nehru saw modernity and development of India in unison with secularism. Besides the Constitutional provisions providing for freedom of religion, Article 14 of the Constitution provides for the State to ensure equality before the law or the equal protection of the laws to all persons. Dr. B.R. Ambedkar aimed for not just a political democracy but a social as well as an economic democracy and to achieve that goal he drafted the Directive Principles of State Policy which are an integral part of the Constitution of India and fundamental in the governance of the country[18]. It is the integral duty of the State to apply these Principles in making laws. Article 38 of the Constitution of India mandates the State to strive to minimise inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities. Article 39 mandates that the State shall endeavour to provide adequate means of livelihood to its citizens and strive to secure that the ownership and control of material resources

[17] (1973) 4 SCC 225.
[18] Bhim Rao Ambedkar, Constituent Assembly Debates, Vol. XIX at 979.

are so distributed as to subserve the common good. The government cannot feign service to Gandhian ideals and do injustice to the populace, especially the subaltern. Its acts of "development"[19] are actually a subterfuge and result in *Adharmarajya* and perpetuate a culture of impunity. Does not this ring a bell of the colonial exploitation carried out by the British in the garb of "development"? After all, as William Faulkner said, "*History is and not was.*"

DISCOURSE BETWEEN RIGHTS AND DUTIES

Our rights are a reflection of the essential capabilities propounded by Martha Nussbaum. She justifies her inexhaustible list of capabilities as a good foundation for political principles all over the world. She believes that the capabilities approach is fully universal and should be applicable to all nations and all people. Some of the capabilities are entitlements to life, health, bodily integrity i.e. security, freedom of imagination and thought in relation to religion, speech and expression, affiliation, dignity and political choices[20]. An elected government is mandated to realise the "functioning" of these capabilities. The contrary is prevailing in our country, which to reiterate, is a disservice to the ideals inspiring our freedom movement. As Shue points out, the demand that the enjoyment of the substance of the right be socially guaranteed is justified. A mere proclamation of a right is not adequate, it has to be socially guaranteed since that

[19] See Land Acquisition Ordinance (discussed later), *Priya Parmeshwaran Pillai* v. *Union of India* W.P. (Civil) No. 774 of 2015 wherein the petitioner was prevented from exercising her freedom of expression and right to travel abroad under Articles 19 (1) (a) and 21 of the Constitution in the fear that her speech to the British Parliaments regarding contestations between Essar, a British company and the local population in Mahan would lead to negative portrayal of India's record in human rights/forest rights and would therefore, invite sanctions and adversely affect foreign direct investment. None of these fears find a mention in law. The Bench rightly held that right to dissent is a component of freedom of speech and expression.

[20] Martha Nussbaum, *Frontiers Of Justice: Disability, Nationality, Species Membership*, PP. 76-78, (1st ed. 2006).

will result in correlative duties[21]. Presently, majoritarian impulses are the de facto law, to make a de jure right a de facto right, there are several steps that the government has to take. As Shue remarks, a government is obliged to make arrangements to secure basic rights as basic rights provide minimal protection to the helpless to protect themselves. These arrangements should serve as guarantees to protect the weak from threatened deprivation of these rights[22]. In a democracy, decision making is a significant constituent of personal liberty. A democratic society is essentially marked with ethical individualism. Each individual has a fundamental human responsibility to create a life that one can look back upon with pride. This responsibility in the democratic moral tradition is often referred to as autonomy or self respect[23]. However, the subaltern, being a subaltern, cannot even hope for visibility, let alone a life of pride, autonomy and dignity because he/she is governed by well entrenched heteronormative, patriarchal, right wing diktats which occupy a force more powerful than law. This is manifested in statements of elected representatives and affiliates of the ruling party who perceive women as sexual objects and breeding machines, existing solely to satiate men, devoid of any autonomy or intellect. They insist on 'curing' sexual minorities and uphold the belief that India has no composite culture or diverse heritage, the only culture it has is "Hindu culture".

To juxtapose the British Raj with the present, most Indians were subalterns then and presently it is the poor, differently abled, religious/cultural/ethnic/sexual minorities and women who comprise the subalterns. When the Indian National Congress won the provincial elections in

[21] Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy*, PP. 13-16, (1st ed. 1980).
[22] *Ibid.* at 18.
[23] Ronald Dworkin, *Euthanasia, Morality and Law*, 31 Loy. L.A. L. Rev. 1127 (1997).

1937, its policies were tinged with civil liberties and socio-economic rights. Indians then were most afraid of the police, therefore, in the Congress ruled provinces, police powers were curbed, reporting of public speeches and shadowing of political workers by Central investigation Department was stopped. Numerous political prisoners were released. Lands confiscated by the British during the Civil Disobedience Movement were restored to the original owners. Peasants were given economic relief through agrarian reforms, such as reduction of rent, land revenue, debt, protection to the tenant and abolition of illegal exactions. They promoted workers' interests by improving working conditions, securing increase in wages and creating goodwill between workers and the capitalists with the Ministers assuming the role of intermediaries[24]. If there was true *Swaraj, Swadhinta and Dharmarajya*, there would be no pariahs today.

The conception of rights formed the foundation of the freedom movement since the conception of Indian National Congress in 1885. To Gandhi, the present day façade of realisation of his dream would have amounted to an anathema to his principles wherein de jure law has its own flaws. Sections 375 (which provides that marital rape is not a crime) and 377 (criminalisation of homosexuality) of Indian Penal Code, 1860 reinforce hegemony and *Adharmarajya.* The latest Land Acquisition Ordinance amending the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 is an antithesis to a rights based approach and rule of law. It affects the most disadvantaged- the poor, Scheduled Castes and Scheduled Tribes and women. Besides being completely undemocratic, it reduces the *Gram Sabha* to a mute spectator and eliminates social impact assessment, thus serving private interests. This is also an antithesis to the Gandhian concept of *Swaraj*. In

[24] Bipan Chandra, et al., *India's Struggle for Independence*, PP. 325-332, (3rd ed.1989).

an interview, he said, "*Independence must begin at the bottom. Thus, every village will be a republic or panchayat having full powers."*[25] Two of the controversial features of the Ordinance are removal of consent clause (i.e. approval of 70% of land owners for Public Private Partnership projects and 80% for private entities) for acquiring lands for five specific purposes and an indecisive stance regarding the period after which unutilised land will be returned.[26] The first provision espouses crony capitalism whilst the latter is comfortably couched in ambiguous terms only to be construed by a majoritarian[27] Court which will toe the government's line, provided that the provisions translate into a legislation.

A government dreaming the Gandhian dream should ensure a healthy dialogue between stakeholders in designing any scheme or legislation. The current Five Year Plan recommends consultation with women before designing any transport project so that project could be effectively engendered[28]. It is imperative for the government to build capacity of grassroot organisations like *Gram Panchayat* and Urban Local Bodies and sensitise them with regard to women, children, Scheduled Castes, Scheduled Tribes, differently-abled and religious/sexual/ethnic minorities so that schemes percolate down and benefit the truly needy. With regard to the new Land Acquisition Bill, consultation with

[25] *Harijan*, 28 July 1946, as reproduced in Collected Works of Mahatma Gandhi, Volume 85, pp. 32-34.

[26] Vinod Madhavan, *Controversy Over Land Acquisition Bill: All You Need to Know*, The New Indian Express, March 7, 2015, Available at: <http://www.newindianexpress.com/nation/Controversy-Over-Land-Acquisition-Bill-All-You-Need-to-Know/2015/03/07/article2701536.ece>.

[27] The idea that democratic theory commands courts to "preserve" politics is embodied in the doctrine that requires deference to an administrative agency's reasonable interpretation of an ambiguous statute. This approach to democratic legitimacy is premised on the normative primacy of majoritarianism: Jane Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 613 (1995).

[28] Available at: <http://planningcommission.gov.in/plans/planrel/12thplan/pdf/12fyp_vol3.pdf>.

stakeholders is highly imperative. As Gandhi answered in response to a question about what would be an ideal village to a villager living in Santiniketan, "*My task just now is to discover what the villagers can do to help themselves if they have mutual cooperation and contribute voluntary labour for the common good. I am convinced that they can, under intelligent guidance, double the village income*[29]*."*

ROLE OF RULE OF LAW

Governance and accountability cannot be separated from rule of law. A government which respects not only the letter but also the spirit of law is governing efficiently. Simply put, rule of law as given by Dicey states that everyone will be equal before law thus leading to the conclusion that government is subservient to law and therefore, accountable to all. Aristotle once said that given the choice between a king who ruled by discretion and a king who ruled by law, the latter was clearly superior to the former. Gandhi, when speaking about independence, remarked, "*Independence must mean that of people of India, not of those who are ruling over them. The rulers should depend on the will of those who are under their heels. Thus, they have to be servants of the people, ready to do their will."*[30] This statement implicitly and sublimely presents the inextricability of rule of law, democracy, governance and accountability.

Friedrich Hayek defined rule of law as "*stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's*

[29] *Harijan,* 9 January 1937: Collected Works of Mahatma Gandhi, Volume 64, pp. 217-18.
[30] *Harijan, supra* note 26.

individual affairs on the basis of this knowledge[31]*."* Rule of law is derived from the notion that law must be capable of guiding the behaviour of its citizens[32]. Derivations from this doctrine are, namely, that the power exercising authority must be guided by a set of detailed unambiguous stable rules as to how to exercise its power while making laws/rules, the independence of judiciary must be maintained[33] (so that they are reconstructionist[34] in their approach rather than majoritarian), principles of natural justice are duly observed, Courts must be accessible and there should be no delays and crime preventing agencies should not be allowed to use their discretion to subvert law. Arbitrariness is contrary to rule of law, thus the government is restrained from making certain laws or using power to achieve personal gains. This is one of the virtues of rule of law, others being guarantee of human rights and human dignity[35].

Rule of law is implicit in the basic structure of the Constitution i.e. Fundamental Rights[36], harmony between Fundamental Rights and Directive Principles of State Policy[37], limited amending power of the Parliament, free and fair elections, democracy, judicial review,[38]secularism[39], socialism[40] and the

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[31] Friedrich Hayek, *The Road to Serfdom*, P. 54 (1st ed.1944).
[32] Joseph Raz, *The Rule of Law and Its Virtue, in* Arguing About Law, p. 183 (Aileen Kavanagh and John Oberdiek eds., 2009)
[33] *Ibid.*, at 184-5.
[34] This view implores courts to use interpretation as a means of progressive social transformation and pursues a vision of political and cultural equality and inclusion: Jane Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 609 (1995).
[35] Raz, *supra* note 33, at 185-7.
[36] According to 6 Judges in *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225.
[37] *Minerva Mills Ltd. and Ors.* v. *Union Of India and Ors*. AIR 1980 SC 1789.
[38] *Indira Nehru Gandhi* v. *Shri Raj Narain & Anr.*, (1975) Supp SCC 1, also limited amending power comprises basic structure: *Minerva Mills Ltd. and Ors.* v. *Union Of India and Ors.* AIR 1980 SC 1789.
[39] *S. R. Bommai* v. *Union of India*, (1994) 2 SCR 644.
[40] *M. Nagraj & Ors* v. *Union of India and Ors*., AIR 2007 SC 71.

Preamble[41]. In *State of Bihar* v. *Kameshwar Singh*[42] it was enunciated that legislative power is subject to Fundamental Rights, thus eliminating arbitrariness. The fathers of the Indian Constitution intended India to have a Constitution as well as be committed to constitutionalism. David Fellman proclaims the desirability of rule of law as opposed to rule by arbitrariness or mere fiat of public officials[43]. Charles H. McIlwain states that constitutionalism is a limitation on government powers[44]. A country which observes rule of law would have attained *Swadhinta, Swaraj* and *Dharmarajya.* Besides the recent instances discussed in this paper, I opine that there have been several incidents of violation of rule of law, discussed below.

SUBALTERN AND THE EXECUTIVE

High Level Expert Group on 'Health' in the Planning Commission recommended an increase in expenditure on health from 1.2% of Gross Domestic Product to 2.5% of Gross Domestic Product by the end of Twelfth Five Year Plan. Planning Commission recognised that one of the flaws of Rashtriya Swasthya Bima Yojana is that out-patient costs are excluded[45]. Instead of rectifying these lacunae, the government has reduced the budget allocation for the AIDS programme for 2015-16 to Rs 1,397 crore — hardly sufficient for priority interventions, let alone for scaling them up to reach national and global targets. India needs to put another one million people under treatment and augment testing and prevention programmes to cover 90% of key affected

[41] *Kesavananda Bharati* v. *State of Kerala,* (1973) 4 SCC 225 and *S. R. Bommai* v. *Union of India,* (1994) 2 SCR 644.
[42] AIR 1952 Pat 417.
[43] David Fellman, *Constitutionalism, in* 1 Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas, P. 485 (Philip P. Wiener ed., 1973).
[44] Charles H. McIlwain, *Constitutionalism: Ancient and Modern*, p. 21 (1st ed. 1947).
[45] Available at: <http://planningcommission.gov.in/plans/planrel/12thplan/pdf/12fyp_vol3.pdf>.

populations for achieving its goal of ending AIDS as a public health threat. With the current allocations, the programme will struggle to maintain momentum and this can potentially lead to a resurrection of the epidemic[46].

Women received another setback when the government downsized its initiative on One Stop Crisis Centres (OSCC). From establishing one OSCC in each district, the government decided to establish one OSCC in each State. The budget for this programme has also been drastically reduced. This has been received by a tirade of oral salvos from women's groups, criticising the government[47]. It is difficult to decipher how the government can be so detached from the concerns of all women, particularly rape survivors. Only a government whose will is the fiat can ignore the subaltern. We are living in such times.

The lone silver lining has been the judgment in *Priya Parmeshwaran Pillai* v. *Union of India*[48] wherein the Court upheld the rule of law by holding that "*The core aspect of democracy is the freedom of an individual to be able to freely operate, within the framework of the laws enacted by the Parliament. The individual should be able to order his or her life any way he or she pleases, as long as it is not violative of the law or constitutes an infraction of any order or direction of a duly constituted court, tribunal or any statutory authority for that matter. Amongst the varied freedoms conferred on an individual (i.e., the citizen), is the right of free speech and expression, which necessarily includes the right to*

[46] JVR Prasada Rao, *Centre must rethink its public health policy*, HINDUSTAN TIMES, March 19, 2015, available at: <http://www.hindustantimes.com/analysis/centre-must-rethink-its-public-health-policy/article1-1327998.aspx>.

[47] DNA Web Team, *Modi government says no to rape crisis centres in every district*, Daily News & Analysis, February 25, 2015, available at: <http://www.dnaindia.com/india/report-modi-government-says-no-to-rape-crisis-centres-in-every-district-2063977>.

[48] W.P. (Civil) No. 774 of 2015.

criticise and dissent. Many civil right activists believe that they have the right, as citizens, to bring to the notice of the State the incongruity in the developmental policies of the State. The State may not accept the views of the civil right activists, but that by itself, cannot be a good enough reason to do away with dissent. That being so, the decision taken to detain the petitioner at the airport on 11.01.2015, was illegal being violative of the Ms Pillai's right under Article 21 and 19(1)(a) of the Constitution." This is in consonance with Gandhi's writings on freedom of speech.

To delve further into the domain of rule of law, governance and accountability, it is important to understand the process of legislating and policymaking. It is vital to see if the legislator considers himself/herself to be above the law and thus acts contrary to rule of law. Therefore, the Fourth Report of the Second Administrative Reforms Commission[49] recommends amendment of Section 8 of Representation of People Act, 1951 to disqualify those candidates from contesting elections who face charges of heinous offences and corruption and a Code of Ethics for all Ministers and presentation of an annual report in Parliament and State Legislature on observance of the said Code, including transgressions. In furtherance, it recommends strengthening of Prevention of Corruption Act 1988 to include subversion of democracy, Constitutional ideals and obstruction of justice as offences, undoing of sanction for prosecution if a public servant is caught red handed and providing protection to whistleblowers and declaration of their victimisation to be a criminal offence. Implementation of such recommendations will ensure that all are subservient to the rule of law and there are no shortcomings in legislating or policymaking. This will eliminate the hegemonic power equation prevailing in our country presently wherein a public

[49] Available at: <http://arc.gov.in/4threport.pdf>.

servant (belonging to legislative, executive or judicial wings of our country) has become a private servant, serving only himself/herself. It is important to remember that public servants need to imbibe the incorruptible integrity of our freedom fighters so that they do their duty with the same integrity and without fear or favour.

