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"Indisputably, there is a wide gap between the demand for basic health care and commensurate medical facilities, because of the inertia amongst the young doctors to go to such (remote, difficult and rural) areas. Thus, giving specified incentive marks (to eligible in-service candidates) is permissible differentiation whilst determining their merit. It is an objective method of determining their merit."

A.M. Khanwilkar J.

State of U.P. v. *Dinesh Singh Chauhan*
(2016) 9 SCC 749, para 29

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Lex Revolution

Journal of Social & Legal Studies

Quarterly Published International Research Journal

Lex Revolution welcomes and encourages scholarly unpublished papers on various fields of Law, Human Rights and Social Science from students, teachers, scholars and professionals. The Journal invites the submission of papers that meet the general criteria of significance and academic brilliance. Authors are requested to emphasize on novel theoretical standard and downtrodden concerns of the mentioned areas against the backdrop of proper objectification of suitable primary materials and documents. The papers must not be published in parts or whole or accepted for publication anywhere else.

OBJECTIVES:

- To develop and promote academic research activities on various contemporary socio-legal issues and trends in law,
- To provide a platform to discuss the problems related to socio-legal and research issues.

The most valuable and suggestive comments of all the readers are always awaited and welcomed in order to achieve the ultimate goal. We are looking forward for your contributions. All communications shall be made only in electronic form e-mailed to: **EDITOR(DOT)LEXREVOLUTION(AT)GMAIL(DOT)COM**. The submission guidelines are available at website.

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MESSAGE

It is with great pleasure we announce the release of Volume II Issue 4 (Oct-Dec 2016) of our Journal ***Lex Revolution*** ISSN 2394-997X as an intellectual platform for contemporary issues pertaining to various fields of Law, Human Rights and Social Science. Research and dialogue is the sine qua non for the development of any legal system. Our goal is to provide scholars worldwide with comparative papers on recent legal developments on the international level. The journal focuses on education, research and existing legal concerns with an editorial board comprising of academicians, professionals, researchers, advocates and students.

We express our discontent towards the recent incident in distinguished institutions of higher education and in the court premises in India which put forth a major concern before the judicial system on deciding the ambit of permissible free speech in the country. Every citizen has the right to protest and persue his political ideology or affiliation but it must be within the framework of the constitution.

We owe our sincere gratitude to Prof. Gopal Krishna Chandani, Mr. K. N. Chaubey and Prof. S. K. Gaur for their valuable guidance and motivation for making this journal a reality. We would like to acknowledge the generosity of www.advocatekhoj.com that has been the continuous platform for us encouraging various forms of legal dialogue with our readers and contributors.

Finally, we would like to thank all prominent members of our Editorial Board for joining us in this new fascinating and promising academic voyage.

We are indebted to the various Professors, Asst. Professors, Research Scholars, Advocates and Students whose views and opinions have been incorporated in the text.

- **Editorial Board**

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HELPING STUDENTS BECOME MOTIVATED LEARNERS

Dr. Ritu Agarwal*

Motivation is an internal state or condition which is sometimes described as a need, desire, or wants that serves to activate or energize behavior and gives it direction. It may be rooted in a basic impulse to optimize well-being, minimize physical pain and maximize pleasure. It consists of the physical, emotional, cognitive, and social forces that drive our desire for and commitment toward reaching a particular goal even when challenges arise. We are simply more motivated toward certain goals at different times depending on our needs, interests, and our beliefs about our ability to be successful in achieving a particular goal. This means that motivation changes and evolves and can be influenced by the environments in which we find ourselves and by the people in those environments.

When we talk about motivation in schools, we are generally talking about whether students are motivated to learn. "Motivation to learn" can be measured by the degree to which students are committed to thinking through problems and working through challenges to master a concept or gain a new skill. The motivation to learn would help to set up an environment that has the greatest potential of igniting the desire to learn in every student.

Motivation is said to be intrinsic or extrinsic. Intrinsic motivation is the natural curiosity and desire to learn that we are all born with. We experience intrinsic motivation when we find ourselves seeking answers to a question that intrigues us or pushing ourselves to work hard to master a skill. For a student it includes fascination with the subject, a sense of its relevance to life and the world, a sense of accomplishment in mastering it, and a sense of calling to it. Extrinsic motivation is when we work for an external reward or to avoid an external punishment provided by someone else**.** It includes parental expectations, expectations of other trusted role models, earning potential of a course of study, and grades. A balanced pedagogical approach in the classroom includes the combination of both types.

Keeping in view the importance of motivation in learning the purpose of this paper is to provide instructors with a general understanding of student motivation from a psychological perspective by identifying effects of motivation on student's learning and behaviour and to recommend specific strategies to help motivate students in the classroom. The overall study

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consists of participant observational research method. The particular approach used is largely interpretive.

REVIEW OF LITERATURE

According to Ryan and Deci (2000), to be motivated means to be moved to do something. A person who feels no impetus or inspiration to act is thus characterized as unmotivated, whereas someone who is energized or activated toward an end is considered motivated. In the classroom setting, student motivation refers to the degree to which a student puts effort into and focus on learning in order to achieve successful outcomes. Motivation and engagement are very important for sound student learning. Sternberg (2005) believes that motivation is very important for school success, in its absence; the student never may make an effort to learn.

Students not only have different quantities, but also different qualities of motivation that can vary from time to time depending on the learning and teaching context (Ryan & Deci, 2000; Schlechty, 2001). If teachers have a sound understanding of the different types of student motivation possible in any given context, then they are in better position to provide a more conducive learning environment to students that better promotes their learning (Marsh, 2000). Kohn (1999, p. 257) contends, *"the implicit premise of the words "intrinsic" and "extrinsic" is that there are qualitatively different kinds of motivation, and the kind matters more than the amount."* The question of what motivates children's behavior in achievement contexts is one of long-standing interest to psychologists and educators. Much of the research in this area has classified motivation as either intrinsic (i.e., inherent to the self or the task) or extrinsic (i.e., originating from outside of the self or the task). That is, students are often thought to be learning either for the sake of learning or as a means to some other end, whether it be praise, tangible rewards, or meeting the demands of powerful authority figures. Numerous research studies have shown that intrinsically motivated students have higher achievement levels, lower levels of anxiety and higher perceptions of competence and engagement in learning than students who are not intrinsically motivated (Wigfield & Eccles, 2002; Wigfield & Waguer, 2005).

Some students seem naturally enthusiastic about learning, but many need or expect their instructors to inspire, challenge and stimulate them. *"Effective learning in the classroom depends on the teacher's ability … to maintain the interest that brought students to the*

course in the first place." (Ericksen, 1978,). Many factors effect a given student's motivation to work and to learn (Bligh, 1971; Sass, 1989): interest in subject matter, perception of its usefulness, general desire to achieve, self-confidence and self-esteem, as well as patience and persistence.

Researchers have begun to identify those aspects of the teaching situation that enhances student's self-motivation (Lowman, 1984; Lucas, Weinert and Kluve, 1987; Bligh, 1971). Research has also shown that good everyday teaching practices can do more to counter student apathy than special effort to attack motivation directly (Ericson, 1978). Most student respond positively to well organized course taught by an enthusiastic teacher who has a genuine interest in student and what they learn. Thus the activities of the teacher undertaken to promote learning will also enhance students' motivation.

HOW MOTIVATION AFFECTS LEARNING AND BEHAVIOUR

Motivation has several effects on students' learning and behavior.

- Motivation determines the specific goals toward which learners strive and affects the choices they make.
- Motivation increases the amount of effort and energy that learners extend in activities directly related to their needs and goals.
- Learners are more likely to begin a task they actually want to do. They are also more likely to continue working at it until they've completed it, even if they are occasionally interrupted or frustrated in the process.
- Motivation affects what learners pay attention to and how effectively they process it for instance, motivated learners often make a concerted effort to truly understand classroom material—to learn it meaningfully—and consider how they might use it in their own lives.
- Motivation determines which consequences are reinforcing and punishing. The more learners are motivated to achieve academic success, the more they will be proud of higher grades and upset by a low grade.
- Because of the other effects just identified—goal-directed behavior, effort and energy, initiation and persistence, cognitive processing, and the impact of consequences—motivation often leads to improved performance.

STRATEGIES TO IMPROVE STUDENT'S MOTIVATION

Motivation, both intrinsic and extrinsic, is a key factor in the success of students at all stages of their education, and teachers can play a pivotal role in providing and encouraging that motivation in their students. Some simple strategies to improve student's motivation are as follows:

Giving Students a Sense of Control:

While guidance from a teacher is important to keeping kids on task and motivated, allowing students to have some choice and control over what happens in the classroom is actually one of the best ways to keep them engaged. For example, allowing students to choose the type of assignment they do or which problems to work on can give them a sense of control that may just motivate them to do more.

Defining Objectives Clearly:

Students want and need to know what is expected of them in order to stay motivated to work. At the beginning of the year, clear objectives, rules, and expectations of students should be laid out so that there is no confusion and students have goals to work towards.

Creating a Threat- Free Environment and Providing Positive Reinforcements:

When teachers create a safe, supportive environment for students, affirming their belief in a student's abilities and provide positive reinforcements, students feel highly motivated.

Including Novelty Elements:

To renew interest in the subject matter or just in learning in general, students should be given a chance to get out of the classroom. For eg., taking students to the field trips, bringing in speakers, or even just heading to the library for some research.

Providing Choices and Varied Preferences:

Not all students will respond to lessons in the same way. For some, hands-on experiences may be the best. Others may love to read books quietly or to work in groups. In order to keep all students motivated, mix up the strategies so that students with different preferences will

each get time focused on the things they like best. Doing so will help students stay engaged and pay attention.

Helping Students to See the Value in Learning the Instructional Material:

Teachers can help to draw connections between themes in the curriculum and students' own experiences or current-day events and can help students to see how certain skills will be useful to them in their long-term goals.

Focusing on Personal Improvement:

Teachers should help the student to compare themselves with their previous selves. They should show students their own growth and students will begin to believe in their own learning.

Encouraging Risk-Taking and Experimentation:

When learning is the primary goal, students are encouraged to ask questions, experiment, and take risks in their attempts to approach and grapple with the material. Educators can do this by inviting students to express opinions and insights. "Mistakes" or incorrect answers can be reframed as valuable opportunities for learning and growth by asking students why they think they got a particular result or what they might do differently next time, rather than making students feel embarrassed for getting the wrong answer.

Showing Care for All Students:

Students performed better socially and academically when they feel cared for by their teachers, teachers' attitudes and beliefs can have a profound effect on students. However, it is not the amount of care that teachers have per se, but how much care the students perceive teachers have.

Structuring Positive Competition:

Competition in the classroom motivates students to try harder and work to excel. A teacher should work to foster a friendly spirit of competition in the classroom and provide opportunities for them to show their knowledge.

Offering Rewards for Good Improved Performance:

Offering the students the chance to earn rewards is an excellent source of motivation. A teacher should consider the personalities and needs of the students to determine appropriate rewards for the class.