It is significant for the policymakers and legislators to understand that economic growth and human development (i.e. development of all, especially the disadvantaged who constitute the majority) are not irreconcilable. Despite an increase in economic growth, our country ranks 127 out of 148 countries in the Gender Development Index. In the World Economic Forum gender survey, India ranks 114 out of 142 countries and in the health category (i.e. sex ratio and life expectancy) India ranks a miserable 141 out of 142 countries. There are increasing concerns about the fall in sex ratio in the 0-6 years age group (from 927 in 2001 to 914 in 2011) and the huge gap between male and female infant mortality rate. In 2014, India ranked 135 in Human Development Index. This deplorable situation implies that fruits of economic growth are not being shared widely.

Amartya Sen and Jean Dreze rightly point out the shortcomings in policymaking. India has failed to employ the 'East Asian strategy' i.e. using an increased public revenue (increased due to economic growth) to eliminate large deficiencies in social, educational and health services, meet growing demands of social and physical infrastructure and increase the accountability and efficiency of public services. The 'Asian Experience' is based on the adept use of the complementarity of economic expansion and human advancement. In 2011 half of all Indian households did not have any access to toilets, compared with less than 10% of the total population in Bangladesh and only 1% in China. The nature

of the Indian inequality is entrenched in disparities of caste, class and gender. Tolerance of such inequalities would be similar to tolerance of economic exploitation during the British Raj. Sen and Dreze lament the absence of the voices of the marginalised in the protest movements. Their silence excludes them from many political issues, decision making and accentuates social injustice. The reluctance of Indians to realise their own strength was a big factor in perpetuating British Raj and today, the reluctance of the marginalised to wage Satyagraha for removal of their extraordinary deprivation is a cause of their constant social injustice[50]. Policies and laws which curb or lessen such inequalities would be instances of rule of law as they would be proclaiming and bringing into effect rights for the subaltern, and thus, achieving *poorna Swaraj*, *Swadhinta* and *Dharmarjaya*.

CONCLUSION

In a democracy, it is obvious that there will be dissidence and different opinions but rather than government's own rule prevailing upon interested parties, it is vital that such various opinions and dissidence are not only tolerated but also respected. It is only then that effective policies and statutes will be framed and due respect will be paid to rule of law. Like Voltaire said, "*Tolerance has never provoked a civil war; intolerance has covered the Earth in carnage*[51]*."* The principle of tolerance entails rights and corresponding duties and therefore, echoes the Gandhian dream.

The Weimar Constitution has been held to be the perfect Constitution "on paper". Before Constitutionalism fades away and our country is reduced to

[50] Jean Dreze and Amartya Sen, *An Uncertain Glory: India and Its Contradictions,* pp. 278-279, 281, 285-287 (1st ed. 2013).
[51] Voltaire, *Treatise on Tolerance* (1763).

having a Constitution but without any traces of Constitutionalism, before lugubrious pin drop silence in complicity with majoritarian impulses devours the concept of rights for the pariahs and before a melancholic denouement is pronounced which echoes Macbeth, "*To-morrow, and to-morrow, and to-morrow,/Creeps in this petty pace from day to day/To the last syllable of recorded time,/And all our yesterdays have lighted fools/The way to dusty death*" we must stymie this denouement. The only way to do that is realise the relevance of *Swaraj, Swadhinta* and *Dharmarajya* today so that we do not have to wait for a morose tomorrow. We may not be conscious of the dream but it may be still there in our unconscious, making its appearance in unrelated dreams and slips of tongue. These Freudian slips may soon arouse us from our deep slumber and motivate us to take action and fulfil the unfulfilled dream. As Franklin Delano Roosevelt said "*Freedom cannot be bestowed, it can only be achieved*".

I would conclude by quoting extracts from Dr. Ambedkar's speech in the Constituent Assembly in 1949, which echo the unfulfilled dream. He elaborated on constitutional morality by quoting Grote, who said, "*It means a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control",* and stated that while it was common knowledge that Constitutional morality is crucial for the peaceful working of a democratic Constitution, two things go unnoticed. One being that the form of administration is closely related to the form of the Constitution. The former must conform as well as be in the same sense as the latter. The second thing is that it is perfectly possible to deprave the Constitution without altering it by merely altering the form of administration. The only solution to these dangers is that democracy and Constitutional morality have to be cultivated. "*We must*

make our political democracy a social democracy wherein liberty, equality and fraternity will be treated as a trinity as to divorce one from the other defeats the very purpose of democracy. Without equality, liberty would produce the supremacy of the few over many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things."[52]

[52] Constituent Assembly Debates, Vol. XI at 972-81.

CONSTITUTIONAL ROLE AND INDEPENDENCY OF ATTORNEY GENERAL

INTRODUCTION

"Freedom and independence, form my character"

- Mustafa Kemal Ataturk

If men were angels, no Government would be necessary. If angels were to govern men, neither external nor internal controls on Government would be necessary.[1] In framing a Government which is to be administered by men over men, the great difficulty lies in this: you must first enable the Government to govern the governed; and in the next place, oblige it to control itself.[2]

The constitution is full of old and strange jobs and titles, like that of Attorney General. To most people, even those with knowledge of Government and the criminal justice system, the role of Attorney General is something of a mystery.[3] The office of Attorney General is described as a meeting place of diverse legal, political and constitutional functions; the Attorney General is both the legal adviser to the Government and the guardian of the public interest.[4] The common tendency is to view the Attorney General and his department as nothing

[1] Johnson V. Commonwealth, *Defining the Scope of the Attorney General's Office and the Power of The Legislature over It*, 291 KY.829, 165 S.W.2D 280 (1942).
[2] Stephen Charles Mixter, *The Ethics In Government Act Of 1978: Problems With The Attorney General's Discretion And Proposals For Reform, Duke Law Journal*, Vol. 1985, No. 2 (Apr., 1985), pp. 497-522, available at: <http://www.jstor.org/stable/1372362>
[3] Elwyn Jones, *The Office Of Attorney General*, The Cambridge Law Journal, Vol. 27, No. 1 (Apr., 1969), pp. 43-53, available at: <http://www.jstor.org/stable/4505281>.
[4] Darren Lehane, *Legal Janus: Resolving The Conflict Between The Attorney General's Functions as Guardian of the Public Interest and Legal Adviser to the Government*, The Irish Student Law Review Vol. 12 (2004), pp.48-63, available at: <http://heinonline.org/hol/page?handle=hein.journals/irishslr12&div=7&g_sent=1&collection=journals#54>.

more than a law firm which is always on call to serve the interest of the political party that is in power at the time.[5]

Now, as discussed above the Attorney General is like the legal adviser of the Government and the defender of the public interest then 'how on earth can one explain the fact that G. E. Vahanvati who is the current Attorney General of India, to put it as politely as possible, misled the Supreme Court itself, if only by his silence?'[6]

The event that happened was this, the Supreme Court asked a simple, a very direct, question. Had the C.B.I. shared its report on the Coal Allotment Scam with anyone in the 'political executive'? Multiple sources confirm that G. E. Vahanvati was present at such a meeting, in the office of the Union Law Minister, and with officials from both the Prime Minister's Office and the Coal Ministry in attendance.[7]

(Union Law Minister Ashwani Kumar has reportedly gone so far as to allege that the meeting was called by the Attorney General!) It is also on record that G. E. Vahanvati was present in court when their Lordships posed that query. He chose to remain silent when Additional Solicitor General Haren Rawal said the C.B.I. had not revealed its report to the 'political executive'.[8]

Can anyone present a reasonable explanation to excuse this?

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[5] John Ll. J. Edwards, *The Attorney General, Politics and the Public Interest,* The Cambridge Law Journal, Vol. 44, No. 3 (Nov., 1985), pp. 480-482.
[6] TVR Shenoy, *Legal Tangles In Investigation*, (May 06 2013), available at: <http://www.mathrubhumi.com/english/story.php?id=135766>.
[7] *Ibid.*
[8] *Ibid.* at 6.

On 30 April, the Supreme Court spoke on the need to further insulate the C.B.I. from political interference. Perhaps their Lordships could also extend this protection to the Attorney General too — simultaneously sending out the message that the Attorney General is much more than a professional doing his duty to the ministry of the day that he owes a higher duty as an officer of the court.[9]

The Authors see that Article 76[10] of the constitution gives constitutional status to the office of Attorney General. Article 76 (2)[11] provides that the Attorney General shall be the legal adviser of the government and shall perform all such powers, functions and duties as are prescribed by law. The constitutional status and role of the Attorney General is defined in the constitution, but "the constitutional provisions do not expressly define all the powers and function of the office.

In Attorney General (Condition of service) Rules[12], the President made the following Rules regulating remunerations duties and other terms and conditions of the Attorney General for India. In the definition clause, Attorney

[9] *Ibid.* at 6.

[10] Indian Constitution, Art. 76: Article 76 says that Attorney General For India:(1) The President Shall Appoint A Person Who Is Qualified To Be Appointed A Judge Of The Supreme Court To Be Attorney General For India,(2) It Shall Be The Duty Of The Attorney General To Give Advice To The Government Of India Upon Such Legal Matters, And To Perform Such Other Duties Of A Legal Character, As May From Time To Time Be Referred Or Assigned To Him By The President, And To Discharge The Functions Conferred On Him By Or Under This Constitution Or Any Other Law For The Time Being In Force,(3) In The Performance Of His Duties The Attorney General Shall Have Right Of Audience In All Courts In The Territory Of India,(4) The Attorney General Shall Hold Office During The Pleasure Of The President, And Shall Receive Such Remuneration As The President May Determine Conduct Of Government Business.

[11] *Ibid.*

[12] Law Officer (Conditions Of Service) Rules, 1987. Ministry of Law and Justice, Department of Legal Affairs, No.F.18 (1)/86-Judl. Government of India, New Delhi, The 1st January 1987.

General means the person appointed under clause (1) of Article 76[13] of the constitution as the Attorney General for India and includes any person appointed to act temporarily as the Attorney General for India. In essence, the powers and functions of the Attorney General as described in clause 5, Attorney General (Condition of service) Rules 1987 shall be[14]: (a) to exercise the final responsibility for the office of the prosecutor general; (b) to be the principal legal adviser to the President and the Government; (c) to represent the government of India in any reference made by the President to the supreme court under article 143.[15]

Since independence, our community has changed fundamentally. It is contented that those changes have produced a redirection, a new purpose in the role of the Attorney General. We have become, in a striking way, a rights-oriented society.[16] The courts are increasingly perceived by our citizens as the appropriate forum for profound social and economic changes. Politics itself is increasingly dominated by the rhetoric of rights.[17]

To understand the function of the Attorney General it is necessary to know the nature of the office of which it is a part, and the authority on which that

[13] *Supra* note 10.
[14] *Supra* note 12.
[15] Indian Constitution, Art.143: Article 143 says that Power Of President To Consult Supreme Court (1) If At Any Time It Appears To The President That A Question Of Law Or Fact Has Arisen, Or Is Likely To Arise, Which Is Of Such A Nature And Of Such Public Importance That It Is Expedient To Obtain The Opinion Of The Supreme Court Upon It, He May Refer The Question To That Court For Consideration And The Court May, After Such Hearing As It Thinks Fit, Report To The President Its Opinion Thereon (2)The President May, Notwithstanding Anything In The Proviso To Article 131, Refer A Dispute Of The Kind Mentioned In The Said Proviso To The Supreme Court For Opinion And The Supreme Court Shall, After Such Hearing As It Thinks Fit, Report To The President Its Opinion Thereon.
[16] Steyn, "*The Weakest and Least Dangerous Department of Government*" (1997) Public Law 84 at pp. 91-92.

office rests. The basis of the office of the Attorney General is found in history and constitution. The origins and development of the office in England can provide a frame of reference for understanding today's problem; to understand this development is to understand the conflicts inherent in the structure today are not necessarily of intentional design.

This paper takes the position that the Attorney General is not just the government's lawyer, but plays an important role in protecting the rule of law within government.

GENESIS OF THE ATTORNEY GENERAL'S OFFICE

"I think it is vitally important to study History. If we are going to lead Britain safely into the future, it is essential that we understand our country's historical roots. If we can learn the lessons of the past, we will be able to avoid making mistakes in the future."

- Tony Blair

It is not that the early experiences of the development of the office of the Attorney General would necessarily answer today's questions. But, one of the most important contributions that a study of history of this office offers is the point that, from the start of this office, what were the questions and problems present and what were their answers. But while history cannot provide definitive answers, it offers an instructive approach to constitutional interpretation.

DEVELOPMENT OF OFFICE OF ATTORNEY GENERAL IN ENGLAND

THE OFFICE of Attorney General is an ancient and honourable one in the constitutional history of the British people. The 1st appointment was of Lawrence del broke in around 1247 whose function was to sue 'the king's affairs

of his pleas before him'.[18] Essentially, the officials who became known as attorneys general were the representative for the king in the courts of the realm.[19] The actual office of Attorney General was probably established in 1472 with the appointment of William Hesse as the chief attorney for king Edwards IV[20]. His title as well as his office, has been derived from the common law of England, where from an early date the Attorney General has been the chief legal representative of the sovereign.[21]

The office grew rapidly in prestige during the sixteenth and seventeenth centuries. The Attorney General was summoned by writ of attendance to the House of Lords where he was consulted on bills and points of law.[22] In 1673 the Attorney General began to sit in the House of Commons. During the ensuing constitutional struggles the Attorney General emerged as legal adviser to the President.[23] Either by himself or through his deputy he appeared on behalf of the President in the courts, gave legal advice to all departments of state and appeared for them if they wished to take action in the courts.[24] In general, the office is quite characteristic of English constitutional development.' From one out of many of the King's Counsel the Attorney General became, by an evolutionary process,

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[18] Elwyn Jones, *The Office of Attorney General*, The Cambridge Law Journal, Vol. 27, No. 1 (APR., 1969), pp. 43-53, available: at <http://www.jstor.org/stable/4505281>.
[19] *Ibid.*
[20] Kent Roach, *The Attorney General and the Charter Revisited*, The University Of Toronto Law Journal, Vol. 50, No. 1 (WINTER, 2000), pp. 1-40, available at: <http://www.jstor.org/stable/826033>.
[21] *Ibid.*
[22] Robert Kramer and Nathan Siegel, *The Attorney General of England and The Attorney General of The United States*, 1960 DUKE L.J. 524.
[23] Henry Barrett Learned, *The Attorney-General And The Cabinet*, Political Science Quarterly, Vol. 24, No. 3 (SEP., 1909), pp. 444-467, available at <http://www.jstor.org/stable/4506788>.
[24] Rita W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and The American Colonies*, The American Journal Of Legal History, Vol. 2, No. 4 (OCT., 1958), pp. 304-312, available at: <http://www.jstor.org/stable/844539>.

the chief legal officer of the President. Tradition coupled with modern requirements shaped the character of the office.[25]

The King had an exceptional position with respect to appearing by attorney, for as supreme "justiciar," in whom re-posed the rights and liberties of the people, the administration of the laws in their behalf; he could not appear in his own courts in person to plead his case where his interests were concerned.[26] It was necessary that he appoint some qualified person to appear in his behalf. At first it was the practice for the King to appoint an attorney for a particular court or for a particular cause.[27] But this attorney was more than an ordinary attorney. He was the representative of the President, looking after the interests of the King in the King's own court, who was present in the eyes of the law.[28] The King was said to be "prerogative." This gave the King's attorney superior standing, especially when later the King came to appoint an attorney to represent him generally in all courts.[29]

The Attorney General as the legal representative of the President represents the interests of the President qua sovereign, and also qua parens

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[25] Gordon F. Gregory, *The Attorney General in Government*, 36 U.N.B.L.J. 59 1987.
[26] H. Jefferson Powell, *The Constitution and The Attorneys General*, The American Journal of Legal History, Vol. 44, NO. 2 (APR., 2000), pp. 224-225, available at: <http://www.jstor.org/stable/846123>.
[27] Holdsworth, *The Early History of The Attorney and Solicitor General*, 13 ILL. LAW REV. 602 (1919). (An Interesting Passage Which Demonstrates The Medieval Use Of The Term As Well As Shakespeare's Legal Knowledge Appears In Richard Ii In Which York Says To Richard: If You Do Wrongfully Seize Hereford's Rights, Call In The Letters Patent That He Hath By His Attorneys-General To Sue His Livery, And Deny His Offer'd Homage You Pluck A Thousand Dangers On Your Head. (Richard Ii, Act Ii, Sc. 1.).
[28] John Griffiths, *The Australian Constitution Annotated By The Attorney General's Department*, The Cambridge Law Journal, Vol. 41, No. 2 (NOV., 1982), pp. 370-371, available at: <http://www.jstor.org/stable/4506468n>.
[29] G. W. Keeton, *The Office Of Attorney General*, 58 JURIDICAL REV. 109 (1946).

patriae.[30] The Attorney General may act on his own initiative, as guardian of the public interest to restrain public nuisances and prevent excess of power by public bodies.[31]

The basis of the office appears to have been that as the sovereign could not appear in person in his own courts to plead in any case in which he had an interest, an attorney appeared on his behalf.[32] The British Attorney General while representing the law as any attorney must, have the specific and clearly defined function of serving as the lawyer for the prime minister and his government.[33] When he rendered advice, he did so for his government alone, not for the public at large. Accordingly, his representations as counsel were confidential; his opinions were not published.[34] His advice had a limited impact; indeed, if disregarded by the prime minister and his government, it will have almost no impact at all upon society.[35]

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[30] LITERALLY, "FATHER OF HIS COUNTRY." Black's Law Dictionary, p. 1269 (4th ed. 1951). The Parens Patriae Function In English Common Law Had Its Origin In Feudal Times. The King Actecd As Guardian Of Persons Non Sui Juris-Those Legally Incompetent To Act For Themselves. Blackstone Noted That:
[U]Pon The Abolition Of The Court Of Wards, The Care, Which The President Was Bound To Take As Guardian Of It's Infant Tenants, Was Totally Extinguished In Every Feudal View; But Resulted To The King In His Court Of Chancery, Together With The General Protection Of All Other Infants In The Kingdom.... As To Idiots And Lunatics: The King Himself Used Formerly To Commit The Custody Of Them To Proper Committees, In Every Particular Case; But Now, To Avoid Solicitations . . . A Warrant Is Issued By The King. . . . The King As Parens Patriae Has The General Superintendence Of All Charities…

[31] The Honourable Ian Scott, *Law, Policy, And The Role of The Attorney General: Constancy And Change In The 1980s* , 39 U. TORONTO L.J. 109 1989.

[32] Kent Roach, Not *Just The Government's Lawyer: The Attorney General As Defender Of The Rule of Law*, 31 QUEEN'S L.J. 598 2005-2006.

[33] CUMMINGS & MCFAR.AND, *The Attorney General and the Cabinet*, 24 POL. SCI. Q. 444, 45 (1909).

[34] Robert P. Lawry, *Who Is The Client Of The Federal Government Lawyer? An Analysis of The Wrong Question*, 37 FED.BAR J. 61 (FALL 1978).

[35] Jones, *The Office Of Attorney General*, 27 CAMBRIDGE L. REV. 43-64 (1969).

But, as the function of sovereignty became more complex and more extensive, and acquired a more public character so the role and duties of the attorney became wider.

DEVELOPMENT OF THE OFFICE OF ATTORNEY GENERAL IN INDIA:

The roots of the office of Attorney General in independent India can be traced back to the era of colonial British rule in India. This office was first introduced in the year 1919 by the Government of India Act, 1915-19 in which the office of Attorney General was mentioned as Advocate General. The provision for the office of Advocate General was in section 114[36] of the act this provision provided Advocate General's for each of the presidencies in British India. Then later on the Government of India Act, 1935 was enacted. This act established the position of Advocate General for India.

The Government of India Act, 1935 vide section 16[37], provided for an advocate- general for the centre.[38] Section 16[39] provided for the appointment of

[36] Government of India Act, 1915-19 [Repealed]: Section 114: (1) His Majesty may, by warrant under His Royal Sign-Manual, appoint an advocate-general for each of the presidencies of Bengal, Madras and Bombay; (2) The advocate-general for each of those presidencies may take on behalf of His Majesty such proceedings as may be taken by His Majesty's. Attorney General in England., (3) On the occurrence of a vacancy in the office of Advocate-General or during any absence or deputation of an Advocate General the Governor-General in Council in the case of Bengal, and the local government in other cases, may appoint a person to act as Advocate-General; and the person so appointed may exercise powers of an Advocate General until some person has been appointed by His Majesty to the office and has entered on the discharge of his duties, or until the Advocate General has returned from his absence or deputation, as the case may be, or until the Governor General in Council or the local government, as the case may be, cancels the acting appointment.

[37] Government of India Act, 1935 [REPEALED], § 16 - Advocate General For Federation: (1) The Governor-General Shall Appoint A Person, Being A Person Qualified To Be Appointed A Judge Of The Federal Court, To Be Advocate-General For The [Federation].(2) It Shall Be The Duty Of The Advocate-General To Give Advice To The [Federal] Government Upon Such Legal Matters, And To Perform Such Other Duties Of A Legal Character, As May Be Referred To Assigned To Him By The Governor-General, And In The Performance Of His Duties He Shall Have Right Of Audience In All Courts In British India And, In A Case In Which [Federal] Interests Are Concerned, In All Courts In Any [Federated] State. (3) The Advocate-General Shall Hold Office

an Advocate General for India. His function was to give advice to the government on such legal matters and perform such other duties of a legal character as may from time to time be referred or assigned to him.[40] The provision of this section has been substantially incorporated in article 76[41] of the constitution but for the change of name from Advocate General to Attorney General.[42]

Since the 1980s, our understanding of the role of the Attorney General in the administration of criminal justice has evolved dramatically. The independence of this role has been eroded by the fact that courts and law societies have taken a more active role in scrutinizing the decisions of Attorneys General, and the public has demanded greater transparency and accountability.[43]

In contrast, in England, the office of the Attorney General is regarded as a political office in the sense that he is a member of the ministry and comes in and goes out with it.[44] In India, the Attorney General has not, so far, been a member of the council of ministers. But there is a practice that the Attorney General also resigns on the resignation of the council of ministers.[45]

During The Pleasure Of The Governor-General, And Shall Receive Such Remuneration As The Governor-General May Determine. (4) In Exercising His Powers With Respect To The Appointment And Dismissal Of The Advocate General And With Respect To The Determination Of His Remuneration, The Governor-General Shall Exercise His Individual Judgment.

[38] *Ibid.*

[39] *Ibid.*

[40] *Ibid.*, 36

[41] *Supra* note 10.

[42] *Supra* note 10.

[43] Craig E. Jones, *On The Attorney General, The Courts And The New Ministry Of Justice*, 71 ADVOCATE VANCOUVER 189, 2013.

[44] Paul.P Craig, *Administrative Law*, 5TH ed., 2008.

[45] V.N. Shukla, Constitution of India, pp. 150-151, 11th ed., 2008.

The Constituent Assembly believed the office of the Attorney General so important that they devoted Article 76[46] of the Constitution to it. (Articles 74[47] and 75[48], by the way, spell out the powers and duties of the Prime Minister and the Union Council of Ministers.) In practice the Attorney General and his colleagues form a bridge between the executive and the judicial wings of the state.[49]

The Bar Council of India's web lays out the professional standards expected from lawyers.[50] The first sentence starts with: 'Advocates, in addition to being professionals, are also officers of the courts...'[51] it carries on with a lot of dos and don'ts but those first twelve words are all you need to know.

[46] *Supra* note 10.
[47] Indian Constitution, Art. 74: Article 74 says that Council Of Ministers To Aid And Advise President:(1) There Shall Be A Council Of Ministers With The Prime Minister At The Head To Aid And Advise The President Who Shall, In The Exercise Of His Functions, Act In Accordance With Such Advice: Provided That The President May Require The Council Of Ministers To Reconsider Such Advice, Either Generally Or Otherwise, And The President Shall Act In Accordance With The Advice Tendered After Such Reconsideration,(2) The Question Whether Any, And If So What, Advice Was Tendered By Ministers To The President Shall Not Be Inquired Into In Any Court.
[48] Indian Constitution, Art. 75: Article 75 says that Other Provisions As To Ministers:(1) The Prime Minister Shall Be Appointed By The President And The Other Ministers Shall Be Appointed By The President On The Advice Of The Prime Minister,(2)The Minister Shall Hold Office During The Pleasure Of The President,(3) The Council Of Ministers Shall Be Collectively Responsible To The House Of The People,(4) Before A Minister Enters Upon His Office, The President Shall Administer To Him The Oaths Of Office And Of Secrecy According To The Forms Set Out For The Purpose In The Third Schedule,(5) A Minister Who For Any Period Of Six Consecutive Months Is Not A Member Of Either House Of Parliament Shall At The Expiration Of That Period Cease To Be A Minister,(6) The Salaries And Allowances Of Ministers Shall Be Such As Parliament May From Time To Time By Law Determine And, Until Parliament So Determines, Shall Be As Specified In The Second Schedule The Attorney General For India.
[49] *Supra* note 6.
[50] The Bar Council Of India Advocates, In Addition To Being Professionals Are Also Officers Of The Courts And Play A Vital Role In The Administration Of Justice. Accordingly, The Set Of Rules That Govern Their Professional Conduct Arise Out Of The Duty That They Owe The Court, The Client, Their Opponents And Other Advocates, available at: http://www.barcouncilofindia.org/about/professional-standards/Rules-on-professional-standards/.\
[51] *Ibid.*

Uncompromisingly, they remind attorneys that they are not around just to make money but to serve the cause of justice.[52]

And if that is true for lawyers in general how much more so for the Attorney General(the Attorney General, the Solicitor General, and the Additional Solicitor(s) General), then Can you say that the Attorney General has lived up to the ideal spelt out by the Bar Council in some of the most notorious scandals of our times?

There have been many scandals or as they are called now 'Scams' in India since its independence and if we were to make a list of these scandals then which scandals or 'Scams' would head the list? Such a list would include the Bofors Scandal, the 2G Scam, and the Coal Allotment Scam and then there were others like the Taj corridor case and the habeas corpus case or Indian emergency (1975–77) case. The authors would be discussing a few of these cases with respect to the role that the Attorney General played in these cases.

ROLE AND INDEPENDENCY OF ATTORNEY GENERAL IN PROSECUTION

One of the most important of the Attorney General's responsibilities, encompassed by the constitution is the power to institute or stay criminal proceedings. Decisions on prosecution policy must be made on a daily basis and represent one of the Attorney General's historical functions. Although responsibility for prosecutions obviously pre-dates the constitution, the traditional constitutional requirements that have applied to the Attorney General's exercise of prosecutorial authority provides a valuable perspective on the way in which the Attorney General should approach other duties to which the

[52] *Supra* note 6.

constitution may be related. The constitutional position of the Attorney General in making prosecutorial decisions is quite clear.

In **TAJ CORRIDOR CASE**[53], the court had ordered registration of FIR against Ms Mayawati and others when an application filed by amicus curiae Krishan Mahajan and a petition filed by Ajay Agarwal alleged that Crores of rupees were being siphoned out of the Rs 175-crore project, which was yet to receive environmental clearance. After the CBI completed its investigation, it had sought an opinion of the AG as to whether it should prosecute Mayawati on the basis of evidence gathered by it.[54] The opinion of the Attorney General not to prosecute Ms. Mayawati came as a surprise as the investigating officer of the case, the superintendent of police, the deputy legal advisor, the DIG, the joint director, additional legal advisor and additional director of CBI — had all opined that a case was made out for her prosecution.[55]

The Supreme Court, which was not convinced with the AG's opinion, then asked the Central Vigilance Commission (CVC) to go through the case files.[56] The CVC told the court that it was a fit case for the prosecution of Ms Mayawati. It had also said that chargesheets could be filed against Ms.

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[53] Tavleen Singh, Taj Corridor Case: High Court Notice To Maya, Siddiqui, The Indian Express, Sat Sep 19 2009, 05:40 Hrs At Lucknow, available at: <http://www.indianexpress.com/news/taj-corridor-case-high-court-notice-to-maya-siddiqui/519049/>.

[54] *Ibid.*

[55] Mayawati Trapped In Taj Corridor,The Economic Times, Nov 28, 2006, 03.09am Ist At New Delhi, Available At: <http://articles.economictimes.indiatimes.com/2006-11-28/news/27434384_1_taj-corridor-case-cbi-director-naseemuddin-siddiqui>.

[56] Taj Corridor Case: Supreme Court Issues Notice To Mayawati, The Economic Times,Pti Jan 28, 2013, 12.59pm Ist , Available At <http://articles.economictimes.indiatimes.com/2013-01-28/news/36596485_1_taj-corridor-mayawati-and-siddiqui-governor-t-v-rajeswar>.

Mayawati, her then Cabinet colleague in charge of the environment ministry Naseemuddin Siddiqui and former environment secretary RK Sharma.[57]

The court tore into the advice of the government's chief law officer, Attorney General Milon Banerjee, and said his views were sought to kill the case.[58] "When all members of the investigating team opined that it is a fit case for prosecution, it was nothing but a charade performance by the CBI director to seek the closure of the case," the bench comprising Justice S.B. Sinha, Justice S.H. Kapadia and Justice D.K. Jain said.[59]

What has emerged is an expectation that the office of the Attorney General is protected from improper political influences and that prosecution is conducted in accordance with fairness and respect for the law.[60] The authors argue that while the most important factor in the impartial administration of justice may be the personal character and integrity of the Attorney General. The Attorney General is not simply the government's lawyer, but the protector of the rule of the law within government. The case for the Attorney General as defender of the rule of law is not easy one.

The rationale for the Attorney General's independence in criminal prosecutions is the need to ensure that the law is applied fairly and equally to all, and that people are not needlessly prosecuted when there are neither sufficient legal nor public interest grounds for the prosecution.[61] This requires that

[57] *Ibid.*
[58] *Supra* note 55.
[59] *Supra* note 55.
[60] Geoffrey **c.** Hazard Jr., *Conflicts Of Interest In Representation Of Public Agencies In Civil Matters*, 9 WIDENER J. **PUB.** L. 211 (2000).
[61] H. Garrison, *The Opinions By The Attorney General And The Office Of Legal Counsel: How And Why They Are Significant*, 76 Alb. L. Rev. 217 2012-2013.

prosecutorial decisions be made by a law officer, usually one trained in the law and always advised by those experts in the law.[62]

As the President's Attorney he occupies an office with judicial attributes and in that office he is responsible to the President and not responsible to the Government.[63] He must decide when to prosecute and when to discontinue the prosecution. In making such decisions he is not under the jurisdiction of the Cabinet nor should such decisions be influenced by political considerations.[64] They are decisions made as the President's Attorney, not as a member of the government of the day.[65]

The authors understand that the duty of the Attorney General is that he should absolutely decline to receive orders from the Prime Minister, or Cabinet or anybody else that he shall prosecute. His first duty is to see that no one is prosecuted with all the majesty of the law unless the Attorney General is satisfied that a case for prosecution lies against him. He should receive orders from nobody.