Giving Students' Responsibility:

Assigning students classroom jobs is a great way to build a community and to give students a sense of motivation. It can also be useful to allow students for leading activities or helping out so that each feels important and valued.

Allowing Team Work:

The team spirit can get students excited about things in the classroom and they can motivate one another to reach a goal. Teachers should ensure that groups are balanced and fair.

***Giving Praise and Encouragement*:**

Teachers can give students motivation by rewarding success publicly, giving praise for a job well done, and sharing exemplary work.

Encouraging Self- Reflection:

One way to motivate students is to get them to take a hard look at themselves and determine their own strengths and weaknesses. Students are often much more motivated by creating these kinds of critiques of themselves than by having a teacher do it for them, as it makes them feel in charge of creating their own objectives and goals.

Being Enthusiastic About the Subject and Being Passionate About Work:

One of the best ways to get students motivated is to share enthusiasm. When a teacher is excited about teaching and doing work sincerely, the students will be much more excited about learning.

Knowing the Students:

When students feel appreciated it creates a safe learning environment and motivates them to work harder, as they want to get praise and good feedback from someone they feel knows and respects them as individuals.

Creating Interest in Learning:

Teachers should relate classroom material to things that students are interested in or have experienced, so as to make things more interesting and related to students thereby keeping students motivated for longer.

Helping Students' Find Intrinsic Motivation:

It can be great to help students get motivated, but at the end of the day they need to be able to generate their own motivation. Helping students find their own personal reasons for doing class work and working hard, is one of the most powerful gifts a teacher can give them.

Managing Students' Anxiety:

Some students find the prospect of not doing well so anxiety-inducing that it becomes a self-fulfilling prophecy. For these students a teacher should support no matter what the end result is and ensure that students don't feel so overwhelmed by expectations that they just give up.

Making Goals High but Attainable:

Students like to be challenged and will work to achieve high expectations so long as they believe those goals to be within their reach, so a teacher should push students to get more out of them.

Scaffolding Instruction:

When a teacher break instruction down into steps or short-term learning goals and provide clear directions and adequate support to complete each step, reaching a larger goal feels doable for students. Reviewing pre-requisite concepts at the beginning of a new lesson also helps all students to be successful.

Giving Feedback and Offering Chances to Improve:

A teacher should help students to learn exactly where they went wrong and how they can improve next time.

Tracking Progress Regularly:

It can be hard for students to see just how far they've come, especially with subjects that are difficult for them. Teachers should track the progress of the students as a way to motivate them by allowing them to see visually just how much they are learning and improving as the year goes on.

Making Learning Fun:

Adding fun activities into the school day can help students who struggle to stay engaged and make the classroom a much friendlier place for all students.

Focusing on strengths:

It is normal students to feel a lot of self-doubt. Identifying and reinforcing their strengths can help to build confidence important to persisting through challenges.

Providing Opportunities for Success:

A teacher should make sure that all students get a chance to play to their strengths and feel included and valued. It can make a world of difference in their motivation. A teacher should capitalize on students existing needs.

CONCLUSION

Motivated and engaged students learn better and show best possible outcomes in their academic study and by using the appropriate pedagogies teachers can also make classrooms more engaging places for students to learn.

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DE-MATERIALISATION: A NOVEL EPOCH OF INDIAN CAPITAL MARKET

Dr. Y. Papa Rao*

INTRODUCTION

The Indian Capital Market plays a significant role in growth of Indian Economy. The growth of Indian Capital Market was really like a Midas touch and ensures the development of economy of Nation. The role played by capital market in mobilising the long term savings of individuals in securities enhanced the economic structure of the country as a whole. Apart from this growth and development, later at some point of time, the unmanageable burden of paper work retarded the working of capital market to an extent. The Depositories Act, 1996 was the ultimate solution to solve such complications. It introduces the concept of dematerialisation and earmarked the new era of Indian Stock Market.

The Depositories Act opens a new way of book-keeping in electronic format which enables to overcome the risks followed by paper work. The depository works as an aid to dematerialise securities through depository participant and eliminate paper from the market. This helps in faster online derivative trading. Dematerialisation plays a positive role in further modernisation in Indian Capital Market by providing higher liquidity, higher returns and lower volatility.[1]

Carry forward and settlement transactions become easier, the net result being an increase in the volume of trade being carried out in the capital market. It helps the investors to take rescue from the time consuming procedures of the stock markets, the payment of stamp duty, the risk of losing or misplacement of the certificate etc. The revolutionary presence of the Act has definitely stimulated the day to day business of the capital market and stock exchanges.

The recording, keeping and maintaining of shares and other securities in a dematerialised form is the modern practice followed by the developed and developing countries in the world[2]. The electronic securities match with the fast growing Technological World. As those

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[1] A.K. Vashishtt and R.K. Gupta, "Investment Management and Stock Market" pg. no. 70; Deep and Deep Publications Pvt. Ltd.

[2] R SURYANARAYANAN & V VARADARAJAN, SEBI LAW, PRACTICE AND PROCEDURE 824 (2003).

in physical form took lot of time of the investors which results into bad delivery and unnecessary delay, in comparison to it the new format has made easy for the investors to invest easily and get results very fast and accurate.[3] There have been some securities issue in the network that carries the transaction of the payment but with the advancement of the technology this has reduced and will be further reduced to the lowest point.[4] The best part is that it requires the digital signature which is not easy to forge and use.

WHAT IS DE-MATERIALISATION?

Dematerialization is the process wherein share certificates and other securities held in physical form are converted into electronic form and credited to Demat account of an investor opened with a depository participant who is an agent of Depository.[5] SEBI has made compulsory trading of shares of all the companies listed on stock exchanges in Demat form with effect from 2nd January 2002. The procedure of opening a Demat account with DP is similar to opening a bank account.[6] There are following differences between Demat account and Bank account:

1. For opening an account in a bank a minimum balance has to be deposited, but in case of a Demat account it can be opened by investor without any security.
2. Bank account holder is known as account holder, but account holder of the depository is known as beneficial owner.
3. Bank can use the deposits of its customers for the normal course of its business and pays interests to them, but depository cannot use any deposits (shares) in the account of its customers and there is no point to pay interest in this respect.
4. In case of joint account, later on any one of the operators name may be removed, but it is not possible in case of Demat account.
5. For opening a bank account there is no requirement of any agreement between the banker and customer, but for Demat account it is necessary to enter into a written agreement between Depository Participant and beneficial owner.

[3] Impact of dematerialization of securities in financial markets available at https://essays.pw/essay/impact-of-dematerialization-of-securities-in-financial-markets-150614#sthash.6BEoLUY3.dpdf
[4] Id
[5] Shaikh Saleem, "BUSINESS ENVIRONMENT" 3rd ed., 2015; Pearson India Education Services Pvt. Ltd. pg. no. 192
[6] id

National Securities Depository Limited[7] defines dematerialisation as "*the process by which a client can get physical certificates converted into electronic balances*[8]." Dematerialisation means the conversion of a stock certificate from its physical form to electronic form. It offers scope for paperless trading whereby stock transactions and transfers are processed electronically without involving any stock certificate or transfer deed after the stock certificates have been converted from physical to electronic form[9]. Fungibility is the fundamental feature of depository system. The Act mandates that all dematerialised securities shall be in fungible form[10]. This means all the holdings of particular securities are identical and inter-changeable and they have no unique characteristic such as distinctive number, certificate number, folio number, etc. and can be represented only by the account with depository[11].

Each of the securities dematerialised in the depository bears a distinctive ISIN (International Securities Identification Number). It is a unique identification number for each security issued in any of the International Standards Organisation (ISO) member countries in accordance with the ISIN Standard (ISO 6166)[12].

The process of dematerialisation is an optional which rests with the investor. The investor can keep his securities - partly in physical and partly in electronic form, wholly in physical or wholly in electronic form. The dematerialised securities can again be re-converted into physical form through another process which is known as re-materialisation.[13]

[7] NSDL, the first and largest depository in India, established in August 1996 and promoted by institutions of national stature responsible for economic development of the country has since established a national infrastructure of international standards that handles most of the securities held and settled in dematerialised form in the Indian capital market. For details refer https://nsdl.co.in/about/index.php

[8] See official website of NSDL,(Oct. 16, 2013), https://nsdl.co.in/services/demat.php

[9] SUDHINDRABHAT, SECURITY ANALYSIS & PORTFOLIO MANAGEMENT, 136 (2008)

[10] Depositories Act, 1996 Section 9: All securities held by a depository shall be dematerialized and shall be in a fungible form.

[11] See Handbook for NDSL Depository Operations Module Available at (Oct. 26, 2013), https://nsdl.co.in/downloadables/pdf/core-services.pdf.

[12] See for more "Dematerialisation" (Oct. 26, 2013), http://sifying.speedera.net.

[13] G Vasudha, "*Dematerialisation: An Introduction*", (Oct. 23, 2013), http://www.indianmba.com/Faculty_Column/FC435.html.

REMINERALISATION OF SECURITIES:

Re-materialization is the process of converting securities held in an electronic form in a demat account in to physical form i.e. paper certificates.[14] It is the process by which a client can get his electronic holdings converted into physical certificates[15]. For re-materialization of scrips, the investor has to fill up a re-mat request form (RRF) and submit it to the Depository Participant who forwards the request to depository after verification of the investor's balances. Depository in turn initiates the registrars and transfer agent or the issuer company. Company/RTA prints the certificates and dispatches the same to the investor.

ADVANTAGES OF DE-MATERIALISATION

- ***Immediate transfer and registration of securities:*** Dematerialisation of securities ensures immediate transaction and registration. In this form there can be no postal delay. Once the securities are credited to the investor's account on pay out, he becomes the legal owner of the securities.[16]
- ***Decreases paperwork:*** It saves not only paper and thereby environment but also keeps offices cluster free. Since all the formalities and compliances are in electronic form there is no question of mutilated certificates, fake certificates, theft etc.
- ***Saving of Time:*** It is very fast and reliable. This can avoid errors which may occur when the work is done manually and thus eliminates all risks related to physical certificates. All types of capital market instruments can be held in a single account which can avoid confusion and can also make all the deals transparent.
- ***Riddance of bad delivery:*** Earlier the transactions of securities were delayed as a result of bad deliveries due to signature difference or minor mistakes in the transfer certificate etc. The electronic format ridded all these kinds of bad deliveries and related problems. Statistically, in the physical environment, about 20% of delivered stock constituted bad deliveries.
- ***Saves money:*** There are no stamp duties, postal charges or other transaction costs. In case of physical shares stamp duty is to be payable on transfer of shares.

[14] See official Website of Central Depository Services Limited (Oct. 26, 2013), http://www.cdslindia.com/downloads/faq/Demat%20CDSL%20Way%20-%20X%20-%20Rematerializtion.pdf.
[15] See Official Website of National Securities Depository Limited, (Oct. 26, 2013), https://nsdl.co.in/services/remat.php.
[16] MADHUVIJ & SWATI DHAWAN, MERCHANT BANKING AND FINANCIAL SERVICES, 51 (2012).