The above discussion indicates that the issues of whether to institute or discontinue a prosecution are not matters of government policy. The Cabinet has no power to direct whether a particular prosecution should be pursued or whether a particular appeal should be undertaken.[66] These decisions rest solely with the Attorney General, who must be regarded for this purpose as an independent

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[62] Philip b. Kurland and d. W. M. Waters, *Public Prosecutions In England,1854-79: An Essay In English legislative History*, Duke Law Journal Volume **1959** Fall Number 4.
[63]Bruce A. MacFarlane, *Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency*, (2002) 45 CRIM. L.Q. 272 at 282.
[64] *Supra* note 25.
[65]*Ibid*.
[66] Debra M. Mcallister, *The Attorney Generals Role As Guardian Of The Public Interest In Charter Litigation*, 21 WINDSOR Y.B. ACCESS JUST. 47, 2002.

officer exercising a function that in many ways resembles the functions of a judge.[67] Questions of prosecution policy are legal issues and, while considerations of the public interest are vital in determining these questions, prosecutorial decisions must be made according to legal criteria.[68] The Attorney General's assessment of the public interest must absolutely exclude any consideration of the political implications of a particular decision.[69] Public respect for the rule of law demands that prosecutorial decisions be made objectively, without regard to possible political consequences.[70]

There is only one consideration which is altogether excluded [from the decision whether or not to prosecute] and that is the repercussion of a given decision upon the Attorney General's personal or his/ her party's or the government's political fortunes: that is a consideration which never enters into account.

There must be excluded any consideration based upon narrow, partisan views, or based on the political consequences. In arriving at a decision on such a sensitive issue as this, the Attorney General is entitled to seek information and advice from others but in no way is he directed by his colleagues in the government or by Parliament itself. In other words, prosecutorial decisions should be made with due attention to the requirements of the law.

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[67] Gil McKinnon, Q. C. and Keith Hamilton, *Taking Politicians Out of Prosecutions*, 52 Advocate Vancouver 843, 1994.
[68] *The hon. l J king ac, QC, The Attorney General, politics and the judiciary,* THE AUSTRALIAN LAW JOURNAL— VOLUME 74, pp. 444-460.
[69] Michael Code, *President Counsel's Responsibilities When Advising the Police at the Pre-Charge Stage"* (1998) 40 CRIM. L.Q. 326 AT 328-38.
[70] R. A. Melikan, *Mr. Attorney General and the Politicians,* The Historical Journal, Vol. 40, No. 1 (MAR., 1997), pp. 41-69, available at: <http://www.jstor.org/stable/3020952>.

The above discussion of the independence of the office of the Attorney General has been discussed by the eminent Attorney General of England Hartley William Shawcross, Baron Shawcross. This doctrine will be discussed by the authors as follows.

PROSECUTION WITH RESPECT TO SHAWCROSS DOCTRINE

In addition, the Attorney General under the Shawcross doctrine of Attorney General's independence from cabinet,[71] states that the Attorney General is free to consult with Ministers of the President about the public interest implications of legal decisions, provided that the he does not take direction from those ministers or the Cabinet.[72]

The true meaning of the doctrine is that it is the duty of the Attorney General, in deciding whether or not to authorize the prosecution, he should acquaint himself with all the relevant facts of the case, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy.[73] In order so to inform himself, he may, although (Lord Hartley William Shawcross, Baron Shawcross) does not think he is obliged to, consult with any of his colleagues in the government, and indeed, as Lord Simon once said, "*He would in some cases be a fool if he did not"*.[74] On the other hand, the assistance of his colleagues in the government is confined to informing him

[71] James W. Diehm, The *Government's Duty To "Seek Justice" In Civil Cases*, 9 Widener J. PUB. L. 289, 1999-2000.
[72] *Ibid.*
[73] The Honorable Marc Rosenberg, *The Attorney General and the Prosecution Function on the Twenty-First Century,* Vol. 43(2) Of Queen's Law Journal, P. 813-862 (Queen's University, Kingston, 2009).
[74] H Shawcross, *'The Office of Attorney General'* (1954), *Parliamentary Affairs,* Vol. VII, No 4, 381.

of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be.[75] The responsibility for the eventual decision rests with the Attorney General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.[76]

An Attorney General who seeks to sustain his privileged constitutional status as the guardian of the public interest, in the widest sense of that term, may seek, and frequently would be seriously at fault in failing to do so, advice from whatever quarter, ministerial or otherwise, that may help to illuminate the decision confronting him. [77]What is absolutely forbidden is the subjection by the Attorney General of his discretionary authority to the edict of the Prime Minister or the Cabinet or Parliament itself.[78] The cabinet or the council of ministers has the right to question and criticise the Attorney General. It does not have the right to direct the Attorney General in the discharge of his constitutional duties.[79] The absolute independence of the Attorney General on questions of prosecution policy is accepted as an important constitutional principle.[80]

POLITICIZATION OF OFFICE AND DOCTRINE OF PLEASURE

An appointed Attorney General is subject to interest group politics and all the potentially compromising influences. An appointed Attorney General could be product of political cronyism and therefore be subject to under political pressures and interference from the cabinet in deciding whether to make an

[75] *Ibid.*
[76] *Supra* note 70.
[77] *Supra* note 73.
[78] Grant Huscroft, *Reconciling Duty and Discretion: The Attorney General in the Constitution Era*, 34 QUEEN'S L.J. 773, 2008-2009.
[79] *Ibid.*
[80] *Ibid.*

inquiry, initiate an investigation, or bring an action.[81] This would happen in as he is appointed under article 76(1)[82] of Constitution of India and article 76(4)[83] which lay down that the Attorney General shall hold office during the pleasure of the President.[84]

The Origin of the pleasure doctrine was discussed in the case of *Union of India v. Tuslsiram Patel*[85], that:

"Servants Of The President Hold Their Appointments At The Pleasure Of The President Or Durante Bene Placito ("During Good Pleasure" Or "During The Pleasure Of The Appointor") As Opposed To An Office Held Dum Bene Se Gesserit ("During Good Conduct"), Also Called Quadiu Se Bene Gesserit ("As Long As He Shall Behave Himself Well").[86]"

In the case of *Ram Jawaya Kapur v. State of Punjab*[87] where the Supreme Court has observed that:

"*The expression 'aid and advice' may apparently suggest that it is left to the President to accept the advice or ignore the same and thus the decision on all matters will be of the President himself. But on a true Interpretation of the expression in the context of the relevant provision of the Constitution, it becomes*

[81] William N. Thompson ,Lee Gough, John Wallace, *Conflicts of Interest and the State Attorneys General*, 15 WASHBURN L.J. 15, 1976.
[82] *Supra* note 10.
[83] *Ibid.*
[84] *Supra* note 10.
[85] *Union of India v. Tuslsiram Patel*, AIR 1985 SC 1416: 1985 SCR Supp. (2) 131.
[86] *Ibid.*
[87] AIR 1955 SC 549: 1955 2 SCR 225.

abundantly clear that the functions of Ministers or Council of Ministers are not merely giving advice; they can take decisions which must take effect.[88]"

In *B.P Singhal v. union of India*[89], the Supreme Court held that:

"*The President is bound to act in accordance with the advice of the council of ministers*."[90]

Now, from the above discussed cases we can infer that if the Attorney General is not in alignment with the political ideas of the government, then government will lose confidence in Attorney General which would amount to his removal by the President who acts on the aid and advice of the council of ministers of government. Hence this office would become political one and will lose its independence.

But, there is a distinction between the doctrine of pleasure as it existed in a feudal set-up and the doctrine of pleasure in a democracy governed by rule of law.[91] In a nineteenth century feudal set-up unfettered power and discretion of the President was not an alien concept.[92] However, in a democracy governed by Rule of Law, where arbitrariness in any form is eschewed, no Government or Authority has the right to do what it pleases.[93] The doctrine of pleasure does not mean a licence to act arbitrarily, capriciously or whimsically.[94] It is presumed that discretionary powers conferred in absolute and unfettered terms on any

[88] *Ibid.*
[89] (2010) 6 SCC 331.
[90] *Ibid.*
[91] *Ibid.* at 88.
[92] *Ibid.* at 88.
[93] *Ibid.* at 88.
[94] *Ibid.* at 88.

public authority will necessarily and obviously be exercised reasonably and for public good[95].

As we have seen that the pleasure doctrine operates on the aid and advice of the council of ministers which makes this constitutional body a political one. Also, as the removal of the Attorney General is governed by the doctrine of pleasure, his removal might be arbitrary. But, this is contrary to the fundamentals of democracy which is that the power of the doctrine of pleasure shouldn't be whimsical in nature and must be backed by reasons. So, the removal of the Attorney General arbitrarily should not happen in country as this a democratic nation.

CONCLUSION

Wise members of the legislature often ask for advice as to whether the proposed legislation, conflicts with an existing legislation and if not is it constitutional and whether the language proposed has an established legal meaning and import. On these important questions the Attorney General's advice can be most helpful.

Lincoln's Attorney General, Edward Bates said of his office:

"The office I hold is not properly political, but strictly legal; and it is my duty, above all other ministers of state, to uphold the law and to resist all encroachment, from whatever quarter, of mere will and power".[96]

The motto "qui pro domina justitia sequitur" is roughly translated to mean "now comes he who prosecutes on behalf of justice"[97] the significance of

[95] *Ibid.* at 88.
[96] Arthur S. Miller, *The Attorney General As The President's Lawyer, In The Roles Of The Attorney General Of The United State,* DUKE LAW REVIEW 41, 51 (1968)

the motto is less in its history and more in the assertion and proposition that it provides. The office of Attorney General was perceived from its origin and through to the modern era as the officer tasked with carrying out his or her duties in the quest of law and justice, not politics. A reliance on the people is no doubt the most important control on the government; but experience has taught mankind the need of auxiliary precaution. It is important, at this time, to remind ourselves of the advancement that can be made towards this goal through the Attorney General's duty to ensure that government activities and legislation conform to constitutional requirements. The public and the legal profession should be observant to see that the Attorney General vigorously pursues this duty in a manner that respects the fundamental principles of independence and detachment that have historically guided the exercise of the Attorney General's responsibilities.

Also, as there is no legislative or constitutional basis for the independence of the Attorney General and that his functions as custodian of the public interest are not clearly defined. It would certainly help improving this situation if the duties and responsibilities office of the Attorney General is carefully defined and that the independence of the Attorney General in the exercise of such functions be given by way of a statue.

The authors would like to conclude by saying that the important aspect of Attorneys general's job is to serve as an overseer over the executive branch, keeping an eye around on the government and the administration to prevent and prosecute unlawful conduct. Certainly the existence of an elected Attorney General without political loyalty or administrative accountability to the governor

[97]Arthur H. Garrison, *The Opinions By The Attorney General And The Office Of Legal Counsel: How And Why They Are Significant*, 76 Alb. L. Rev. 217, 2012-2013.

and state agency officials and with investigative and prosecutorial authority constitutes a check and balance feature of the executive branch of state government, a means for ambition to counteract ambition.

SPACE TOURISM – EXPANDING THE HORIZON

*ADITYA KUMAR PANDEY & *HARSHIT TIWARI

INTRODUCTION

It is very evident that after the first successful operational flights the number of tourists willing to go in space will be more and proportionately the tickets for such space flights will also increase. Such increase in demand of interest of tourists will give a boost to the confidence of the commercial space flights to increase the facilities and design of their spacecrafts.

Such increase in the market will create a competition among various commercial companies which will lead to enhancement and development of new technology as that is the basis on which they can claim better prices.

The companies will focus on increased safety which is the key in commercial flights business. Enhanced performance and increase in the flight time will play a major role as this activity will attract more people and this is what tourists demand.

BRIEF HISTORY OF SPACE TOURISM:

While tracing history one thing which is evident is that travel has always been a charm for humans. To seek new places is not new for humans and this very habit of humans forms the basis for growth in tourism sector. Today earth became a small place to explore for humans and now humans are exploring outer space. So now the concept of Space tourists is no more a dream rather it is now

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reality. Since the 1960s, around 450 astronauts have gone into outer space but very few rich individuals have gone into space as tourists.

Outer space exercises have grown after Sputnik 1 was launched, humans are on the verge of the next great 'leap' into space. In April 2001, Dennis Tito an US national spent six days in International Space Station (ISS) and for the first time any private individual has paid for space travel and for stay in hotel. His trip was confirmed after there was agreement between all ISS partners[2]. However NASA was against his visit and said that sending an private individual on ISS would risk other persons. But later after the success of his journey, NASA itself became active in the concept of space tourists.

In April 2002, Mark Shuttleworth, from South Africa became the world's second space tourist to be launched onto the ISS. Then there was an U.S. based scientist and entrepreneur Gregory Olsen.

A History was made in Space Tourism, when Fourth space tourist Anousheh Ansari became first female space tourist to enter in space and first astronaut of Iranian slide.

[2] The partners in the ISS Project are the US, Russia, Japan, Canada, and 11 Member States of the European Space Agency (Belgium, Denmark, France, Germany, Italy, The Netherlands, Norway, Spain, Sweden, Switzerland, and the United Kingdom): see Art. 3(b) of the intergovernmental agreement that formalises the relationship between the ISS Partners, the Agreement concerning Co-operation on the Civil International Space Station, opened for signature 29 January 1998, TIAS No. 12927 (entered into force 27 March 2001) ('ISS Agreement').

WHAT IS SPACE TOURISM?

The term 'space tourism' means 'any commercial activity offering customers direct or indirect experience with space travel'[3]. A space tourist means 'someone who tours or travels into, to, or through space or to a celestial body for pleasure and/or recreation'[4]. Further it be classified into

I. ORBITAL SPACE TOURISM

In orbital spaceflight orbital velocity is to be obtained for the space vehicle so that it can fly along the curvature of the Earth. The velocity required to stay in an orbit is called orbital velocity and depends on the altitude of the orbit. For a circular orbit at an altitude of around 200 kilometers, the orbital velocity required is approximately 28 000 kilometers per hour[5]. So this very need of high speed makes orbital space flight technically difficult and costly.

Orbital public space travel is currently limited to one spacecraft, the Russian Soyuz vehicle. Two times in a year, Russia launches Soyuz on supply flights to the ISS as only two cosmonauts are required to fly the Soyuz, a third seat on each mission is for to probable space tourists.

Although the Soyuz is currently the only option for orbital public space travel, other potential, future options exist:

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[3] Stephan Hobe and Jürgen Cloppenburg,'*Towards a New Aerospace Convention? Selected Legal Issues of "Space Tourism*", (2004) 47 Proceedings of the Colloquium on the Law of Outer Space 377.

[4] Zeldine Niamh O'Brien, *'Liability for Injury, Loss or Damage to the Space Tourist',* (2004) 47 Proceedings of the Colloquium on the Law of Outer Space 386.

[5] The orbital altitude of the International Space Station is between 370 and 460 kilometres and its orbital velocity is approximately 27 500 Kilometres per hour: European Space Agency, 'International Space Station: Final Configuration' (Fact Sheet No 1, 3 November 2005), *available at*: <http://www.spaceflight.esa.int/users/downloads/factsheets/fs001_12_iss.pdf>.

GOVERNMENT SPACECRAFT/PROGRAMS

- Space Shuttle (U.S.)
- Shenzhou (China)
- Defense Advanced Research Projects Agency (DARPA) Responsive Access, Small Cargo, Affordable Launch (RASCAL) Program (U.S.)
- NASA's 2nd Generation Reusable Launch Vehicle Program (U.S.)

COMMERCIAL SPACECRAFT

- K-1 (Kistler Aerospace)
- SA-1 (Space Access)
- Starbooster (Starcraft Boosters, Inc.)
- Neptune (Interorbital Systems

SUB-ORBITAL TOURISM

A suborbital flight is a trip to space that does not involve sending the vehicle on into orbit. If a spacecraft makes a ballistic trip to an altitude of 100 km (62 miles), basically flying in a wide arc from the ground and back down again, it is called a sub-orbital jump. Below is a partial list of some of the suborbital vehicles under development:

SUBORBITAL VEHICLES (AND DEVELOPERS)

- Armadillo (Armadillo Aerospace)
- Ascender (Bristol Spaceplanes)
- Astroliner (Kelly Space and Technology)
- Canadian Arrow (Canadian Arrow)
- Cosmopolis XXI (Myasishchev Design Bureau)

- Millennium Express (Third Millennium Aerospace)
- Pathfinder (Pioneer Rocketplane)
- Proteus (Scaled Composites, LLC)
- SC-1 and SC-2(Space Clipper International)
- Space Cruiser (Vela Technology Development)
- Starchaser (Starchaser Industries)
- Xerus (XCOR)

II. INTERCONTINENTAL ROCKET TRANSPORT

Intercontinental rocket transport infers a travel through space with a specific end goal to reduce the travel time taken with one point on Earth then onto the next. This idea is alluring for the military and also business transportation space tourists. However, the technical complexity are substantial in terms of the required velocity and requirement for a robust thermal protection system for proper re-entry to the Earth's atmosphere and this complexity can be best understood by taking the example of Concorde aircraft.

PHASES IN SPACE TOURISM

Like any type of business, the space tourism will grow upon its inception. With such onset a relatively insufficient and relatively exorbitant-priced 'pioneering phase', the prices will go down and range of activities will prosper as it matures

PIONEERING PHASE

Gordon Woodcock of Boeing proposed "space adventure travel", and it is suitable to depict the first phase. There will be less tourists - from hundreds per

year to thousands per year; high prices, $50,000 and up; and closer to "adventure travel" than to luxury hotel-style.

MATURE PHASE

There will be growth of tourists in this phase, thousands of passengers per year to hundreds of thousands per year. Low cost ticker and different airports will facilitate departure facilities.

MASS PHASE

There will be fall in the price of tickets and the range of tourists will be from hundreds of thousands to millions of passengers per year.

LEGAL POSITION OF SPACE TOURISTS

The five space treaties which reflect the international law of outer space i.e. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies[6], Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space[7] , Convention on International Liability for Damage Caused by Space Objects[8], Convention on Registration of Objects Launched into Outer Space[9], Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space[10], and sets of principles, namely, Principles Governing the Use by States of Artificial Earth Satellites for

[6] Opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967).
[7] Opened for signature 22 April 1968, 672 UNTS 119 (entered into force 3 December 1968).
[8] Opened for signature 29 March 1972, 961 UNTS 187 (entered into force 1 September 1972).
[9] Opened for signature 14 January 1975, 1023 UNTS 15 (entered into force 15 September 1976).
[10] GA Res 1962 (XVIII), UN GAOR, 18th sess, 1280th plen mtg, UN Doc A/RES/1962 (XVIII) (13 December 1963).

International Direct Television Broadcasting[11] ,Principles relating to Remote Sensing of the Earth from Outer Space[12], Principles relevant to the Use of Nuclear Power Sources in Outer Space[13], and Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries[14], make no mention regarding 'tourists', but they do consider space travel done by 'astronauts', including 'personnel of a spacecraft'. The Outer Space Treaty considers and places astronauts as 'envoys of mankind'[15], and obligates states for giving 'all possible assistance' to astronauts in case of an 'accident, distress or emergency landing'[16]. In the Rescue Agreement it is made states' responsibility to rescue and return, both 'astronauts' and 'personnel of a spacecraft'[17]. However in the Moon Agreement 'any person' on the Moon is to be referred as an astronaut[18].

It is rather feasible that space tourists would form a part of 'personnel of a spacecraft' and hence bringing them within the scope of rescue and return obligations of the Rescue Agreement. Noting that in the Rescue Agreement it is specifically settled that it is 'prompted by sentiments of humanity', it can be safely concluded that it will include space tourist flights also.

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[11] GA Res 37/92, UN GAOR, 37th sess, 100th plen mtg, UN Doc A/RES/37/92 (10 December 1982). Note that, unlike other space related resolutions of the United Nations General Assembly, this resolution was not passed unanimously, but rather by a vote, in which most of the major developed (broadcasting) states at the time either abstained or voted against the resolution.
[12] GA Res 41/65, UN GAOR, 41th sess, 95th plen mtg, UN Doc A/RES/41/65 (3 December 1986).
[13] GA Res 47/68, UN GAOR, 47th sess, 85th plen mtg, UN Doc A/RES/47/68 (14 December 1992).
[14] GA Res 51/122, UN GAOR, 51th sess, 83rd plen mtg, UN Doc A/RES/51/122 (13 December 1996).
[15] Article V of the Outer Space Treaty requires states parties to 'regard astronauts as envoys of mankind'.
[16] Outer Space Treaty Art. V.
[17] Rescue Agreement Arts. 1–4.
[18] Moon Agreement art 10.

LIABILITY

The fall of Columbia Shuttle[19] has marked not only the hazardous side of space travel but has also highlighted the requirement for a conceivable set of measures of security regulation to govern commercial human space tours[20]. It is worthy to be mentioned here that two out of originally five (40%)[21] space shuttles have been lost in merely 130 flights which in itself violates safety margin requirements of NASA[22]. It becomes more unacceptable with the involvement of general public; as the minimum safety record/standard needs to be enhanced before allowing any such involvement. Furthermore, not only must there be suitable security models relating to the configuration, development and operation of a space tourism dispatch vehicle, but there should also be a system of obligation/responsibility and liability made at the universal level, supplemented by municipal law, to manage those circumstances when a space traveler endures harm or loss, so as to uproot current instabilities encompassing the remedies that may be available, and to guarantee that fitting danger evasion methods are effectuated.

The narrowly defined current liability regime of *corpus iuris spatialis in iuri gentium*, as is evident, is highly incompetent to tackle the commercial

[19] See, e.g., '*The Columbia Space Shuttle Tragedy'*, *The Guardian* (online), 2010 , available at: <http://www.guardian.co.uk/gall/0,,888237,00.html>

[20] Freeland Steven, *"fly me to the moon: how will international law cope with commercial space tourism?"* available at < http://www.law.unimelb.edu.au/files/dmfile/download2f6a1.pdf>

[21] Space Shuttle Endeavour Mission STS-130 commenced as this article was being finalised: NASA, *Space Shuttle* (2010) <http://www.nasa.gov/mission_pages/shuttle/main/index.html>

[22] Paul Recer and Broward Liston, '*More Shuttles Are Likely to Be Lost, Safety Panel Tells NASA*', *The Sydney Morning Herald* (Sydney) 28 March 2003, p. 16.

evolution of space travels, for it was not designed to meet such requirements[23]. Practically speaking this liability regime has never been put in use, not even in 1978 COSMOS 954 accident.[24]

In like manner, the following part will form a layout of the current legal regime with regard to liability for damage and will assess the methods and lawful bases under the different agreements and treaties.

LIABILITY TOWARDS STATES AND THIRD PARTIES

As per Article 8 of Draft Articles on Responsibility of States for Internationally Wrongful Acts, actions of private individuals cannot bind the states[25]. However in Space Law no such distinction has been laid down and therefore there is no private individual specific provision in Convention on International Liability for Damage Caused by Space Objects 1972[26]. Therefore any launch procured by a private entity will be deemed to be procured by the state of nationality of that entity or the state issuing the license authorizing such launch[27].

Going further in next section we will examine this state oriented liability under *OST,* Liability Convention and municipal/domestic laws.

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[23] Dimitrios Buhalis and Carolos Costa, *Consumer, Products and Industry*, Butterworth Heinemann, 2006, p. 157.

[24] Kerrest, '*Liability for Damage Caused by Space Activities*' (n 65) p. 104.

[25] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (Supplement No 10 (A/56/10), November 2001) Article 8 (noting that states will only be responsible for private acts if the private 'person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct')

[26] As of 2007, the Convention has 82 ratifications and 25 signatories. Three European intergovernmental organisations, including the ESA, have accepted the rights and obligations provided for in the Convention.

[27] Liability Convention (n 64) Article I(c) denies a launching state as '(i) a State which launches or procures the launching of a space object; (ii) a State from whose territory or facility a space object is launched.

OUTER SPACE TREATY (OST) & INTERNATIONAL LAW

1963 UN Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, the *OST*, in Article VI holds the states liable, internationally, for activities carried out by either governmental or non-governmental agencies[28] which is unlike aviation law whereby damage if caused by activities of any private entity, say any airliner, cannot hold the government responsible. Article VI further continues to state the responsibility of the states to ensure the adherence/safeguard of provisions of *OST* and international law and thus, as noted above, the state will be held liable for any such breach done even by private entities.

The liability arising thereof is dealt under Draft Articles on Responsibility of States for Internationally Wrongful Acts[29]. Any breach of international obligation of State, as per these articles, is actionable *per se*[30]. The provisions also provide for full reparation either through monetary damages or, *resitutio in integrum*[31] . Article XXX establishes the requirement for the offending state 'to cease that act [and] to offer appropriate assurances and guarantees of non-repetition…' to reinstate any loss of rapports caused due to the said act of breach.

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[28] OST Article VI provides that: 'States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities'.

[29] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (Supplement No 10 (A/56/10), November 2001).

[30] *Ibid.* Article 2. Article 12 further provides that '[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character'; See generally, Corfu Channel Case (*United Kingdom* v. *Albania*) [1949] ICJ Rep 4 (ruling that Albania committed an internationally wrongful act against the United Kingdom).

[31] Paul G Dembling, '*A Liability Treaty for Outer Space Activities*', 1970, 19 American University Law Review 33, p. 41.

However, things get bit complicated yet interesting when the classification of space tourism, previously mentioned in this paper, is taken into consideration. In this case the law governing liability is to be determined by 'attachment to aircraft'; while the sub-orbital vehicle remains attached to the aircraft, the air law relevant in that scenario comes into effect but when both are separated space law comes into play. Interestingly enough, both the space objects will become subject of space law if the space capsule is launched by a rocket[32].

Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome Convention) regulates the liability of a third party during transportation by aircraft[33]. Although, this liability is limited[34] but in case the claimant establishes that damage was caused as a result of "a deliberate act or omission of the operator…done with the intent to cause damage"[35], unlimited liability will apply.

It is to be noted that the relevance of Rome Convention is limited due to very few instances of its ratification. As of today merely 49 ratifications have been seen. Many prominent countries, excluding Russia, are not a party to this convention.

LIABILITY REGIME

Under the Liability Convention there exists no legal mechanism to recover the damages. Generally the compensation is measured in the light of

[32] Stephan Hobe, *Legal Aspects of Space Tourism*, Nebraska Law Review, Volume 86, Issue 2, Article 6.
[33] Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface ("Rome Convention") Oct. 7, 1952, 310 U.N.T.S. 181, available at:
<http://www.dot.gov/ost/ogc/Romel952.pdf>.
[34] *Ibid.* at Art. 11.
[35] *Ibid.* at Art. 12(1).

principles of justice and equity. Article II of the convention establishes an absolute liability arising out of any damage caused by a space object and suffered on the surface or to an aircraft in flight. One key feature of this provision is the absence of prerequisite proof of fault on the part of launching state[36].

However, in Article III of this convention the existence of fault is *sine qua non*, when damage is caused by persons, space objects or other property of State which launched the space vehicle. It is evident that the concepts of liability in above mentioned articles is different from the liability under Article VI of *OST*, where unlike Liability Convention, States are responsible for ALL the activities in the outer space.

In totality the liability convention obligates the member States to regulate and supervise the private entities so as to ensure that their acts do not end up making the state liable. In the pro-privatisation world like that of today such provisions are unjustified, given the fact that not all the activities of private entities concern the state or the state may not be directly involved in such activity or procuring any benefit out of it.

This, in-effect, has a reverse adverse impact on the private space programmes, especially in the light of the fact that the liability convention has placed no limit over the amount of compensation which can be sought under its provisions. The states facing the liability might seek re-imbursement, from that private entity causing the damage, as per the provisions of national legislation in this regard or on the basis of terms of licensing. This will hamper the growth of not only private space programmes but also that of national programmes as the states might get apprehensive of associated financial risks.

[36] Kerrest, '*Liability for Damage Caused by Space Activities*', (n 65) 96.

Another impact of such obligation will be that states will start heavily regulating the reimbursement of compensation paid by that state to the state suffering damage and that may lead or instigate the private entities to opt for such launching state which are either incompetent or uninterested to enforce the international norms upon them. This might lead to forum-shopping whereby for same kind of events different compensations will be given[37]. It will be fair to hold that, 'the Liability Convention's complete failure to hold private entities accountable poses problems for all commercial space developments.'[38]

NATIONAL LEGISLATIONS

The role of national legislations in complementing the international liability regime can be best understood by a brief case study of various countries' legislations. But it is to be noted that many states lack laws to regulate their existing space programs; like India "has not put in place a law regulating space activities by Indian nationals and corporations within Indian Territory."[39] Various states are using only licensing policy to regulate the commercial space activities and that also determines the status of launching status but they do not specify the extent of jurisdiction over these private entities.[40] Let us now examine three

[37] Xue Hanqin, *Trans-boundary Damage in International Law*, Cambridge University Press 2003, pp. 77-78.

[38] Beck Brian, '*The Next, Small, Step for Mankind: Fixing the Inadequacies of The International Space Law Treaty Regime to Accommodate the Modern Space Flight Industry'* (2009) 19 Albany Law Journal of Science and Technology 1, p. 18.

[39] C. Jayaraj, India's Space Policy and Institutions, in United Nations treaties on outer space: actions at the national level, Proceedings of the United Nations, Republic of Korea Workshop on Space Law, U.N. Office of Outer Space Affairs, ST/SPACE/22, at 106 (Daejeon, Republic of Korea, Nov. 3-6, 2003) available at:
<http://www.unoosa.org/pdf/publications/st_space_22E.pdf>.

[40] Among these countries are Australia, Space Activities Act 1998, No. 123 (1998), *available at* http://www.unoosa.org/oosa/SpaceLaw/national/australia/space_activities_act_1998E.html; Brazil, Ministry of Science and Technology Brazilian Space Agency Administrative Edict N. 27, June 20, 2001, *unofficial translation available at*

major national regimes which are made as an attempt to resolve the jurisdiction issue.

FINLAND

Though Finland is not among the major state players in the 'Space Race', its penal laws are worthy to be noted here for transcending its jurisdiction even into outer space. Rather than counting regional necessities in the components of the individual wrongdoing, the Finnish code makes a sweeping jurisdictional proclamation toward the start of the code viably augmenting its whole criminal law. To begin with, the Finnish code utilizes the detached identity guideline to amplify its purview over law violations perpetrated against its residents, however just if that wrongdoing is culpable by more than six months detainment.[41] Likewise, the nationality guideline has been systematized, however in the event that the wrongdoing is submitted outside the domain of any state the act again

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http://www.unoosa.org/oosa/SpaceLaw/national/brazil/administrative_edict_27_2001E.html;
The Russian Federation, Law of the Russian Federation, *About Space Activity*, Decree No. 5663-1 of the Russian House of Soviets, *unofficial translation available at* http://www.unoosa.org/oosaddb/showDocument.do?documentUid=312 (the Russian code does affirmatively extend its laws on board its vessels);
South Africa, Space Affairs Act 1993, *available at* http://www.unoosa.org/oosa/SpaceLaw/national/south_africa/space_affairs_act_1993E.html;
United Kingdom, Outer Space Act chap. 38 (1998), *available at* http://www.unoosa.org/oosa/SpaceLaw/national/united_kingdom/outer_space_act_1986E.html;
and Ukraine, Ordinance of the Supreme Soviet of Ukraine, On Space Activity, Law of Ukraine, Nov. 15, 1996, *unofficial translation available at* http://www.unoosa.org/oosa/SpaceLaw/national/ukraine/ordinance_on_space_activity_1996E.html.
For an overview of these types of laws *see* United Nations Committee on Peaceful Uses of Outer Space (UNCOPUOS), Legal Sub-Comm., *Review of existing national space legislation illustrating how states are implementing as appropriate, their responsibilities to authorize and provide continuing supervision of non-governmental entities in outer space*, UN A/AC.105/C. 2/L. 224 (Apr. 2001).