- ***Change in details/address:*** The address or other details recorded with DP gets registered with all companies in one go in which the investor holds securities electronically thereby eliminating the need to correspond with each of them separately.[17]
- ***No odd lot problem even one share can be sold[18]:*** An individual having demat account can trade even for one share also, which is not the case when securities are held in paper form[19].
- ***Easy Nomination facility and Smooth Transmission of securities in case of any eventualities[20]:*** In case of death of an account holder the securities can be easily transmitted to the nominees or to the surviving holder.
- ***Assured Transfer:*** From the investors' point of view registration and transfer of dematerialised securities under depository system is a good change as once a sale is struck between a seller and buyer through the Stock Exchange, the purchaser is not subject to any doubt as to whether the transfer will be approved by the Board of Directors or not[21].

PARTIES TO THE DEPOSITORY SYSTEM

1. ***The Investors or the Beneficial Owner:*** Anyone can be an investor, for instance individual, HUF, partnership firm, company etc. *"Beneficial Owner"*[22] is a person in whose name a demat account is opened with Depository for the purpose of holding securities in the electronic form and the account opened by the beneficial owner is known as beneficiary account.[23] The Act lays down two owners for the dematerialised securities at the same time; one is beneficial owner and the other is registered owner.
2. ***The Registered Owner (Depository):*** Section 2(j) of Depositaries Act defines *"registered owner."*[24] As per the Bank for International Settlements (BIS), depository

[17] See for more (Oct. 23, 2013), http://www.cdslindia.com/downloads/faq/.
[18] *Ibid.*
[19] See for more, "Depository", (Jan 02 2013) http://www.barjeelgeogit.com/Knowledge-Centre/Depository.aspx.
[20] See for more (Oct. 23, 2013), http://www.cdslindia.com/downloads/faq/.
[21] Supra Note 1 Page no. 827
[22] According to Section 2(a) of the Act, "beneficial owner" means a person whose name is recorded as such with a depository.
[23] See Handbook for NDSL Depository Operations Module(Oct. 23, 2013), https://nsdl.co.in/downloadables/pdf/core-services.pdf.
[24] The depository whose name is entered as such in the register of the issuer. A Depository can be defined as a company formed and registered under the Companies Act, 1956 and it has been granted a certificate of registration under Section 12(1A) of SEBI Act, 1992

is *"a facility for holding securities transaction to be processed by book entry. Physical Securities may be immobilized by the depository or the securities may be dematerialized (so that they exist only as electronic records)*[25]*."*

In November 1996 India's first ever Depository, National Securities Depository Limited (NSDL) inaugurated and was initially promoted by Industrial Development Bank of India (IDBI), Unit Trust of India (UTI) and National Stock Exchange (NSE). CDSL is the second Indian Central Securities Depository founded in the year 1999, based in Mumbai and its main function is to hold securities either in physical or dematerialized form and to enable book entry transfer of securities. CDSL is promoted by Bombay Stock Exchange Limited (BSE) jointly with State Bank of India, Bank of India, Bank of Baroda, HDFC Bank, Standard Chartered Bank and Union Bank of India.[26]

3. ***The Depository Participant (DP):*** A Depository Participant (DP) is an agent[27] of the depository who is authorised to offer depository services to investors. In strictly legal sense, a DP is an entity who is registered as such with SEBI under the provisions of the SEBI Act. Public financial institutions, scheduled commercial banks, foreign banks operating in India with the approval of the Reserve Bank of India, state financial corporations, custodians, stock-brokers, clearing corporations / clearing houses, NBFCs and registrar to an issue or share transfer agent complying with the requirements prescribed by SEBI can be registered as DP[28]. Banking services can be availed through a bank branch whereas depository services can be availed through a DP[29]. A depository is an institution or an organisation which holds beneficial owners securities through a registered Depository Participant[30].
4. ***The Issuing Company or Issuer:*** *"Issuer"* means any entity such as a corporate / state or central government organizations issuing securities which can be held by depository in electronic form. The company issues securities as per the ICDR Regulations 2009

[25] Inderbirkaur, *Investors preference between DEMAT& REMAT and Awareness regarding depository and its various laws",2 International Journal of Business and Management Invention 5*, 45-47 (2013)
[26] See official Website of National Securities Depository Limited (Oct. 24 2013) http://en.wikipedia.org/wiki/Central_Depository_Services_Limited.
[27] In fact, depository participant works as a bridge between the investor and depository. It acts as an agent of the depository who offers various intermediary services to investors.
[28] See official website of Securities and Exchange Board of India, (Oct. 24 2013) http://www.sebi.gov.in/cms/sebi_data/attachdocs/1357620708118.pdf.
[29] *Ibid.*
[30] See official website of Securities and Exchange Board of India, (Oct. 28 2013) http://www.sebi.gov.in/faq/faqdemat.html

and it enters into an agreement with a depository for dematerialising its shares or other securities.

5. ***Registrar and Transfer Agent:*** An RTA is an agent of the issuer. RTA acts as an intermediary between the issuer and depository.

PROCEDURE FOR DE-MATERIALISATION:

- Investor submits certificates for dematerialisation to DP
- DP initiates depository of the request through the system
- DP submits the certificate to the registrar
- Registrar confirms the dematerialisation request from depository.
- After dematerialisation Registrar updates accounts and informs depository of the completion of dematerialisation
- Depository updates its accounts and informs the DP
- DP updates its accounts and informs investor

THE LEGAL FRAMEWORK

The Depositories Act, 1996 was enacted with an aim to *"provide for regulation of depositories in securities and for matters connected therewith or incidental thereto".* Even though the Act allows multiple numbers of depositories to function within the country at the same time it has to obtain the certificate of commencement of business from the Board without which a depository cannot act in its purview. Section 3 of the Depositories Act provides that no depository shall act as a depository unless he obtains a certificate of commencement of business from SEBI.[31] As per the powers envisaged under Section 30 of the SEBI Act 1992 read with Section 25 of Depositories Act 1996, in May 1996 the SEBI has passed Depositories & Participants Regulation to empower depositories to start function. Thus Depositories Act 1996 and SEBI (Depositories & Participants) Regulation 1996 are the key legal basis for the depository system in India. However the depositories are empowered to frame its own bye laws to regulate its day to day affairs with prior approval of SEBI[32].

[31] While other capital market intermediaries specified in the SEBI Act are required to obtain only a certificate of registration from SEBI, the depository is required to obtain a certificate of registration under Section 2 (1) (e) of the Act as well as a certificate of commencement of business under Section 3 of the Act.

[32] Depositories Act, Section 26 (1996): Power of depositories to make bye-laws.
(1) A depository shall, with the previous approval of the Board, make byelaws consistent with the provisions of this Act and the regulations.

The byelaws define the scope of the functioning of NSDL and its business partners; the Business Rules outline the operational procedures to be followed by NSDL and its *"Business Partners"*[33]. Regulation 28 of SEBI (Depositories and Participant) Regulation, 1996 deals with the securities eligible for being held in dematerialised form in a depository.[34]

FUNCTIONS OF A DEPOSITORY

The basic services or functions of a depository includes, de-materialisation of securities, maintenance of accounts of investors, re-materialisation of securities, settlement of market transactions through the release and receipt of securities in the investor's account, off market transfers, inter-depository transfers, distribution of non-financial benefits from corporates to its shareholders, nomination facilities, transmission of shares, hypothecation of dematerialised securities for a bank loan, freezing of account to protect one's holdings (when he is temporarily out of the scene) etc. Depositories shall be deemed to be the registered

(2) In particular, and without prejudice to the generality of the foregoing power, such bye-laws shall provide for-
(a) the eligibility criteria for admission and removal of securities in the depository;
(b) the conditions subject to which the securities shall be dealt with;
(c) the eligibility criteria for admission of any person as a participant;
(d) the manner and procedure for dematerialisation of securities;
(e) the procedure for transactions within the depository;
(f) the manner in which securities shall be dealt with or withdrawn from a depository;
(g) the procedure for ensuring safeguards to protect the interests of participants and beneficial owners;
(h) the conditions of admission into and withdrawal from a participant by a beneficial owner;
(i) the procedure for conveying information to the participants and beneficial owners on dividend declaration, shareholder meetings and other matters of interest to the beneficial owners;
(j) the manner of distribution of dividends, interest and monetary benefits received from the company among beneficial owners;
(k) the manner of creating pledge or hypothecation in respect of securities held with a depository;
(l) inter se rights and obligations among the depository, issuer, participants and beneficial owners;
(m) the manner and the periodicity of furnishing information to the Board, issuer and other persons;
(n) the procedure for resolving disputes involving depository, issuer, company or a beneficial owner;
(o) the procedure for proceeding against the participant committing breach of the regulations and provisions for suspension and expulsion of participants from the depository and cancellation of
agreements entered with the depository;
(p) the internal control standards including procedure for auditing, reviewing and monitoring.
(3) Where the Board considers it expedient so to do, it may, by order in writing, direct a depository to make any bye-laws or to amend or revoke any bye-laws already made within such period as it may specify in this behalf.
(4) If the depository fails or neglects to comply with such order within the specified period, the Board may make the bye-laws or amend or revoke the bye-laws made either in the form specified in the order or with such modifications thereof as the Board thinks fit.

[33] See Official Website of National Securities Depository Limited (Oct. 24 2013) https://nsdl.co.in/about/legal.php.

[34] Inserted by the SEBI (Depositories and Participants) (Amendment) Regulations, 2004, w.e.f. 10-6-2004.

owners of the securities[35] and they shall maintain a register and an index of beneficial owners.[36]

LEGAL POSITION OF DEPOSITORY PARTICIPANT

Depository Participant (DP), in the system work as an intermediary between the investors and the depositories. The relationship between the DPs and the depository is governed by an agreement made between the two under the Depositories Act, 1996[37]. It works as an agent of the depository and also deals with the customers directly. It facilitates dematerialisation and all other services of a depository. The depository associates with depository participants, clearing Corporation of Stock Exchanges, Issuing Companies and their Share Transfer Agents etc. to perform its day to day business operations. Further, for all purposes the depository deals the securities of the beneficial owner as its own, except when the question of benefit comes with regard to the payment of dividend and issue of bonus shares etc. in these cases the benefit will go in favour of beneficial owner i.e. *'member'*. In *Dinesh Kumar Jhunjhunwala* v. *The Karur Vysya Bank Ltd*[38] the Madras High Court held that the definition of *'member'* includes *"beneficial owner, whose name is entered in the records of the depository."*

THE PROCEDURE INVOLVED

In order to dematerialise the securities, **the investor** will have to open an account with any of the DPs and also has to fill Demat Request Form (DRF) which is available with Depository Participants. Along with the request form, the investor has to submit the physical certificates and also he should deface the physical certificate by stamping 'Surrendered for Dematerialisation.[39]' After receiving the request form, the DP has to inform this to the depository and the certificates along with the request shall be forwarded to the Issuer Company or RTA. On receiving the physical documents and the electronic request, R&T

[35] Depositories Act , Section 10 (1996) (1)Notwithstanding anything contained in any other law for the time being in force, a depository shall be deemed to be the registered owner for the purposes of effecting transfer of ownership of security on behalf of a beneficial owner.