[41] The Penal Code of Finland, at Chap. 1.§5 (2003), *unofficial translation available at* <http://www.finlex.fi/pdf/saadkaan/E8890039.PDF>.

must be deserving of more than six months detainment.[42] Finish Penal Code extends itself over the deemed international offences:

> *Finnish law applies to an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland (international offence).*[43]

Finland could utilize this procurement to amplify its law into external space to regulate as per the OST. This segment of the code could just be utilized to apply the criminal code to space voyagers that are either ready for items for which Finland is a launching state or Finnish nationals, as it has no commitment to administer others in space. There would at present be constraints relying upon how one characterizes "national activities" as utilized as a part of the OST.

SWEDEN

Swedish law is illustrative of the most widely recognized sort of enactment used to direct nationals in space. The Swedish Act on Space Activities obliges a license with a specific end goal to partake in space exercises in the territory of Sweden or by a "Swedish natural or juridical individual" regardless of the possibility that not in the domain of Sweden.[44] Essentially, there is a penal punishment if this act is violated.[45] Space Activities, as per the Decree on Space

[42] *Ibid.* at Chap. 1, §6(1).
[43] *Ibid.* at Chap. 1, §7(1).
[44] Act on Space Activities, § 2 (1982:963), *unofficial translation available at:* <http://www.unoosa.org/oosaddb/showDocument.do?documentUid=318&level2=none&node=SWE1970&level1=countries&cmd=add>
[45] *Ibid.,* §5. Either a fine or imprisonment of up to a year.

Activities, are to be controlled by the National Board of Space activities.[46] This control is as near to a remark on ward that can be found in the Swedish laws. The demonstration is hazy in respect to whether every individual participating must gain a license or if a license can be allowed to an organization. Probably (by the utilization of the statement "party" rather than person in §2) an organization could pick up a permit which would then leave open inquiries of jurisdiction for people. This is of specific import since Virgin Galactic has setup its first space port in Sweden.[47] Whether every individual space traveler will need to pick up a space license is questionable, on the grounds that the expression "space activities" is not particularly characterized, making it hard to figure out if mere travel through space is a space activity or not. At last the Swedish law is not sufficiently positive to take care of jurisdictional issues.

UNITED STATES OF AMERICA

Apart from being a leading country[48] in Space Race the United States of America is also ahead in terms of legal framework governing those activities. The jurisdiction of this framework is extra-territorial through its Special Maritime and Territorial Jurisdiction legislation:

> *Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial*

[46] Decree on Space Activities, § 2 (1982:1069), *unofficial translation available at* <http://www.unoosa.org/oosaddb/showDocument.do?documentUid=319&level2=none&node=SWE1970&level1=countries&cmd=add>

[47] Selding Peter de, '*Virgin Galactic Strikes Deal with Swedish Government'*, SPACE.COM, Jan. 28, 2007, available at: <http://www.space.com/news/070128_sweden_virgin.html>.

[48] Japan Aerospace Exploration Agency, *supra* note 21, at 32 (noting the United States "represents eighty percent of the total investment in space activities").

Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.[49]

The augmentation of jurisdiction by this law is in accordance with the Outer Space treaties, yet it is not by any means clear concerning how far it augments. Jurisdiction is assuredly accorded to the United States on a vehicle, however, there is no remark as to the impacts of the entryways of the vehicle being opened in space. Besides, the beginning provision practically augments jurisdiction over "any vehicle used or designed for flight or navigation in space" The jurisdiction applies to the region of the vehicle and not to the domain outside the vehicle, subsequently the result is that an individual who leaves the vehicle likewise leaves the jurisdiction of the United States.[50]

So, in the mugging situation, if the mugger had been on a US space object he would have left the jurisdiction of the US. The US could at present utilize its extraterritorial jurisdiction that applies to global spaces, yet in the event that the not one or the other the mugger nor the exploited person were US

[49] 18 U.S.C. §7(6) (2006).

[50] 18 U.S.C. §7(6) (2006) 131 This sort of jurisdiction has been held to extend to an Arctic iceberg in a manslaughter case. See *United States* v. *Escamilla*, 467 F. 2d 341 (4th Cir. 1972) (the en banc appeals court was equally divided on the issue of jurisdiction and therefore upheld the decision of the lower court to exercise jurisdiction.) But see Smith v. United States, 507 U.S. 197, 204 (1993) ("we assume that Congress legislates against the backdrop of the presumption against extraterritoriality.").

citizens,[51] the mugger would be invulnerable from indictment, on the grounds that US courts will decline to uphold extraterritorial jurisdiction without confirmation of particular Congressional intent.[52] Therefore, a wrongdoing submitted by a space explorer who was not personnel or a US resident yet had left the limits US space item would be outside US jurisdiction.

ADVOCATING FOR AN INTERNATIONAL CONVENTION

The current space law regime is unable to bear the burgeoning space tourism industry as 'the backbone of international space law is too inflexible to be a stable basis for space tourism'. This article has outlined the deficiencies of the current framework and has advocated for a new international convention, one which is dedicated solely to the regulation of commercial space travel, thereby eliminating uncertainties. Such a uniform instrument should take into account the provisions of the already-existing air law regime and consider the regime as a model, particularly in regards to issues of liability. The creation of a comprehensive legal policy in this regard is a key element of the overall development of the commercial aspects of space. On this basis, economic activity in space needs to be accompanied by the simultaneous implementation of a legal framework through which these activities will be regulated by an international organisation, with a view to gaining effective endorsement as a unilateral system.

[51] 18 U.S.C. §7(7) (2006).

[52] *See McCulloch* v. *Sociedad Nacional de Marineros*, 372 U.S. 10, 20-21 (1963) (looking for and finding no "construction which would exert United States jurisdiction over and apply its laws to the internal management and affairs of the vessels here flying the Honduran flag, contrary to the recognition long afforded them not only by our State Department but also by the Congress.").

CONCLUSION

The corpus of existing universal space law speaks to an imperative base from which to create the lawful apparatuses to legitimately manage the upcoming phase of space activities. Yet it is not sufficient even for present purposes, in addition to for the impending decades. The appearance of space tourism brings up numerous unanswered legitimate issues, some of which have been highlighted in this article. Other legitimate issues will likewise emerge. As more space tourism (and other) exercises happen, fitting debate determination methods must be settled upon to manage clashes that will inescapably emerge, both at the public and private international law level

The utilization of Outer Space should be based upon the principles of cooperation and common heritage of mankind, which have pivotal importance in this era of expansion of mankind's spatial conscience.

These issues speak to extensive difficulties in the matter of how international law, fusing the worldwide legitimate regulation of space, will have the capacity to adapt to future exercises in space, including the appearance of commercial space tourism. The path in which the law is created and adjusted to meet these difficulties will be imperative for space itself, as well as for the generation yet to come!

"It is difficult to say what is impossible, for yesterday's dream is today's hope and tomorrow's reality"- **ROBERT GODDARD**

DISTANT SILENCES AND DEFAULT JUDGMENTS: ACCESS TO JUSTICE FOR TRANSNATIONALLY ABANDONED WOMEN IN INDIA

***PRITI RANA**

INTRODUCTION

Transnational migration of people is not a new phenomenon but the new heights that it is now scaling thanks to advances in the field of communication and transport technologies and the increasing interdependence of nation states is unprecedented in the history of the humankind. In today's globalised world the movement of men and women within a continent or from one continent to another for different reasons, ranging from employment to business or from education to tourism, marriages and divorces on a transnational scale are on the rise. With the increasing number of foreign marriages and divorces, a significant rise in matrimonial disputes is taking place.[1] There have always been a large number of Indians living abroad, a substantial number of Indians have settled in the West and are prospering in places like the United States, Canada, Australia, Germany, France and the United Kingdom. The lure for setting in foreign jurisdictions attracts a sizeable Indian population, but the problems created by such migration largely remain unresolved.[2] The legal problems relating to the international dimensions of marriage and divorce are also on the rise. Advances in the field of information and technology especially the internet, have brought to the fore new problems as far as celebration of foreign marriage is concerned. As a result of these developments it is not unusual to come across cases where

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[1] See generally *Y. Narsimha Rao* v. *Y. Venkata Lakshmi*, (1991) 2 SCR 821.

[2] Law Commission of India, Two Hundred and Nineteenth Report on Need for Family Law Legislations for Non-Resident Indians, March, 2009.

husband and wife reside in different countries, possess domicile in a third country and their children reside in a fourth country.

Due to a wide divergence among the personal laws (including private international law rules), courts of different countries are now confronted with insuperable difficulties in adjudicating disputes arising therefrom. Globalisation and greater mobility of the world population are bound to make the task of the courts more difficult than ever. There are cases, where a citizen of this country marries here, and either, one or other both migrate to foreign countries. Marriages between parties, at least one of whom, is an Indian national are being solemnised here or abroad. There are instances where parties having married here have been either domiciled or resident in different foreign countries. The problems in the field of marriage and divorce have been confronted by Indian courts many a times. To deal with a large number of foreign decrees in matrimonial matters, India like other countries is in need of a well developed body of private international law rules on solemnisation and recognition of marriages, recognition of a foreign decree of divorce, nullity of marriage etc.

It is true that each country has its own culture, which regulates inter-personal relationship in the field of family law. Nevertheless, there is a need for the unification and codification of rules of conflict of laws relating to matrimonial matters so as to prevent limping marriages. Requirements of rule of law and gender justice on the one hand, and the need to protect the basic human rights of parties to a marriage on the other, also demand internationally accepted norms to deal with inter personal and international disputes. This paper attempts to analyse the Hague Convention, known as "The Hague Convention on the Recognition of Divorces and Legal Separations" that seeks to reconcile divergent

social and religious philosophies of different States, on basic questions of the nature of marriage and the desirability of divorce or of legal separation. However, the paper starts with the common issues in NRI marriages affecting the women in India.

NRI MARRIAGES AND STATUS OF WOMEN IN INDIA:

The issue of "NRI marriages" has gained paramount importance over the years as the problem of Indian women trapped in fraudulent marriages with Non-Resident Indians (NRIs)[3] and people of Indian Origin (PIOs) has assumed alarming dimension."Contemporary global shifts" have produced "new types of consumerism in the form of escalating dowry demands," increased transnational mobility, and fueled a desire by parents to have their daughters marry spouses living and working abroad. Against this transnational backdrop, wives are routinely "abandoned" by their husbands across borders: left without resources, divorced without consent, and strategically denied access to forums where they can advocate for their social and economic rights. The scale of the problem is staggering. By a 2012 estimate, over 30,000 women were abandoned in the state of Punjab alone.[4] This "transnational abandonment" of South Asian women by their husbands is "a new face of violence against women."[5]

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

[4]Urjasi Rudra & Shamita Dasgupta, Manavi, *Transnational Abandonment of South Asian Women: A New Face of Violence Against Women*, pp. 7, 18 (2011) (reporting that the "number of transnationally abandoned women in India has reached staggering proportions. Nearly every Indian state has women deserted by non-resident Indian (NRI) husbands although not all such men are immigrants to the U.S. A significant number of men who have migrated to other countries including Canada, U.K., Europe, and the Middle East have also deserted their wives and children in India. By a 2004 estimate, approximately 12,000 women were abandoned in the state of Gujarat, and according to a 2012 study, an estimated 30,000 women have been left behind in the state of Punjab. In 2008, India's minister for Over- seas Indian Affairs, Vayalar Ravi, stated that in Punjab alone, at least 20,000 legal cases were pending against NRI husbands, presumably for abandoning

In recent years, abandonment of Indian wives by their NRI (non-resident Indian) husbands has taken on epidemic proportions. The phenomenon of wives abandoned by their NRI husbands has been growing invisibly for more than a decade. Nearly every Indian state has women deserted by NRI men who live in various foreign countries including Canada, UK, various European and Middle Eastern countries, and the USA. The pattern of NRI wife abandonment falls into three categories: (a)a woman who is married before her husband migrates to a foreign country or while he is visiting India but is never sent sponsorship for a visa to join him; (b) a woman who has been residing abroad with her husband is either deceptively or coercively taken back to India and left there without her passport, visa, and money and thus without any way of rejoining her husband; and (c) a woman who is residing with her husband in a foreign country suddenly finds her husband has disappeared leaving her in the lurch.

According to the Ministry of Overseas Indian Affairs, some women are taken abroad only to be brutally battered, assaulted, abused both mentally and physically, malnourished, confined and ill treated by their husbands and sometimes their in-laws for dowry.[6] In *Venkat Perumal* v. *State of A.P,*[7] the wife has alleged that she was subjected to harassment, humiliation and torture during her short stay at Madras as well as US and when she refused to accept the request of her husband to terminate the pregnancy, she was dropped penniless by her husband at Dallas Airport in the US and she returned back to India with the help of her aunt and on account of the humiliation and agony she suffered miscarriage

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their wives. In Canada, there may be as many as 10,000 runaway grooms. However, the official estimates do not necessarily tally with the non-governmental numbers. According to Government of India's estimate, émigré husbands have abandoned at least 30,000 women in India, a number significantly less than what newspaper reports and NGOs suggest.").

[5] *Ibid.*

[6] *Marriages to Overseas Indians- A guidance booklet*, Ministry of Overseas Indian Affairs, p. 9

[7] (1998) DMC 523.

at Hyderabad. In certain cases, wives reach the foreign country of their husband's residence and are left waiting at the international airport, abandoned in a foreign country. They are deserted with no support or means of sustenance or the permission to stay on there. There are several cases where a woman later learns that her NRI husband has given false information about his job, immigration status, or earning to con her into marriage. Some of these men turn out to be married already or living with another woman abroad.[8] Keeping in mind the socio cultural situation in India, once abandoned these 'holiday' brides lose everything including their social standing.

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

The problem in NRI marriages is manifold and is not only about the woman being abandoned in India but includes demand for dowry, cruelty and

[8] Kul Bhushan, *NRI Marriages: Dreams to Nightmares*, p. 113, 2006, Indo-Asian News Service, London.
[9] Marriages to Overseas Indians- A guidance booklet, Ministry of Overseas Indian Affairs, p. 9

forms of harassment, non-consummation of marriage, marriage of convenience, concealment of pre- existing marriage, *ex-parte* divorce etc. A most conspicuous disturbing trend, however, appears to be the easy dissolution of such marriages by the foreign courts even though their solemnization took place in India as per the Indian laws. The process of such divorce is filled with problems for women who are abandoned outside the country where their husbands reside. This is because in many cases, the women may never receive the legal notice of filing, a copy of the complaint or summons to appear. It has also been suggested that in some cases men's family may suppress such notices from being served in India and forge the recipient's signature to indicate legally binding acceptance.[10] Even when a notice is served properly, it may reach to the woman late with only couple of weeks left to respond. This time may not be sufficient for the woman to obtain visa, travel requirements and legal representation in the country of her husband's residence. Therefore she is unable to defend her own and in some cases her child's legal and financial interests in the case. Further, most women are unaware of foreign laws and often do not have easy access to appropriate legal advice in India.[11]

Even when an abandoned woman has lodged legal complaint in India either before or in response to her husband's legal case, foreign courts may not be aware of these proceedings as there may be miscommunications or delays which allow the husband to obtain the *ex-parte* decrees without contest. Further, the two countries involved may have different laws- for instance, fault- based divorce is no longer recognized in Canada (which now recognizes only irretrievable breakdown of marriage as grounds for divorce) while India still has

[10] Shamita Dasgupta, "*Woman Abuse in a Globalising World: Abandonment of Asian Women*" in *Indian Journal of Research,* 2011, p. 4.
[11] Ranjana Sheel, "*The Migrant Indian Community*" in *Indian Journal of Gender Studies,* 28, 2011, p. 12.

fault- based divorce and does not recognize irretrievable breakdown of marriage as a separate ground of divorce. The courts may also ignore each other's judgments, and thereby issue conflicting orders- for example, the Indian law of restitution of conjugal rights[12] has no equivalent in most US and Canadian jurisdictions and therefore courts in these jurisdictions may not consider this law. Such jurisdictional disagreements and legal contradictions often endanger the rights of women who are not in a position to protect them in the first place. Since there is no comprehensive and special law to govern such aspects, women are being deprived of justice.