[36] Depositories Act, Section 11(1) (1996) Every depository shall maintain a register and an index of beneficial owners in the manner provided in sections 150, 151 and 152 of the Companies Act, 1956.

[37] Depositories Act, Section 4(1) (1996) A depository shall enter into an agreement with one or more participants as its agent. (2)Every agreement under sub-section (1) shall be in such form as may be specified by the bye-laws.

[38] [2007]79 SCL 227 (Mad.)

[39] See Handbook for NDSL Depository Operations Module (Mar 26 2014) https://nsdl.co.in/downloadables/pdf/core-services.pdf.

Agent verifies it and once the R&T Agent is satisfied, dematerialisation of the concerned securities is electronically confirmed to NSDL which credits the dematerialised securities to the beneficiary account of the investor and intimates the DP electronically. The DP issues a statement of transaction to the client. The whole procedure normally completes within fiftee days once the share certificates have reached the issuer/their R&T agent. Thus it will take only a month from the date one hands over shares, to receive Demat Credit[40].

IMPACT OF INTRODUCTION OF DEPOSITORIES AND DE-MATERIALISATION IN INDIA

Depositories, Stock Exchanges, Clearing Corporations or Clearing Houses (CCs or CHs), Depository Participants (DPs) and Registrars & Transfer Agents (RTAs) are the institutions which are directly or indirectly connected with dematerialisation of securities. The inter connectivity between these institutions smoothened the stock market trading, reduced the rate of bad deliveries, transaction costs etc. Competition between National Securities Depositories Limited (NSDL) and Central Depositories Services Limited (CSDL) has brought down custodial charges and continue to improve.[41] In order to catalyse the process of dematerialisation of securities, and dematerialised trading, an element of compulsion was introduced by SEBI requiring the individual and institutional investors to settle trades compulsorily in dematerialised shares of selected companies and on May 31st 1999, 90% of trading volume on the Indian stock exchanges were dematerialised through a phased manner.[42,43] In a short span of time India made quicker progress in the extent of dematerialisation and the percentage of volumes settled in demat for of securities across the World Equity Markets[44]. The impact of dematerialisation on liquidity in the Indian stock

[40] See Official Website of National Securities Depository Limited, (Mar 27 2014) https://nsdl.co.in/downloadables/dsimp.pdf.

[41] M T Raju & Prabhakar R Patil, "*Dematerialisation: A Silent Revolution in Indian Capital Market",*ON SEBI WORKING PAPER SERIES NO. 4, (March 2001), (Mar 27 2013) http://www.sebi.gov.in/cms/sebi_data/attachdocs/1321590203466.pdf

[42] See official website of Securities and Exchange Board of India, (Mar 27 2013) http://www.sebi.gov.in/annualreport/9899/ar98991b2.html.

[43] See Note no. 1 p.no. 823; Section 68B of the Companies Act, 1956, introduced from 13.12.2000 stipulates that every listed public company, making initial public offer of any security for a sum of Rs. 10 Cr. or more, shall issue the same only in dematerialised form

[44] M. T. Raju, AnirbanGhosh, "*Stock Market Volatility – An International Comparison",* SEBI WORKING PAPER SERIES NO. 8, APRIL 2004 (Mar 27 2013) http://www.sebi.gov.in/cms/sebi_data/attachdocs/1293003369119.pdf.

exchanges is quantified and analysed.[45] Now the opportunities are many in front of the investor. In fact the technological advancement made it very easy for the investor as well as for the players in the market which resulted in escalation of liquidity in stock market.[46] Liquidity and returns improved substantially in the post-demat period while volatility was very much below the daily changes permitted[47]. As a concept, volatility is simple and intuitive. It measures variability or dispersion about a central tendency. To be more meaningful, it is a measure of how far the current price of an asset deviates from its average past prices. Greater this deviation, greater is the volatility. At a more fundamental level, volatility can indicate the strength or conviction behind a price move[48].

DISADVANTAGES OF DE-MATERIALISATION

- The technological advancement compels the investors to be the tech savvy. One who lacks knowledge in internet has to depend upon brokers or sub brokers which may result in mismanagement of funds. Further the same technology takes away the investor from investing to trading[49].
- Small investors say compulsory change to paperless trading is unfair because of the higher costs on smaller holdings and absence of an exit route.[50]
- Market intermediaries are using the stock market to convert black money into white by using benami entities as fronts[51] which led to several demat scams.
- A specific disadvantage to the company as to dematerialisation is that it cannot refuse registration of a transfer as the transfers are dealt directly by the depository[52].

[45] Dr. M. T. Raju& Dr. Prabhakar R. Patil "*Dematerialisation of Equity Shares in India: Liquidity, Returns and Volatility"* (Mar 27 2013) http://www.utiicm.com/cmc/pdfs/2001/prabhakar_patil2001.pdf.

[46] BHARAT V PATHAK, THE INDIAN FINANCIAL SYSTEMS: MARKETS, INSTITUTIONS AND SERVICES 241 (2d ed. 2008).

[47] Supra Note 38

[48] *Ibid.*

[49] Vinish Parikh, "*Advantages and Disadvantages of Demat Account*", (Oct. 28 2013) http://www.letslearnfinance.com/advantages-and-disadvantages-of-demat-account.html.

[50] See *"Dematerialisation:A boon or a bane?"*Available at http://www.capitalmarket.com/magazine/cm1402/stoexc.htmVisited on 28/10/2013

[51] "*Demat scam being used to convert black money*", The Financial Express, December 19, 2005

[52] Supra Note 34 P no.827

CONCLUSION & SUGGESTIONS

From the above study, it is clear that dematerialisation has played a very significant and highly constructive role in the modernisation of Indian capital market and there are obvious reasons to conclude that it was a major change and it has varied implications on various sectors of the same. The demat revolution was the appropriate solution for almost all pre-demat period drawbacks. At the same time it has raised some new challenges also and to make this technological revolution more acceptable these issues have to be fixed successfully. In this respect following suggestions are noteworthy:

1. SEBI should take appropriate and immediate steps to educate the investors regarding the effective use of technology and ways to foresee and avoid frauds. The Demat account holders should be given basic information about NSDL, CDSL and Depositories Act, 1996.
2. The DP's should take strong KYC norms to prevent fictitious accounts.
3. Depository participant services should be made available to the investors round the clock and efforts must be made to reduce the transaction time.
4. The majority of the depository participants are not offering any highlighted service to the beneficiary owners. Thus there is a need on the part of DP to increase both of their formal or informal services to the beneficiary owners.
5. The SEBI has to closely monitor to prevent fake demat accounts with a view to protect the minority shareholders. etc…

CRITLICAL ANALYSIS OF CHILD LABOUR (PROHIBITION AND REGULATION AMENDMENT ACT, 2016

Dr. Balwinder Kaur*

ABSTRACT

India's commitment to the cause of children is as old as its civilization. All children must have an equal right, regardless of their background. Every child has right to lead a decent life and is entitled for the basic human rights. The physical, mental and social wellbeing of a child depends upon the family to which she/ he belong. Family and school are two important institutions which play significant role for integrated development of the child. According to the United Nations Convention on the Rights of Child,[1] child means a person male or female who is below 18 years of age. Because of its caring years and inefficiently developed mind and understanding, every child wants protection against harm and exploitation by others. In the decisive years of its life, the child wants special care service to realize its full potential for growth and development. There are about 300 Central and State Statutes concerning children. Majority of them have been enacted with an intention to protect and help children and achieve the goal of child labour welfare enshrined in our Constitution.[2] This paper shall attempt to discuss in brief the child labour in India and the paper also highlights critical appraisal of the amendments to the Child Labour (Prohibition and Regulation) Act, 1986.

Keywords: Child labour, Amendment, Child Labour (Prohibition and Regulation) Act, 1986.

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[1] Available at: www.unicef.org/crc/ ; visited on August 15, 2016

[2] Provisions of Fundamental Rights and Directive Principles of State Policy under Indian Constitution provides for welfare of child labour. Special Issue 6-June, 2015

INTRODUCTION

Child labour is a difficult and a divisive issue. In most of the societies, children work in some way, though the nature of work they do and the forms of their involvement be different .But, its reality many millions of children work under the obnoxious and abusive conditions that are clearly unsafe to them. UN Convention on the Rights of Child, 1989[3] is the most important international instrument concerned with the rights of children in general. Besides this, there are other Conventions which specifically deal with child labour. Some of which India has ratified and the others it has abstained from ratifying. Nonetheless, India has tried to include the provisions of these unratified instruments in its national policies to realize child rights. There are eight core ILO Conventions with respect to labour. Out of these India has ratified four. The two main Conventions with regard to child labour that India has not yet ratified are Minimum Age Convention, 1973[4] and Convention Worst Forms of Child Labour, 1999.[5] A decade after India ratified a UN convention pledging to protect children's rights, the India continues to be home to the world's largest number of child laborers.Inspite of legislative and constitution provisions for regulating and prohibiting child-labour even after many years of independence our country is unable to eradicate child labour. Child labour is still reality in India. According to the report[6] 150 million children throughout the world, one of every four children works in India, Thailand and Turkey. India has approximately one-third of Asia's child labor and one-fourth of the world's working children. According to the NSSO,[7] child workers constitute 3.4 percent of the total labor force and agriculture accounts for more than 75 percent of the total employment of child labor. The Child Labour Prohibition and Regulation Act 1986 prohibits employment of children below 14 in hazardous occupations and regulate employment of children in nonhazardous occupations but it legally permits child labour in the non-hazardous sectors. ILO Conventions are vital towards complete eradication of Child Labour in India but ratification of ILO Conventions

[3] Available at http://childrensrights.ie/childrens-rights-ireland/un-convention-rights-child; visited on September 11, 2016

[4] Available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID; visited on August 20, 2016

[5] Available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182; visited on September 20, 2016

[6] WHO's office of occupational health, Geneva

[7] The National Sample Survey Organization (NSSO), now known as National Sample Survey Office, is an organization under the Ministry of Statistics of the Government of India. It is the largest organization in India conducting regular socio-economic surveys. It was established in 1950.

without proper policy implementation neglects the rights of those who are in need of protection and rehabilitation.[8]

CONSTITUTIONAL FRAMEWORK AND CHILD PROTECTION

Constitution of India provides certain provisions for the protection and development of children; these provisions are mainly incorporated in Part III and Part IV of the Constitution, i.e., fundamental rights and directive principles of state policy. Indian Constitution clearly prohibits practices of child labour. The relevant articles are given below:

Article 15(3) - *Nothing in this article prevents the State from making any special provision for women and children. Thus, this article empowers the State to make special provisions for the children.*[9]

Article -21A - *The State shall provide free and compulsory education to all children of the age 6- 14years in such manner as the State may, by law determine.* [10]

Article 23- *Prohibits traffic in human being and begar and other similar forms of forced labour.*[11]

Article-24- *No child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment. This is very important constitutional provision which prohibit the child labour in hazardous employment.*[12]

Article-39(f) - *Enjoins the State to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that the childhood and youth are protected against exploitation and against moral and material abandonment.*[13]

Article 39(e) and (f) - *Requires the State and secure that the tender age of children are not abused and to ensure that they are not forced by economic necessity to enter avocations unsuited in their age or strength. Those children are given opportunities and facilities to*

[8] Available at http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm; visited on September 11, 2016
[9] M. P Jain, Indian Constitutional Law, at p. 1300, LexisNexis Butterworth's Wadhwa, Nagpur, 6th Edn., 2010.
[10] Id at 1547 Article 21A inserted by the Constitution (Eighty Sixth Amendment) Act, 2002.
[11] Id at 1712
[12] Id at 1775
[13] Ibid.

develop in a healthy manner and conditions of freedom and dignity and that childhood and youth are protected.[14]

Article-45- *The State shall endeavor to provide early childhood care and education for all children until they complete the age of six years.*[15]

Article 51A (k)-*Makes it a fundamental duty of the parent or Guardian to provide opportunities for education to the child or ward between the age of 6 and 14,15years.*[16]

Thus our Constitution makers were also keen to provide, protection to children in free India.

DEFINITION OF CHILD LABOUR

"Child Labour" is not an incident or feature strange to India. This has been there all over the world. The weak conditions of a child forced child to labour for his employer described by Charles Dickens in his well-known novel 'Nicholas Nickleby'.[17] The concept of child labour is complex in its nature. It is very hard to define and give a suitable definition of child labour. But International bodies, like UNICEF, ILO, Research Groups, had made their best efforts to define the concept of child labour in a more coherent manner based on time and space factor.

According to the Recommendation of the Second National Labour Commission Report the definition of child labour be must be as follows: "*All out of school children must be treated as child laborers or as those who have the potential to become child laborers. Thus, all work done by children, irrespective of where it is done, must be considered as child laborers. Only then girls and children working within the family become a part of the strategy to eliminate child labour, and significant headway will be made towards achieving the goal of eliminating child labour*".[18]

United Nations Conventions on the Rights of the Child 1989, Article 1 defines '*a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'.*

[14] Supra Note 8 at 1988
[15] Id at 2002
[16] Article 51A of the Constitution
[17] *A Sriram Babu* v. *The Chief Secretary of the Government of Karnataka & others* cited in the Child Labour (Prohibition and Regulation)Act 1986, 4th Edn, Bangalore: Karnataka Law Journal Publication, 2010, p.89.
[18] Report of the Study Group on Women and Child Labour, Second National Commission on Labour, 2002, Section Viii - Recommendations, pg.220

International Labour Organization proposes following definition of child labour-"*Child labour includes children permanently leading adult lives, working for low wages under conditions damaging to their health and physical and mental development. They are sometimes separated from their families, frequently deprived of meaningful educational and training opportunities that could open up for them a better future".*[19]

The Child Labour (Prohibition and Regulation) Act (CLPR Act) 1986 prohibits employment of a child in 18 occupations and 65 processes and regulates the conditions of working of children in other occupations/ processes. As per this Act, a child means any person who has not completed 14 years of age.[20]

A child is considered to be involved in Child Labor activities under the below classification given by the United Nations International Children's Emergency Fund (UNICEF):

• Children 5 to 11 years of age, those who did at least one hour of economic activity or at least 28 hours of domestic work during the week preceding the survey did and

• Children 12 to 14 years of age those who did at least 14 hours of economic activity or at least 42 hours of economic activity and domestic work combined during the week preceding the survey.[21]

The definition of children given under Child Labour (Prohibition and Regulation) Act, 1986 is in contradiction with United Nations Convention on the Rights of the Child, 1989 and Juvenile Justice (Care and Protection of Children) Amendment Act, 2006. Article 24 of the Constitution indirectly permits the child labour and it provides for only partial ban on child labour. [22]

Number of legislations was enacted since 1881 which provides the legal protection to the working children. The Children (Pledging of Labour) Act, 1933 followed by the Employment of Children Act, 1938 was the first statutory enactment dealing with child labour which was repealed by the Child Labour Act, 1986. The Child Labour (Prohibition and Regulation) Act

[19] International Labour Organization 1919
[20] The Child Labour (Prohibition and Regulation) Act, 1986
[21] Available at http://www.unicef.org/infobycountry/stats_popup9.html; visited on August 11, 2016
[22] M. P Jain, Indian Constitutional Law, at p. 1300, LexisNexis Butterworths Wadhwa, Nagpur, 6th Edn., 2010

1986 is an outcome of various recommendations made by a series of Commissions.[23] The Act was amended in the year 2006. On August 01, 2006, the Government imposed a ban on employment of children as domestic servants or servants in dhabas (road side eateries), restaurants, hotels, motels, teashops, resorts, spas or in other recreational centers. Employing children in these categories would make the offender liable to prosecution, and may result in imprisonment up to two years or fine shall not be less than Rs.10,000 but may extend to Rs.20, 000.[24]

MAIN FEATURES OF THE AMENDED ACT CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986

The new bill imposes a complete ban on employing children, except in the following two cases: Children allowed helping his family or family enterprise(s) provided that (i) such enterprise is not involved in hazardous processes and (ii) the work is carried out after school hours or during vacations. Children are allowed to work in the audio-visual entertainment industry including in advertisements, films, television serials or any such other entertainment or sports activities except in a circus subject to (i) compliance with prescribed conditions and adoption of safety measures, and (ii) the work does not affect the school education of the child.

The proposed amendment of the definition 'child' to provide that child means a person who has not completed his fourteenth year of age or such age as may be specified in the Right of Children to Free and Compulsory Education Act,2009, whichever is more.

Prohibition of employment below the age of 14 years– In the view of the Right of Children to Free and Compulsory Education Act, 2009,[25] the Act places the blanket ban on employment of children below 14 years but permit them to work in home, family enterprises, outside of school hours and during holidays, and in audio –visual entertainment industry and sports only if it does not affect their education.

'Adolescents' introduced. The Act inserts a new section 3A to prohibit employment of 'adolescents' (the 14-18 age groups). They can be employed in 'non-hazardous' occupations.

[23] The National Commission on Labour 1969; The Gurupadswamy Committee on Labour 1976 &Sanat Mehta Committee 1984.
[24] Child Labour (Prohibition and Regulation) Act 1986, Sec. 2 (ii)
[25] The Right of Children to Free and Compulsory Education Act, 2009 (35 of 2009) received the Assent of the President on 26.8.2009 and came into force w.e.f. 1.4.2010 Sec. 2(c)

An 'adolescent' has been defined as a person who has completed his 14th year but has not completed his 18th year. This definition too is slightly different from the definition of adolescent in the Factories Act.[26]

THE AMENDMENT OF SECTION 4 OF THE ACT TO EMPOWER THE CENTRAL GOVERNMENT TO:

(i) To alter the list of hazardous occupation.

(ii) To empower District Magistrate in order to ensure effective implementation of law.

(iii) To conduct periodic inspection of places where children and adolescent cannot be employed.

The omission of Part III-The amendment proposed to omit part III of the said Act in view of the prohibition of employment of children below fourteen years of age in all occupation and processes;

The amendment to omit the provisions of Clause (a),(b) and (c) of sub-section (3) of section 14 of the Act- In view of the prohibition of the employment of children below fourteen years in all occupation and processes;

The amendment of sub-section (1A) of section 14 to enhance the punishment– The Act has enhanced the punishment by way of this amendment. For the first time offender, the fine has been increased from 20,000 to 50,000 and imprisonment has been extended from 6 months to 2 years. The offence is cognizable and a punishment of 1-3 year will be awarded to repeat offenders. The Act incorporates relaxed penal provisions for a parent. In a case of a repeat offender, a parent has to pay a fine of 10,000 rupees.

The amendment inserted new section 14A- to provide that the offence under the proposed legislation shall be cognizable notwithstanding anything contained in the Code of Criminal Procedure, 1973;

The insertion of new section 17A-to empower the appropriate Government to confer such powers and duties on a district magistrate, to ensure that the provisions of the proposed legislation are properly carried out and to empower the District Magistrate to specify the

[26] Available at: http://164.100.47.134/lsscommittee/Labour/15_Labour_40.pdf; visited on September 17, 2016

officer, subordinate to him, who shall exercise all or any of the powers, and perform all or any of the duties, so conferred or imposed and the local limits within which such powers or duties shall be carried out by the officer in accordance with the rules made by the appropriate government.[27]

The insertion of new section 17B-It ensures that appropriate government to make periodic inspections.

Child and Adolescent Labour Rehabilitation Fund –The constitution of a *special Child and Adolescent Labour Rehabilitation Fund* has been proposed for the rehabilitation of rescued children and adolescents. The Act proposes to set up Child and Adolescent Labour Rehabilitation Fund for rehabilitation of children. The Act puts the responsibility on the State Government to rehabilitate the child and to extend monetary assistance by giving Rs 15,000 and add the fine from the employer for child's rehabilitation.[28]

ASSESSMENT OF THE AMENDMENTS TO THE ACT

The proposed amendment to the Act Slashed list of hazardous occupation encourages child labour- Reducing the list of hazardous occupation from 83 to just 3 (mining, explosives, and occupations) would only reduce child laborers in number, not in reality.

The new proposed amendment provides that adolescents can be employed in rest 80 hazardous occupations. Section 4 of the Child Labour (Prohibition and Regulation) Act, 1986 gives discretionary power to government authorities, not to parliament, to revise the list. Therefore, it will increase child labour.

Legalizing Child labour in "family enterprise" will results in forced labour – Section 3 Clause 5 of the Act permits a child to work in family or family enterprises and in an audio-visual entertainment industry. The said provision is controversial and harmful as it is silent about the hours of work. It simply provides that only after school hours and during vacation child can work. Such legal provision is likely to be misused such provision will have a bad impact on education, minds, as well as health and overall development of a child.

[27] Available at: http://www.prsindia.org/billtrack/the-child-labour-prohibition-and-regulation-amendment-act-2012-2553/; visited on September10, 2016

[28] Fortieth Report on The Child Labour (Prohibition AND Regulation) Amendment BILL 2012

The proposed amendment to the Act lacks the provisions concerning to regulation, inspection and monitoring systems. The lack of such provisions will be hindrance in implementing the Act effectively.

The proposed amendment to the Act is in violation of domestic legislations as well as international convention– The Act not only overturn the gains of previous laws, but also goes against the spirit of RTE Act of 2009 as it allows a child to work in a family enterprise.