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

[12] Sec. 9, the Hindu Marriage Act, 1955.

In *Harmeeta Singh* v. *Rajat Taneja*,[13] the Delhi High Court passed an order of restraint against the husband to stop him from continuing with divorce proceedings in the U.S. while a maintenance case was going on in India filed by the abandoned wife. The High Court asked the husband to present a copy of this order to the U.S. court and observed that if he still obtained a divorce from the U.S. courts, such a divorce would not be recognized in India. Since under Section 44A of the Civil Procedure Code (CPC) the United States was not a "reciprocating territory," orders issued by a U.S. court would not be automatically recognized by the Indian court. As per CPC, foreign decrees from non-reciprocating countries must be filed in Indian District courts to seek recognition and enforcement.

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

In a similar case, the Supreme Court of India refused to recognize a divorce decree obtained by the abandoning spouse from a Circuit Court in Missouri. The Circuit Court in Missouri had issued the decree on the basis that the marriage was "irrevocably broken" and the petitioner had fulfilled the minimum requirement of residence having lived there for ninety days prior to filing for divorce. In *Veena Kalia* v. *Jatinder N.* Kalia,[14] the Delhi High Court

[13] 102 (2003) DLT 822.
[14] AIR 1996 Del. 54.

made an observation that even if the husband succeeded in obtaining a divorce decree in the US, that decree would be unlikely to receive recognition in India as the Indian court had jurisdiction in the matter. The Indian courts have also made this very clear in their own pronouncements that they will not simply mechanically enforce judgments and decrees of foreign courts in family matters. The Supreme Court of India in *Y. Narsimha Rao* v. *Y. Venkata Lakshmi*[15]observed that "habitual residence" should not mean a temporary residence that can merely serve the purpose of obtaining a divorce decree and ruled, "The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married." The court itself laid down the only three exceptions to this rule:

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

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

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

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

[15] (1991) 2 SCR 821.

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

THE HAGUE CONVENTION ON THE RECOGNITION OF DIVORCES AND LEGAL SEPARATIONS:

The Hague Convention on the Recognition of Divorces and Legal Separations, 1970[16] is a complex piece of international legislation. It reconciles divergent social and religious philosophies of various States, on basic questions of the nature of marriage and the desirability of divorce or of legal separation. It seeks to reconcile differences in the approach of different systems to the problems of private international law involved. Article 1 (1) of the Convention[17] provides for recognition in one contracting State of divorces and legal separations obtained in another contracting State. Thus the Convention limits its application only to contracting States. Article 1 (1) also indicates that the duties of recognition assumed by contracting States under the Convention do not apply in the case of a State having plurality of legal systems to the recognition in that State of divorces and legal separations obtained in one of its constituent systems.

[16] Full text available at <http://www.hcch.net/upload/conventions/txt26en.pdf>. (last visited on 27.12.2014).
[17] Convention on the Recognition of Divorces and Legal Separations, 1970.

Article 1 (1) does limit divorces and legal separations to which the Convention applies, to those, which 'follow judicial or other proceedings officially recognized in that state and which are legally effective there.' The first clause of the paragraph, represents a fragile compromise between two opposing philosophies- 'recognition of divorces permitted or provided by the granting state irrespective of their form or method, and non-recognition of divorces emanating from systems which, by failing to establish official procedures, might fail to protect a depending spouse.' Thus the compromise formula adopted covers overseas divorces and legal separations obtained by judicial, legislative, executive or administrative process and probably religious procedure. The only conditions are that the decree must have been obtained in proceedings 'officially recognized' and 'legally effective'. Another interesting aspect of the Convention is its non-applicability to foreign 'negative decrees'. Though Article 9[18] permits the contracting States to refuse to recognize a foreign divorce or legal separation which is incompatible with a previous decision whether positive or negative, which by the law of the State in which recognition is sought determines the matrimonial status of the spouses.

Different legal systems adopt divergent approach to the problems of private international law in respect of divorce and legal separation. While common law countries give more weight to questions of jurisdiction and ignore the question of application of foreign law in matters of divorce and legal separation, civil law countries give due weight to the application of appropriate choice of law rules in respect thereof. The Convention, however, adopts the standpoint of common law systems of private international law rather than that of continental European systems. The principle basis of the Convention is that the

[18] *Ibid.*

duties of the contracting States to recognize foreign divorces and legal separations derive from the granting State's compliance with the tests of jurisdiction. The main objective of the Convention has been to reduce the incidence of limping marriages. But to achieve this objective the Convention does not adopt the extreme position that all foreign divorces should be recognized regardless of their jurisdictional basis. Such an approach may be possible within a limited group of States adopting essentially the same conflict rules in matters of divorce but it is certainly an impracticable proposition within a larger circle of States with divergent conflict rules. The Commission rejected this suggestion not only because of this reason but also in defence to the wishes of many delegates that the Convention should do nothing to encourage 'forum shopping'.

Under Article 2 of the Convention[19] a foreign divorce or legal separation shall be recognized if at the date of institution of proceedings in the State of origin, i.e. the State of divorce or legal separation the respondent had his habitual residence there. But a divorce or legal separation in favour of the petitioner shall not be recognized on the basis only of his habitual residence in that and the Convention requires that such habitual residence had continued for not less than one year immediately prior to the institution of proceedings or that the spouses have habitually resided there.

Historically, nationality has been the basic ground of jurisdiction in civil law countries. Its recognition as a basis of jurisdiction under the Convention was therefore a foregone conclusion. But the Conference admitted the nationality criterion with certain modifications in deference to the criticism voiced against it

[19] *Ibid.*

by certain delegates. Thus under the Convention nationality of the respondent is not recognized as a basis for the recognition of a foreign divorce or legal separation. But it allows for recognition of a divorce or legal separation on the grounds that both spouses were nationals of the granting State.[20] The petitioner's nationality is recognized as a ground of recognition, but only when coupled with such fortifying elements as (i) petitioner's own habitual residence in his national state, or (ii) his habitual residence there for a continuous period of one year falling at least in part, within the two years preceding the institution of proceedings. The Convention also permits recognition of divorce on the basis of petitioner's nationality of the granting State if both the following conditions were satisfied: (a) the petitioner was present in that State at the date of institution of the proceedings and (b) the spouses last habitually resided together in a State whose law, at the date of institution of the proceedings, did not provide for divorce.[21]

Although domicile has been the historic basis of jurisdiction in personal matters in common law countries. As a result the Convention allows the concept of 'domicile' in an indirect way. Article 3, which was introduced as a compromise solution provides 'where the state of origin uses the concept of domicile as a test of jurisdiction in matters of divorce or legal separation, the expression 'habitual residence' in Article 2 shall be deemed and include domicile as the term is used in that statement.' Thus this does not exclude the recognizing State having regard to tests prescribed in Article 2 but requires it, in addition, to

[20] B.C. Nirmal, "*Hague Conventions on Recognition of Validity of Marriages, Decrees of Divorce and Decisions Relating to Maintenance Obligations*", in V.C Govindraj and C. Jayaraj (ed), *Non Resident Indians and Private International Law*, 9, 2008, p. 54.
[21] Lakshmi Jambholkar, "*Private International Law*", in V.C Govindraj and C. Jayaraj (ed), *Non Resident Indians and Private International Law*, 9, 2008.

recognize divorces and legal separations based jurisdictionally upon the domicile of the respondent or the domicile of the petitioner with, where necessary, the appropriate "fortifying elements".

INDIAN PRIVATE INTERNATIONAL LAW ON RECOGNITION OF FOREIGN DECREES OF DIVORCE AND LEGAL SEPARATION:

The Indian law of recognition of foreign divorces is not well developed. The general provisions relating to recognition of foreign judgments and decrees are also applied to the recognition of foreign divorces. Section 13 of the Code of Civil Procedure, 1908 embodies a fundamental principle of private international law that a judgment delivered by a foreign court of competent jurisdiction should be respected and enforced. The Indian courts have to accord- recognition to a foreign judgment nit by way of courtesy but on considerations of justice, equity and good conscience. It is true that different countries have different rules of private international law but there are certain common principles which have been recognized in civilized jurisdiction. The Indian law adheres to the English approach according to which 'a foreign judgment is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error either of fact; or of law.

Section 14[22] enacts that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on record, or is proved. Section 13 of the Code of Civil Procedure, 1908 lays down a seven-fold criterion, the fulfillment of which will

[22] Code of Civil Procedure, 1908.

impart to a foreign judgment, brought before an Indian court for recognition and enforcement, finality and conclusiveness.

According to the said Section 13 of the C.P.C., a foreign judgment shall be conclusive between the parties as to any matter directly adjudicated upon, as also their privies litigating under the same title. However, its conclusiveness can be challenged on the following grounds, namely:

a) where it has not been pronounced by a court of competent jurisdiction;
b) where it has not been on the merits of the case;
c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
d) where the proceedings in which the judgment was obtained are opposed to natural justice;
e) where it has been obtained by fraud;
f) where it sustain a claim founded on a breach of any law in force in India.

For a foreign judgment to be conclusive in India it is necessary that it has been pronounced by a court of competent jurisdiction. The foreign court must be competent both in terms of the law of the state which has constituted it and in an international sense. It is important to note that what is conclusive is the judgment and not the reasons given by the foreign court. Courts in India can examine a foreign judgment from the point of view of competence but not of errors. Thus in determining the conclusiveness of a foreign judgment our courts will not require whether conclusions recorded by a foreign court are correct or findings otherwise tenable.

A word of caution is needed while recourse is had to Section 13 of the C.P.C. in that the section is just illustrative, not exhaustive. This is borne out by leading illustrations where *ex-parte* judgments to foreign courts were obtained as in *Smt. Satya* v. *Teja Singh*[23] and *Y. Narasimha Rao* v. *Y. Venkatalakshmi*[24] to annul marriages duly performed in India as per Hindu law. To execute such make-belief *ex-parte* decrees of divorce obtained by errant husbands in foreign courts here in India, is to say the least, travesty of justice. To counter such malady, Section 13 of the C.P.C. has to be suitably amended so as to effectively deal with the scope of jurisdiction exercised legally but invoked unjustly with a view to circumvent decrees obtained in violation of rules of conflict of laws.

CONCLUSION:

India lays emphasis on several policy goals viz. sanctity of the institution of marriage, justice to both spouses, certainty in the law, needs of the modern life protection of the interests of the women who very often become victims of a foreign decree of divorce. Since the Hague Convention also seeks to secure these policy goals in a varying degree, it is submitted that India can use it as a useful framework for the development of its private international law rules. It should be recognized that a wife deserted or abandoned by her husband not only needs a forum which is the most appropriate for her to sue but also certainty of the execution of a divorce she obtains on internationally accepted grounds. In the past whenever a wife approached an Indian court to seek justice against an *ex parte* foreign decree of divorce and the court granted her an appropriate relief maintenance or restitution of conjugal rights, it generally failed to serve her purpose due to serious difficulties in execution of the decree. Since the Hague

[23] AIR 1975 SC 105.
[24] (1991) 2 SCR 821.

Convention offers some solution in this regard India should consider the desirability of its accession. It is true that in order to become a party to the Hague Convention, the State shall also have to accept certain rules which are not easily palatable to it, but this is not unusual in any global regime. The Hague Convention merely implies toleration by participating states of certain grounds of jurisdiction adopted by other States. So an answer to the question whether India should accede to The Hague (Divorce) Convention depends on whether India is willing and prepared for such toleration in view of advantages that this international legislation offers to a contracting State.

JUSTIFICATIONS OF ADULTERY LAW

***PEARLITA NARAIN**

INTRODUCTION

The word "adultery" finds its roots in the Latin word 'adulterium'[1]. Adultery is supposed to be a consensual sexual act by a married person along with another person whose marital status is irrelevant. Almost all religions prohibit it and treat it as inexcusable. Surprisingly, this is not obvious in the penal laws of all countries. However, most the legal systems recognise it as grounds for divorce from the defaulting spouse.[2]

The aim of this essay is to analyse adultery laws in India in various perspectives and to explore the various rationale and critiques of existing adultery law.

Merriam Webster's Dictionary defines Adultery thus:

> *"Voluntary sexual intercourse between a man and someone other than his wife or between a married woman and someone other than her husband"*

In India, Adultery is a crime according to the Indian Penal Code and it also forms grounds for divorce under various personal laws. Given the uniform

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[1] 'A Dictionary of Greek and Roman Antiquities', John Murray, London, 1875, Art. George Long, p.17, Available at: <http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Adulterium.html>., retrieved on 03 November, 2014

[2] '"Adultery" in the Indian Penal Code: Need for a Gender Equality Perspective', K.I. Vibhute (2001) 6 SCC (Jour) 16, Available at: <http://www.ebc-india.com/lawyer/articles/2001v6a3.htm>., retrieved on 03 November, 2014

applicability of criminal law in India, this essay analyses the IPC provision criminalizing adultery.

Lord Macaulay did not think it was necessary or wise to include 'adultery' in this First Draft of the IPC. Evaluating opinions gathered from the three Presidencies about the viability of the criminalisation of adultery, and he concluded that there seems to be no advantage that most people expect out of the criminalization of adultery and that there seems to be a divide of opinion as to what is a sufficient punishment for engaging in adultery. One strand of opinion states that this is something that can never be adequately atoned for, while the other strand justifies a mere monetary penalty on the offending spouse. They felt that in the given circumstances, it is best to treat adultery as a civil wrong.[3]

The Law Commission in its Second Report, took a different view, despite that, it placed heavy reliance on Macaulay's remarks on the position of women in this country, they finally concluded:

> *"While we think that the offence of adultery ought not to be omitted from the Code, we would limit its cognizance to adultery committed with a married woman, and considering that there is much weight in the last remark in Note 'Q', regarding the condition of the women in this country, in deference to it, we would render the male offender alone liable to punishment."*[4]

The Indian Penal Code[5] provides thus:

> *"Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and*

[3] 'Macaulay's Draft Penal Code (1837)', Notes, Note Q, pp. 90-93, cited from, Law Commission of India, Forty-second Report: Indian Penal Code (Government of India, 1971), para 20.13.
[4] Forty- second Report on the Draft Indian Penal Code (1847), pp. 134-35.
[5] Section 497, IPC.

shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."

It is important to understand fully the ingredients of the offence and its entailments.

For an act to amount to adultery, it must contain the following ingredients:

A) Sexual Intercourse;
B) Heterosexual;
C) Voluntary;
D) Both parties are married;
E) The man has reason to believe the woman is married.

Along with the above, it is also important to note that according to Section 198 Cr.P.C., only a man can complaint against another man of having engaged in an act of adultery.

To illustrate, take the example of H (Husband) and W (Wife).

1. If H sleeps with an unmarried woman, no offence is made out

2. If H voluntarily sleeps with woman he knows to be married, an offence is made out but only the husband of such other woman can complaint and W cannot complaint.

3. If W sleeps with an unmarried man, no offence is made out.

4. If W sleeps with a married man, H can complaint against such man.

5. In any case, no one can allege adultery against one's own spouse. Adultery can be alleged only against 3rd parties.

Comparing the given law with the dictionary definition of adultery, there seem to be a lot of differences in the applicability of the offence with reference to men and women. By the dictionary definition, anyone should be able to complaint against their spouse, and women too should be getting prosecuted for it. Knowledge of parties as to the marital status of the other party should be irrelevant.