CONCLUSION

The present amendment brought many major changes to the child labour (Prohibition and Regulation Act), 1986.The basic objective of the Act is to safeguard the childhood of every child in our country and to see that each and every child goes to school. It is fact that child labour is a global evil therefore we need joint effort to wipe it out. The government has framed legislation and has also taken many steps to stop child labour but the major determinants of child labour is socio-economic conditions prevailing in the country like poverty, illiteracy. Poverty and child-labour are inter-related. Poverty is main reasons for children being engaged in work from a young age, lack of schooling facilities, lack of basic community's health services, lack of awareness and, lack of social protection are some of the contributory reasons compelling the push of the children into work. In spite of number of legislative enactments, child labour continues to be a major problem. A large number of children are exploited and deprived of what is due to them.

SEXUAL VIOLENCE AGAINST WOMEN:PROSTITUTION AS CRIME

Pallavi Kumari*

ABSTRACT

Prostitution is commercialized sex and as such it involves two parties' buyers and sellers. It can be described as indiscriminate sexual activity without the normal motives that is procreation and pleasure. It is promiscuous sexual intercourse by a woman for hire –for money or kind .The seller generally is the women and the men is the buyer; the reverse roles are however not unknown. Also there is though much rarer male prostitution in which gratification is provided by one male to another.

There are different schools of thought on prostitution from which emerge different legal paradigms. One school of thought considers prostitution to be the most brutal violation of human rights of the women victims, who are coerced and enslaved into the flesh trade, whereas the other school of thought considers prostitution to be a kind of profession and the sex workers as professionals, who exert physical labor and, therefore, are entitled to all rights as any other laborer/ employee.

According to UN report- 'Prostitutes are a heterogeneous group and prostitution is the aggregate of social and sexual relations, which are historically, culturally and personally specific'.[1] *Whereas majority of prostitutes are victims of coercion, deception or economic enslavement, a few could have taken up the profession through the exercise of 'rational choice'.*

The classical approach has always perceived as a 'necessary evil' or 'an obnoxious features' of every society ,[2]*but the passage of time has led to a realization that prostitutes as a group of individuals are in a dire need of protection of their human rights ,immaterial of the fact which particular school of thought is being preferred /adopted .*

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[1] Dr. Vandana, Sexual Violence Of Women,Lexis Nexis Butterworths Wadhwa,Nagpur2009,

[2] Law Commission Of India ,64th Report On The Suppression of Immoral Traffic in Women and Girls Act1956, Ministry Of Law & Justice And Company Affairs, Government Of India ,1975,Pg1

The article deals with the matter concerning commercialized heterosexual practices, causes of prostitution like economic, socio-cultural, psychological, etc. its harm, combating prostitution and enforcement of laws relating to the same and the consequent harms. Then the researcher would deal with the perpetuation and condo nation of sexual violence by the state. Then through this article the researcher would try to justify the fact that the prostitutes are rather the victims of the society not the criminals of the society.

PROSTITUTION IN INDIA

Prostitution is promiscuous sexual intercourse by a woman for hire -for money or kind .there are different school of thought on prostitution from which emerge different legal paradigms. one school of thought considers it to be the most brutal violation of human rights of the women victims, who are coerced and enslaved into the flesh trade, whereas the other school of thought considers prostitution to be a kind of profession and the 'sex workers' as professionals, who exert physical labour and, therefore, are entitled to all rights as any other labourer/employee.

In words of UN special reporter on violence against women – 'prostitutes are a heterogeneous group and prostitution is the aggregate of social and sexual relation, which are historically, culturally and personally specific.[3] Whereas majority of prostitutes are victims of coercion, deception or economic enslavement, a few could have taken up the profession through the exercise of 'rational choice'.

The classical approach has always perceived 'prostitution' as a 'necessary evil' or an obnoxious feature of every society[4], but the passage of time has led to a realisation that prostitutes as a group of individuals are in dire need of protection of their human rights, immaterial of the fact which particular school of thought is being preferred or adopted.[5]

Prostitution exists in all societies all over the world .the size of the population, which indulges in prostitution, worldwide is not known accurately and only rough estimates are available .according to a conservative estimate of national commission for women's affairs 1994, there were at least 200,000 sex workers in Thailand. [6] According to other estimate by the same organisation in 1996, 20,000 to 40000 girls under the age of 18 years were engaged in commercial sex work in Thailand[7] it is estimated that in India 2 million women are in commercial sex work of which 25 % are below 18 years.[8] At least 25000 children are engaged in prostitution in the major metropolitan cities of Bangalore, Calcutta, Delhi,

[3] Its Cause And Effect ,Ms Radhika Coomarswamy 1994, Para 205

[4] Law Commission Report ,64th Report On The Suppression Of Immoral Traffic In Women And Girls Act, 1956, Ministry Of Law And Justice And Company Affairs ,Government Of India ,1075.P1

[5] Report Of The Committee On Prostitution, Child Prostitutes And Children Of Prostitutes And Plan Of Action To Combat Sexual Exploitation Of Women And Children, Department Of Women And Child Development,Ministry Of Human Resource Development , Government Of India ,1998.

[6] NCWA 1994

[7] NCWA as given by the UNICEF 1997

[8] Situation Of India Report 1998

Hyderabad, Madras and Mumbai.[9] In Mumbai alone 40000 girls between the ages of 10-16 years are selling bodies.[10] According to an estimate by the UNICEF, there are about 5,000 commercial sex workers in Kathmandu alone, of which 1000 are children, more than 20% of women are under the age of 16 years.[11] According to the country report, Srilanka (1998), estimates of children in commercial sex work range from a low of 2,000 as quoted by the government sources to 30,000 as per international sources.[12]

SEXUAL VIOLENCE AGAINST PROSTITUTES: ITS CAUSES

There are various causes of prostitution like economic, socio-cultural, psychological, etc. amongst all the reasons, economic compulsions or poverty plays a major role in perpetuating flesh trade. Due to lack of other viable means of sustenance, children and women from poor families are coerced into prostitution. Sometimes the psychological impact created by the media and films push young people into prostitution, who want to be rich and fulfil their ambitions within a quick span of time. Sometimes the children are sold by the parents for induction into this trade. Deception, by promising employment in good jobs is another common mode by which the vulnerable lots are lured into prostitution. Traditional practices like dedication of girls to temples as 'devdasi' further promote flesh trade.

Whatever may be the reason in a particular case, it remains a matter of fact that all prostitutes are subjected to severe economic exploitation, though the degrees may be varying. A few may be held in debt bondage and may not see any percentage of their labour earnings at all.[13] Prostitutes are very dependent on various organizational edifies like pimps and touts, who profit immensely from their labour.

Due to illegal or highly regulated status of prostitution, women and children in prostitution face enormous legal and moral isolation .Because of their highly stigmatised social status and vulnerable legal status, the prostitutes can acquire no help from the legal machinery. The extensive health hazards -STDs and HIV/AIDS, to which the prostitutes are subjected are life threatening. It is found medically that male to female transmission of HIV/AIDS is three times more efficient than female to male transmission i.e., the virus spreads rapidly through

[9] Figures Provided By Government Of India
[10] NCW1997
[11] UNICEF1997
[12] Country Report ,Sri Lanka 1998
[13] Preminary Reoprt Its Cause And Effect ,Ms Radhika Coomarswamy 1994, Para 205

prostitution community through male clients .on the other hand, in part, owing to fear of HIV /aids, there has been a marked increase in demand for 'fresh' or 'virgin girls'. Apart from economic exploitation and serious exposure to health hazards, brutal physical violence awaits the woman who refuses to comply with the commands of brothel owners and their agents or tries to escape from the brothel .in one known incident in Thailand, five girl prostitutes were burned to death in a brothel because they had been chained to their beds and could not get away.[14]

The chief causes of prostitution can be classified in the following categories:[15]

Economic Causes:

Through the economic compulsions constitute the major factor in the causation of prostitution; it is by no means the only and exclusive causes of the phenomenon. It is not the cause that every prostitute accepts money for her services or that all prostitutes hail from indigent homes. There are many prostitutes who hail from well to –do families. In India, of course, there are many prostitutes who are compelled to adopt prostitution to feed themselves and their dependents. However, poverty is not the only economic factor; there are many other factors which are economic. The economic factors are comprised of:

i. poverty,
ii. Under age employment
iii. Unhealthy working conditions,
iv. The pollution and corruption in Industrial centres and
v. Immoral traffic in women and children.

Poverty: the poverty is the main economic factor responsible for prostitution. A woman who is unable to get any gainful employment and who has no supporter must either starve to death or earn her livelihood through prostitution. The illiterate the semiliterate women cannot easily get employment. More often than not they have to sexually gratify their prospective employers. More often than not they have to sexually gratify their prospective employers. Many parents feel so utterly helpless that they prostitute their own children. The maid servants are after objects of the lust of their employers. The concept of poverty however is

[14] Dr.Vandana, *Sexual Violence Against Women*, Lexis Nexis, Butterworths Wadhwa, Nagpur,2009
[15] S.M.A. Qadri , *Ahmad Siddique criminology*, Eastern Book Company, 5th edition, 2005

relative. Woman may prostitute herself in order to live well and give first-class education to her children.

Under-age employment: Many females have to work in hotels, officers, industry and shop at immature age, at this impression able age they are easily misled by lust-seekers. Bad working conditions: In India many women are able to get employment through intermediaries. These intermediaries and agents recruit women and keep them at their mercy whenever opportunity offers itself they exploit it fully and often succeed in receiving sexual bribe. Once a woman falls prey to their lust hey in no time make a professional out of her.

Pollution and Corruption in Industrial Centres: The living conditions in most of the industrial centres are barbarous in India. Living accommodation is scares and whatever is available is in slums. "Due to paucity of accommodation most of the workers are compelled to leave their family and live alone. In the absence of family, cinema going gambling etc. Make prostitute mongers of these persons. The industrial towns have busy brothels and innumerable prostitutes. In India women are paid fewer wages than men. Therefore, contractors make it a point to recruit maximum number of women in the labour force. These women are easy prey to the lusts of contractors and their friends. Due to poverty and habit the labour women wear scanty clothes and often their raw bodies are exposed to full view of these lust seekers. In slums the unmarried girls have to witness sexual activities of their relatives and are often seduced prematurely. The precocious development of sex often drives women of prostitution.

Immoral Traffic in Children Women: Many tender girls are kidnapped from their homes by unscrupulous gangsters. They properly train them in the art of prostitution and when these girls mature they are sold.

Social Causes:

The social causes are extremely important factors in encouraging and promoting prostitution. The social factors are comprised of:

i. family causes,
ii. Marital factors,
iii. Bad neighbourhood and
iv. Illegitimate motherhood.

Family Factors: A study of London Prostitutes published as Women of the Street reveals that most of the prostitutes are connected with family troubles. Their parents were either living separately or their family relations were so strained that as children they were left to their own machinations and received no love. An unloved child when she grows up offers all of herself to any one showing any degree of love and affection. The children of criminals show a marked tendency to become prostitutes. It the mother is characterless and has to carry her clandestine liaisons, she rarely escapes the eager eyes of her daughter. Often it happens that a man sleeping with mother succeeds easily in seducing the daughter.

Marital Factors: Many a superstition prevalent in India force women into prostitution. For example, widow-remarriage is still frowned upon. The widows unable to remarry due to social stigma may fulfil their physical needs by self-abuse, seducing of young etc. But as these are poor substitutes for the real sex. They may choose to become prostitutes secondly, in India it is still is still common to marry persons very young. If these girls become\widows they often do so when they are very young. In India homes particularly in villagers and poor, the illicit communications are common. Even Brothers step so low as to have sex connections with their sisters. As a matter of fact there is no relationship so sacred that it does not get sometimes consumed by the fire of passions. Evidently these illicit connections are temporary and do not meet the sex needs of young women fully. Therefore, they seduce their servants or ‘themselves to outsiders. Due to the irregular security, unable to satiate their desires, they take prostitution as a last resort.

Bad Neighbourhood: The children living near brothels or in the company of immoral persons become so used to seeing sex trade that they come to accept it as normal. The brothel keepers usually haunt these areas for their prey. The children who get exposed to sex business want to have these exhilarating experiences at the first available opportunity. The young boys are lured to serve as sex slaves of wealthy sex crazy women.

Illegitimate Motherhood: The women who become pregnant as a result of their liaisons and who cannot get abortion get exposed in society. Nobody wants to marry them but everybody wants to enjoy them sexually. Desperately such women prefer to become regular prostitutes.

Psychological Causes:

There are some psychological facts which tend the person towards prostitution. A woman who is frigid becomes desperate. She tries one man after another. Because of frigidity she is

unable to experience pleasure and becomes a prostitute by trial and error. Some women are incapable of submission. In order to assert their independence they consort with other men. There is a psychological abnormality knows as troilism. A husband who suffers troilism wishes to watch her submitting to the embraces of another men, sometimes he wants another woman to embrace his wife sexually and at the same time he sodomites her. It is not possible to go into the full range of psychological factors.

Biological Factors:

The persons born with defective sex organs or over active glands may feel compelled to seek sex gratification in a bizarre manner.

Religious and Cultural Factors:

In India there has been religious sanction to prostitution. In south, every family was supposed to offer one daughter to the temple where apparently she was supposed to serve gods with total dedication. They were known as devadasis god-slaves. But in actual practice they lived a life of prostitution. In ancient and medieval Indian prostitutes enjoyed the status of courtesans, that is, pleasure girls of courtiers and kings. There courtesans enjoyed high status in society. There are certain religious sects in India as well as aboard in which the priest has the right to deflower every newly married girl. The polyandry and polygamy sanctioned by many societies are sophistications of prostitution. A man with numerous wives has to countenance lesbianism and illicit liaisons with servant in his family. Even eunuch is used by such women to obtain relief. It is natural that if a person lives in a highly lascivious and erotic atmosphere his or her desire is multiplied and seeks release in normal as well as abnormal channels. In many cultures a guest is honoured by the offer of wife or daughter by the host.[16]

PARADIGMS FOR ADDRESSING PROSTITUTION

There are four primary legal paradigms for addressing prostitution

1) Criminalisation (which takes two forms -prohibition and toleration)

2) Decriminalisation

3) Legalisation regulation

[16] Kumar, Urban Sociology, 7th Edn, Publisher Lakshmi Narayan Agarwal, Agra, pg. 198-202 (2008)

4) Decriminalisation combined with a human rights approach[17]

Both criminalisation and decriminalisation approaches view prostitution as an evil, which must be subjected to penal measures. toleration traits a sex work as a necessary evil , whereas prohibitionist approach seeks to abolish prostitution through the criminalisation of all acts and actors including the prostitutes itself .the 1949 convention for suppression of the traffic in persons and the exploitation of prostitution of others arises out of prohibitionist perspective and seeks to criminalise acts associated with prostitution ,though not prostitution itself .the convention does not take human rights approach and views prostitutes as vulnerable beings in need of protection instead of independent actors endowed with rights and reason.

The decriminalisation approach views prostitution outside the ambit of penal laws as it considers that sexual activity among consenting adults is a matter of personal choice of the individuals. legislation\regulation approach also places prostitution outside the purview of criminal law and seeks to regulate the activity through zoning, licensing and health checkups, etc.

Decriminalisation with a human rights approach, calls for decriminalisation of prostitution and all related acts and the application of human rights and labour rights of sex workers. Whether prostitution should be legalised is a difficult question. According to Ms. V. Mohini Giri[18], the personal interviews of nearly 80,000 prostitutes all over the country revealed that the mother prostitutes would not like their daughters to join the profession of sex workers as they do not find it to be a dignified profession and were not in the favour of legislation.[19]

It is true that the value of collectivism and building of cooperative self-help spirit cannot be undermined and it may go a long way in protection of rights of such prostitutes .such organised collectivism will be facilitated if the legitimacy is accorded to prostitution by legal systems.

In the existing legal scenario, the fact cannot be challenged that forced prostitution occupies an extreme position on the continuum of sexual violence against women.

CONCLUSION AND RECOMMENDATIONS

[17] Radhika Coomarswamy, *Its Cause And Effect*, 1994, Para 205
[18] Former Chairmain, National Commission for Women, India
[19] Dr.Vandana, *Sexual Violence Against Women*, Lexis Nexis ,Butterworths Wadhwa,Nagpur, 2009

There are different effects of prostitution on the society and the people living in the society:

No doubt, prostitution cause personal, family and social disorganization. The prostitutes suffer from deterioration. The prostitute and the person who approaches her lead a sort of 'double life'. They suffer from moral collapse and lose their status and position which other respectable men and women enjoy in society. Respectable people hate them, avoid their company and want to isolate them in society. As a result, the pimp and the prostitute become 'hated and isolated islands'. They lead a life with their own definition of promiscuous sex conduct and a life with their own definitions of promiscuous sex conduct and immoral principle. This will be quite different from the society's conception of morality.

The man who approaches a prostitute may be contaminated with venereal diseases. If married he may communicate the disease to his wife and children. The children born to the parents having venereal diseases are likely to be maintained for life and many a time is born blind. The illegitimate and adulterous sexual union, if known to the wives, brings tension in the family and ultimately to desertion to divorce.

There are clinical and psychoanalytic evidence to show that many young men who had pre-marital sex - union with prostitutes suffer from 'psychic impotency' in married life .The reasons for this may be many and various depending upon the individual. One of the reason for the 'psychic-impotency' is the hatred owned towards the prostitute's sex developed before, during or after the sex-union and fear of the contamination of venereal diseases from the prostitute at the time or after he had sexual relation with her.

A prostitute performs two functions in the society-viz., the commercial functions and health function. The brothels, call flats and disorderly hotels where prostitution is permitted become accessible places for the public to have free sex satisfaction. This brings money to those who conduct it, but, at the same time, it spreads venereal diseases. The managers of hotels, pimps, panderers and prostitutes perpetrate criminality in society by inducing and kidnapping girls. They resort to various foul methods of procuring young innocent girls and women to make their trades very prosperous and profitable. By this, they wreck the personality, communicate diseases, scatter marriage and ruin the family of many girls and people in society.[20]

[20] Haveripeth Prakash ,Prostitution and Its Impact on Society-A Criminological Perspective

It may be said that the practice of prostitution is a hydra-headed serpent that has many facets and therefore, must be dealt with at various levels and from various angles; it requires a radical change in the society. This would involve a comprehensive review of the whole problem of social customs and mores regarding marriage, divorce, sex education as well as socioeconomic conditions, and also evolving a suitable and comprehensive programme to vaise the economic level and the socio-moral and emotional level of the people. It is important to realize that *"economic hardship is a form of psychological stress. And all mental stress of whatever kind is one of the commonest precipitation factors in abnormal conduct"* Hence, efforts should be made not only to alleviate every variety of psychological stress, but to provide compensatory children the love, affection, proper knowledge of facts of life' and sense of security and belongingness that is necessary for their normal life, we cannot expect them to lead normal life. This calls for reorganization of the entire problem of child care and child upbringing.

Prostitution lead to awe and suffering to the women .she is sometimes subjected to harsher conduct and behaviour. They are exploited to that extend that leads to huge pain and suffering. It lead to criminal conduct as well .there are laws which help these prostitutes to recover from violence .there are different rehabilitating agencies and NGOs which are taking initiatives to protect them from violence .

By giving sex education would lead to awareness among the people regarding sexually transmitted diseases and also lead to social control and avoid pregnancy and also people would know that it leads to negative effect on their relationship. Also by providing employment to the women and by abolishing social customs like widow remarriage should be encouraged. Even the law punishes those who force prostitution or who kidnaps, abduct and traffic women for prostitution.

IMPACT OF GLOBALIZATION ON GENDER JUSTICE IN INDIA

Mayuri Gupta*

INTRODUCTION

Globalization as a process has been understood in many ways and many forms and the exact nature of globalization cannot be presented or understood in dichotomous terms as either this or that. In the same manner the approach to women's problems and gender issues must be subjected to intensive scrutiny before any conclusive remarks can be made, if at all. A complex relationship exists between gender and globalization.

Globalization termed as a New World Order has resulted in the shrinkage of the world and the forces of globalization have affected all the social systems. Women too have been greatly affected by the forces of globalization positively as well as negatively. They comprise about half the sub-continents population and have so far been on the margin but need to be put at the centre of development theory and practice. The productive restructuring of the economy and its more equitable social distribution necessities sensitivity to women's issues as gender has been in increasingly acknowledged as a critical variable in analysis and development planning.[1]

The WHO considers that 'gender refers to the socially constructed characteristics of women and men – such as norms, roles and relationships of and between groups of women and men. It varies from society to society and can be changed'.[2] The word 'Gender' in archaic use includes men and women only. But in the recent times society has come to acknowledge transgender people, also better known as the third gender. The term 'gender justice' denotes that all people having same or different gender will be treated with equality, justice and

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[1] Inderjeet Singh Maan, 'Its Impact On Women Human Rights in India' The Indian Journal of Political Science' [2008] Vol. 69 No. 2 371-379 <http://www.jstor.org/stable/41856423> Accessed: 18.09.2016 07:32 citing, Currie D H & Thobani S, 'From Modernization to Globalization; Challenges and Opportunities,' Gender Technology and Development Vol. 7 pg. 2

[2] WHO- Gender, Equity and Human Rights <http://www.who.int/gender-equity-rights/understanding/gender-definition/en/> Accessed: 10.10.2016

fairness and shall not be discriminated against on the basis of their gender. It is equality of all sexes.[3]

Due to Globalization world is becoming more and more integrated. The greater trade openness is translating into growing global economic integration and independence as transnational movements of people and capital accelerate and information becomes ever more accessible. Technological developments are rapidly changing the way people learn, work and communicate.[4] Globalization is the new buzzword that has dominated the world since 1990's. Countries round the globe are under the charismatic spell of triplet model of LPG i.e., Liberalization, Privatization and Globalization.