The court had an opportunity to examine the constitutionality of this provision and to read it down or to interpret it differently in light of these problems in the case of *Yusuf Abdul Aziz* v. *State of Bombay*[6], where the this provision was challenged on the grounds discussed above, namely that there is inequality due to the fact that men can proceed against the third person, while women can't- along with other grounds for challenge. The Bombay High Court upheld the constitutionality of this provision by taking support of Article 15 (3) of the Constitution which permits the state to take special measures for protecting women and children. The court added that it found no right was being infringed by virtue of the fact that the provision provided for adulterous acts committed only by males.

[6] AIR 1954 Bom. 321.

In *Sowmithri Vishnu* v. *Union of India*[7], the decision of the Bombay High Court in Yusuf Abdul Aziz was reiterated by the Supreme Court and it added that:

> *"The contemplation of the law, evidently, is that the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime. The offence of adultery, as defined in s. 497 is considered by the legislature as an offence against the sanctity of the matrimonial home, an act which is committed by a man, as it generally is. Therefore, those men who defile that sanctity are brought within the net of the law."*

This judgement highlights most of the considerations involved in the provisions, namely that of the position of women, the moral aspect of the law as well as the objective of preserving marriage. Accordingly, this essay looks for various justifications for the law of adultery along with those provided by the judiciary and tries to apply them to the law as it stands, in order to test if this seemingly unjust law satisfies any of the rationales it was original created to meet. The essay looks at moral justifications of the criminalization of adultery and the concept of breach of trust. Lastly, the law is critiqued from a feminist lens.

PERSPECTIVES

1. MORALITY:

Devlin investigated the nature of the relationship between crime and sin and whether it is the function of the law to criminalize sin and to what extent that is the case. He solved this problem by examining the treatment given by the law to consent. He said that it is never a defence to say that the victim of the murder

[7] AIR 1985 SC 1618.

consented to it. If the law existed to protect individuals, consent would have been paramount. But clearly, that is not the case. According to him, the reason for this state of affairs is that crimes are not offences against persons; they are offences against the morals of society.[8]

The next logical question, according to Devlin, is where exactly law derives these moralities from. To Devlin, these moralities come from the collective ideas in a society as to how its members should lead their lives and the disintegration of moral values is often the first step towards the disintegration of society.

Further, in order to save the determination of moralities from turning into an empirical exercise of collecting opinions, he says that what is moral is what the reasonable man thinks is moral. The reasonable man must not be confused with the rational man; the moralities of the reasonable man can be only intuitive and are most definitely valid. He specifically gives the example of Christian marriage and discussed how essential it is to the fabric of society and hence society rightly prohibits polygamy.

However, he concedes that not all morally reprehensible behaviour can be criminalized and hence adultery should remain outside of the ambit of criminal law due to the difficulty of enforcement.

Devlin believes that morality demands that marriage be taken seriously and the terms of marriage between two persons are not a purely private concern

[8] '*The Enforcement of Morals*', Patrick Devlin, Oxford University, Press (London, 1965), Morals and the Criminal Law, http://faculty.berea.edu/butlerj/Devlin.pdf, retrieved on retrieved on 03 November, 2014.

and the state has an interest in preserving monogamy which why interests of the public should be represented in divorce proceedings to check if any public interest is being harmed in the granting of that divorce. The grounds for state interest in marriage, are two, namely that monogamy needs to be preserved that children's interests too need to be protected. Along with this, Devlin finds divorce proceedings on the additional conditions that the decree must operate in favour of the party who asked for it and unfettered discretion should be exercisable in these matters.

In his chapter on the law of marriage, Devlin expresses a concern that the old English law took into account the fact that adultery is caused due to repeated acts of promiscuity and hence a woman earlier could not obtain divorce on grounds of adultery without proving simultaneous desertion or cruelty. The old English law also accorded different statuses to the adultery of men over that of women since it was recognized that men are more casual but women don't engage in acts of adultery unless they intend for the second relationship to be permanent.[9]

He also believes that the situation with respect to third party violations of the terms of marriage is a little murky due to the existing legal fiction that a married couple is a single entity in law.

After this cursory understanding of Devlin and his idea of law as a tool for upholding social morality, it is a worthwhile endeavour to try and understand S. 497 of IPC in light of his arguments.

[9] 'The Enforcement of Morals', Patrick Devlin, Oxford University, Press (London, 1965), Morals and the Law of Marriage, p. 70

It seems that Devlin would not support the criminalization of adultery at all given that he conceded that due to enforcement difficulties, it should remain outside criminal law. However, he strongly believes that adultery is a moral wrong since it is a breach of the terms of the marriage that the society at large was interested in. He believes that in the cases of adultery, divorce should be granted.

It seems that Devlin's society would recognize the dictionary definition of Adultery as constituting an offence because society the present provision does not criminalize adultery by women and Devlin recognizes the fact that women can engage in adultery and divorce should be granted on those grounds, more easily so than in the case of men since he believed that women don't engage in adultery unless they want the second relationship to be permanent. Further, traditionally society has condemned the adultery of women equally, if not more.[10] Also, the relevant provision in the Cr.P.C.[11] does not allow men to prosecute their own wives and the justification for this, at least in Devlin's sense of morality, could be that a spouse may not initiate action against another due to the legal fiction that they are a single entity. Hence, action is enabled only against the third party. The rationale behind this Cr.P.C. provision was clarified in *V. Revathi* v. *Union of India*[12], where what was specifically under challenge was the legal inability of the wife to prosecute her husband for engaging in acts of adultery, the court held-

[10] 'Medieval Concepts of Adultery', Vern L. Bullough, Scriptorium Press, Arthuriana, Vol. 7, No. 4, Arthurian Adultery (Winter 1997), pp. 5 – 15.
Available at:
<http://www.jstor.org/stable/pdfplus/27869285.pdf?acceptTC=true&jpdConfirm=true>., retrieved on 03 November, 2014.
[11] Section 198, Code of Criminal Procedure.
[12] AIR 1988 SC 835.

"The community punishes the 'outsider' who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring 'man' alone can be punished and not the erring woman. ... The law does not envisage the punishment of any of the spouses at the instance of each other. Thus there is no discrimination against the woman insofar as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated as an offender in the eye of law. The wife is not permitted as Section 198(1) read with Section 198(2) does not permit her to do so. In the ultimate analysis the law has meted out even-handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other."

In the same case, the Supreme Court further held that criminal law might be used as a weapon by married persons against each other and that shall inevitably worsen marital ties. If looked at from the perspective of Devlin, the society can regulate these actions in order to maintain the cohesiveness of marital relationships if it deems such cohesiveness to be the morally desirable conduct.

What's left to consider, is the fact that the law permits prosecution for adultery only in cases where the participant in the act was the wife of another man. According to Devlin, this needs to be tested on the notion of morality of the reasonable man and it is hard to determine this morality without going to questions of empirical nature. However, since empiricism was proscribed by Devlin, one may borrow from social commentators and their views. Accordingly, it may be helpful to borrow from Usha Ramanathan in "Reasonable Man, Reasonable Woman and Reasonable Expectations"[13], which is an insightful piece

[13] 'Reasonable Man, Reasonable Woman And Reasonable Expectations', Usha Ramanathan, International Environmental., Law Research Centre, Images (1920-1950), Published in Amita Dhanda and Archana Parashar eds., Engendering Law – Essays in Honour of Lotika Sarkar,

into the thought process of the reasonable man in this day and age. If Usha Ramanathan's view is to be taken, the reasonable man does not accord women as more than chattel. (Further discussion on the adultery law regarding women as chattel can be found in the chapter concerning a feminist view of the law). Since according to Devlin, the morality of the reasonable man must be upheld, the adultery law is certainly valid in its criminalization of adultery only when the participating woman is married to another man.

Hence, Devlin may or may not be satisfied with IPC s. 497 since he believed adultery should not be criminalized and only divorces should be granted on grounds of adultery. Devlin can be expected to be satisfied with the prohibition of adultery only when the participating woman is married to another man and the prevention of people from using criminal law against their own spouses. It also fails terribly when it comes to the complete forgiveness accorded to female adulterers.

2. BREACH OF CONTRACT:

A second strand of thought argues that Adultery must be prohibited since it is violative of mutual trust and faith and that is the very basis of marriage. For Aquinas, the important issue with adultery was that it was a significant ethical offense against the welfare of the marriage, since it entailed the breaking of the mutual trust of the marital bond on which it was based mostly. Thus, adultery was not separate from to the evil of fornication and as a result of that, it absolutely was an act of injustice against the aggrieved married person.

(Lucknow: Eastern Book Company, 1999), p. 33., Available at: <http://www.ielrc.org/content/a9906.pdf>., retrieved on 03 November, 2014.

Ultimately, also, it absolutely was an act of impiousness, at least wherever the wedding had been solemnized by the religious ceremony of matrimony. Ultimately, for him, adultery was a violation of justice and of socio-religious obligations, and this applied equally to men and women. it's argued that breach of contract is seen as a wrong and so a violation of a mutual terms agreed upon preceding wedding also can qualify as breach of contract so it ought to consequently be seen as a wrong.[14]

After this cursory understanding of Aquinas and his ideas, it is a worthwhile endeavour to try and understand S. 497 of IPC in light of his arguments.

If the view of the proponents of this strand of thought is to be taken, adultery most certainly cannot be criminalized since the comparison is to breach of contract which is only a civil wrong in common law.

Additionally, if the view of Aquinas is taken, you can proceed only against the involved spouse and no third parties can be involved in the equation due to the principle of privity of contracts whereby a contract is binding upon only the parties to it and not upon the world in general. This is clearly not the position of Indian law since Indian law clearly prohibits action between married persons against each other and in fact admonishes only the actions of the outsider or the third party.

Hence, Aquinas would not be satisfied with section 497 due its failure to allow spouses to initiate action against one another for breach of contract due to

[14] *Supra* note 10, p. 12.

the breakage in the bond of mutual trust. An additional problem is created due to the fact that it seems Aquinas wouldn't support the criminalization of adultery since breaches of contract are only civil wrongs.

3. FEMINIST VIEW:

The Fifth Law Commission of India, recommended that the exemption granted to women from punishment for adultery should be removed from Section 497 IPC[15]. Additionally, in 1997 the Fourteenth Law Commission[16] endorsed, with minor modifications, a proposal for reform where women's adultery was criminalized too.

According to Nivedita Menon, section 497 of the Indian Penal Code relating to adultery, is a telling instance of how the state perceives marriage. Since, according to this provision a man can bring a criminal case against another for having an affair with his wife and excludes women from pool of potential complainants, the belief is that the woman is her husband's property, a passive object over which he solely has rights. Thus, the assumptions of this provision are squarely sexist and patriarchal and thus, feminists feel shocked by the recommendations of the Law Commission of India that this provision be turned gender-neutral to bring women within its compass. As recently as 2011, the Bombay High Court upheld the criminalisation of adultery as essential as protective of the holy character of marriages.

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[15] 42nd Law Commission Report, Available at: <http://lawcommissionofindia.nic.in/1-50/Report42.pdf>.

[16] 156th Law Commission Report, Available at: <http://lawcommissionofindia.nic.in/101-169/Report156Vol1.pdf>.

The criminalisation of voluntary sexual intercourse between adults is outrageous. Certainly, adultery by either partner could also be treated a 'wrong' which will be the grounds for a divorce; however it can not be treated as a criminal offence. This provision has no place in contemporary code, and should be repealed.[17]

In *W. Kalyani* v. *State Tr. Insp. of Police & Anr*[18], the Supreme Court acknowledged this criticism but did not go beyond doing just that.

Feminists such as Veena Das find the roots of adultery law in Hindu theology which prescribes expiation for adulterous women. According to her, Hindu law places a woman in a patriarchal set up and emphasizes her accessibility for the husband and consequent purity[19].

Ratna Kapur points out the fact that the criminalisation of chosen specific acts such as adultery and sodomy, and non-criminalisation of other sexual acts such as marital rape, is governed by the idea that only some forms of sexual expression are culturally accepted and therefore are legitimate within marriage, which is a space for containing women's sexuality.[20]

In regard of women not being recognized as aggrieved parties in cases of adultery, Flavia Agnes says that the sole aim of morality backed by patriarchy is

[17] 'Seeing Like a Feminist', Nivedita Menon, Penguin UK, 01-Dec-2012, pp. 38- 39.
[18] (2012) 1 MLJ (Crl) 546 (SC).
[19] 'Femininity and the Orientation to the Body', Veena Das, Orient Longman and NMML, New Delhi, p. 39.
[20] 'Erotic Justice: Law and the New Politics of Postcolonialism', Ratna Kapur, 2004, Taylor & Francis, Delhi, 71.

to challenge the legitimacy of women's claims. Since the provision is based on this sexual morality, the same applies to it.[21]

Further, a lot of feminists also reject the institution of marriage as a whole on several bases.[22] Such feminists find that control of human sexuality is not an interest of the state and therefore laws criminalizing adultery and thereby upholding traditional values of marriage are most certainly unacceptable.

From the above sources, it is fair to draw the inference that feminism rejects the IPC section 497 due to its purpose of upholding the traditional patriarchal institution of marriage and also because the present provision treats women as the chattel of men and this is clear from the fact that it allows prosecution initiated only by men against other men who might have engaged in intercourse with their wives. No other kind of claim is acknowledged by the current provision. Feminist would also agree that since preservation of marriage and control of human sexuality are not state interests, the only remedy available on grounds of adultery should be divorce. The feminist position seems to be in consonance with that of the National Commission for Women which has cited the disempowered status of women in India in support of the non criminalization of adultery of women. It has also recommended that adultery be treated as a mere civil wrong[23].

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[21] Politics of Post-Civil Society: Contemporary History of Political Movements in India, Ajay Gudavarthy, SAGE Publications India, 24-Jan-2013, pg. 56

[22] *'Feminism, Liberalism and Marriage',* Clare Chambers, University of Cambridge, Available at: <https://www.brown.edu/.../Feminism,%20Liberalism%20and%20Marriage.Doc>. retrieved on 03 November, 2014

[23] Centre mulling law to punish cheating wives too, Swati Deshpande, December 14, 2008, Available at: <http://timesofindia.indiatimes.com/india/Centre-mulling-law-to-punish-cheating-wives-too/articleshow/3834174.cms>., retrieved on 03 November, 2014.

CONCLUSION

To sum up, one must now evaluate the findings of the applications of the tests to the provision. This may be done by examining how exactly it fares in each test.

Firstly, moralists shall not be satisfied with IPC s. 497 since Devlin believed adultery should not be criminalized and only divorces should be granted on grounds of adultery[24]. Devlin can be expected to be satisfied with the prohibition of adultery only when the participating woman is married to another man and the prevention of people from using criminal law against their own spouses.

Secondly, from the perspective of breach of trust, the provision should not even criminalize adultery since it can only be treated as a civil wrong[25] and it also does not allow spouses to proceed against one another.

Thirdly, it fails to satisfy feminist considerations in its criminalization of adultery only when the participating woman is married to another man, thereby treating women as chattel belonging to their husbands[26]. A more fundamental feminist critique is that adultery laws uphold marriage, the very basis of which is grounded in patriarchy and patrilineal structures. However, it does succeed in protecting women adequately by making them immune to charges of adultery, thereby recognizing their social status.

Hence, none of these schools of thought agree with the penal provision due to the fact that none of them supports the criminalization of adultery.

[24] *Supra* note 9.
[25] *Supra* note 10.
[26] *Supra* note 17.

Much as some of the tests are worthy of criticism due to their regressive natures, their critique is rendered moot as the provision fails to satisfy even these tests.

In conclusion, it is fair to say that the current provision fails to completely satisfy any of the rationales for prohibiting adultery.