Globalization is the integration of one's own country's economy with the world economy for the commencement of an interdependent world economy. It implies an intensification of social and economic relations beyond state borders, with the consequence that local and global events are increasingly linked to and influenced by each other. It is characterized by such movements that have led to the phenomena of converting the entire world as one market and one village - *the global village*.

The essential four parameters of globalization include free flow of goods, capital, technology and the free movement of labor. Globalization is an umbrella term for a complex series of economic, social, technological, cultural and political changes manifested as increasing interdependence and integration between people, companies, states and nations in disparate locations.[5] International communications are as important as economic exchange. Trans-border interchange can involve people, ideas, information, fashions and tastes. Cross national communication occurs through travel and tourism, telecommunication and the internet. Many forms of transnational interchange include both economic and socio-cultural dimensions.

GENDER INEQUALITIES AND GLOBALIZATION

In most ancient societies women have been considered men's inferiors physically and intellectually. Throughout most of ancient Greece and Rome, women enjoyed very few

[3] Vera Shrivastav, Gender Justice: *A Comparative Study of U.K., U.S.A., E.U. and India* <http://www.legalservicesindia.com/article/article/gender-justice-a-comparative-study-of-u-k-u-s-a-e-u-&-india-637-1.html> Accessed: 09.10.2016

[4] Aguayo, Tellez, Ernesto, 'The Impact of Trade Liberalization Policies and FDI on Gender Inequalities - a Literature Review' [2012] Background Paper World Development Report Gender Equality and Development

[5] Kuruvilla, Moly, *Challenges and Coping Strategies for Women in the Globalized Society* [2010] Women's Link, Social Action Trust, New Delhi

rights. Marriages were arranged; women had no property rights and were not entitled to education.

Procreation of children has been held to be the only role for women. Conception was her only purpose. Hence women were greatly discriminated against. The perception of women among Christian theologians was highly unfavorable. Gender inequity continued into medieval societies as subversive perspective on gender deepened.[6] Under common law of England, a married woman hardly had any rights; she had no rights to her property after marriage. In the early history of the United States, women and children were considered as a man's possession.[7]

In India, it is believed that women enjoyed an equal status as men in the Vedic Period. The education of women held considerable significance, especially from works of katayana and patanjali. The Upanishads and the Vedas have cited women sages and seers. But the condition declined considerably afterwards. According to Hindu laws of Manu as put forth in the texts of *Manusmriti*, women were subservient to male relatives, widow remarriage was not allowed and the law sanctioned the practice of Sati, a truly atrocious practice. Historical practices such as Sati, Jauhar, Purdah and Devdasis, child marriage, are a few traditions reflective of the gender imbalance in Indian Society. Though these practices are largely defunct now, due to legal reform, the essence of the dysfunctional gender equity still is rampant and manifested today through domestic violence, trafficking, dowry deaths, female infanticide, female foeticide, sexual objectification and violence and sexual harassment at work place. Over the centuries, as traditional patriarchal customs and laws became more deeply entrenched, women's lives became more restricted and oppressed. Most women were still denied education and their lives revolved around home making and managing. We still see this custom today in a lot of families.[8]

The issue of suffrage is another glaring illustration of gender prejudice. The struggle for the right to vote for women in USA and Europe blatantly highlights the gender intolerance, the politics of power resulting from dysfunctional gender hierarchies. The movement for woman's suffrage started in France in the 18th Century. In USA women were given the right to vote in 1920, whereas in UK it was in 1928. Continuing into the 20th Century, gender

[6] Upasana Mukherjee, 'Comparative Study on Gender Justice' <http://www.legalserviceindia.com/article/l358-Gender-Justice.html> Accessed: 10.10.2016
[7] Supra note 3
[8] Ibid

imbalances gave rise to Feminist Movements, especially in North America and West Europe. With fervent movements and growth of awareness, there arose gradually some liberalization in social structures and institutions. Various legal reforms were introduced, legislations were passed, which helped in alleviating some of the divides in gender inequity.

India had adopted the New Economic Policy in 1991 in the wake of the debt crisis, as an essential part of the Structural Adjustment Policy urged by the IMF and World Bank. It was believed that this would make India overcome its foreign exchange deficits, encourage foreign investments and strengthen the balance of payments. The World Bank gave substantial loans to tide over the crisis. The globalization of trade and commerce was part of this package. Though these reforms focused mainly on industrial, fiscal, financial and external sectors, it was anticipated that a market determined exchange rate regime, reduction of protection to the industry and removal of restrictions on agricultural exports would benefit the agricultural sector. It was also expected that the new multilateral trading regime would enable India to increase her share in world exports of agricultural and agro based products.

But in the global system, marked with widening income disparities, economic growth disparities, human capital disparities (life expectancy, nutrition, infant and child mortality, adult literacy, enrolment ratio etc.), disparities in the distribution of global economic resources and opportunities, the protection of the interests of the poor and under privileged is a challenge. The dominance of rich nations, multinational corporations and international capital over markets, resources and labor in the developing countries through trade, aid and technology transfer has greatly weakened the capacity of nation states and governments to promote human development and offer protection to the poor people especially the women.

There have been other related issues too. After the economy was opened up in India there was a drastic decline in numbers of females, where 1991 showed the lowest ever sex-ratio in India at 197 females per 1000 males. A reading through the week's newspapers of that time made clear that female infanticide, female feticide, rape and the burning of women for dowry are some of the ills against women's bodies that were reported at an alarming rate.[9] Added to this is a media-generated assault on their symbolic identity and personal worth that prioritizes

[9] Anderson, John Ward, and Molly Moore, 'The Burden of Womanhood' [2000] Social Problems of the Modern World: A Reader Frances Moulder (edn) Belmont, CA: Wordsworth

superficial qualities such as skin color, slim figures and shining hair as the ultimate goals of womanhood.[10]

Gender equality is critical to the development process. The process of globalization may have resulted in new avenues of growth, but due to unequal distribution of its benefits women have been adversely affected in many cases. In 2000, the Beijing +5 Document, while reviewing progress made since the 1995 UN Conference on Women, notes that globalization presents opportunities to some women but leads to marginalization of many others and thus advocates mainstreaming in order to achieve gender equality. Globalization affects different groups of women in different places in different ways. On the one hand it may create new opportunities for women to be forerunners in economic and social progress. With the advent of global communication networks and cross-cultural exchange there seems to be a change in the status of women albeit not to a very large extent. However, globalization has indeed promoted ideas and norms of equality for women that have brought about awareness and acted as a catalyst in their struggle for equitable rights and opportunities. On the other hand it may worsen gender inequality in a patriarchal society, especially in the developing world. In the economic realm it may lead to further marginalization of women in the informal labor sector or impoverishment through loss of traditional sources of income.[11]

According to a United Nations Development Fund for Women's report, over the past two decades the process of globalization has contributed to widening inequality within and among countries, coupled with economic and social collapse in parts of Sub-Saharan Africa and countries in transition like in Eastern Europe and the former Soviet Union and financial crises in Asia and Latin America. The process of globalization must be reshaped so that it is more people-centered instead of profit-centered and more accountable to women. Another report on *'The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights'*, presented to the United Nations Economic and Social Council's Sub-Commission on the Promotion and Protection of Human Rights in its 52nd session, highlights: *Among the distinct groups of society upon whom globalization's impact has been most telling, women clearly stand out. Women have entered the workforce in large numbers in states that have embraced liberal economic policies.*

[10] Subhadra Mitra Channa, 'Globalization And Modernity In India: A Gendered Critique, Urban Anthropology and Studies of Cultural Systems and World Economic Development' Vol. 33, No. 1 (SPRING, 2004) 37-71 Published by: The Institute, Inc <http://www.jstor.org/stable/40553523> Accessed: 18-09-2016 16:30

[11] Bharti Chhibber, 'Globalization and its Impact on Women: A Critical Assessment'[2009] Mainstream Volume XLVII No 21

Globalization has had adverse effects on women especially in the developing countries. As consumers, women are increasingly facing a consumer culture which reduces them to commodities and as producers women are exposed to work exploitation and occupational hazards. Owing to their many roles, as would-be mothers, as mothers responsible for the health of their children and families, as working women at home and outside they are major consumers of healthcare products. In recent years a serious issue has come to light where many products related to women's health, found to be dangerous and banned or restricted in the developed countries, were marketed in the developing countries. As producers also women have to suffer exploitation in terms of low wages, poor working environment, instability of employment, and denial of right to representation.[12]

Many fear that globalization, in the sense of integration of a country into world society, has exacerbated gender inequality. It may harm women in several ways:

- Economically, through discrimination in favor of male workers, marginalization of women in unpaid or informal labor, exploitation of women in low-wage sweatshop settings, and/or impoverishment though loss of traditional sources of income.
- Politically, through exclusion from the domestic political process and loss of control to global pressures.
- Culturally, through loss of identity and autonomy to a hegemonic global culture.

GLOBAL VIEW ON GENDER JUSTICE

Gender Justice, simply put refers to equality between the sexes. Gender justice is a correlation of social, economic, political, environmental, cultural and educational factors, these preconditions need to be satisfied for achieving gender justice. Globally, gender justice has gained strength as it has been realized that no state can truly progress if half of its population is held back. Equal participation by women and men in both economic and social development, and women and men benefiting equally from societies' resources is crucial for achieving gender justice.

Gender justice can be defined as 'the protection and promotion of civil, political, economic and social rights on the basis of gender equality. It necessitates taking a gender perspective on

[12] Ibid

the rights themselves, as well as the assessment of access and obstacles to the enjoyment of these rights for both women, men, girls and boys and adopting gender-sensitive strategies for protecting and promoting them.'[13] Justice, truth, reconciliation and guarantees of non-repetition for victims in the wake of conflict are just some of the core goals pursued by societies through the employment of transitional justice mechanisms. None of these goals however are attainable in a context of exclusion and inequality - as inequality, an injustice in itself, is also a causal factor of conflict. Violence thrives in societies entrenched in hierarchical structures and relations;[14] and no inequality is more pervasive, both vertically and horizontally across the globe than gender inequality.

The human rights activists, feminists, NGO's have struggled for equal rights, freedom and justice of women. Even though considerable progress has been made in this regard, women are still lagging behind. With globalization, there are other complex issues that women face today along with the elementary issues that have always plagued women. Consumerism and cultural heterogeneity has brought in its fold more objectification of women. Apart from these issues, there are still many cultures in the world where the condition of women is still terrible, they still have no control or right over themselves or their bodies or their children. The condition is worse in Africa and the Middle East. Gender Justice refers to harmonizing of rights and needs of women into mainstream society. Justice in this sense means more balanced behavior, an end to violence and equal distribution of social necessities.[15]

[13] Pam Spees, 'Gender Justice and Accountability in Peace Support Operations' (International Alert, February 2004), Available at:
<http://www.international-alert.org/pdfs/gender_justice_accountability_peace_operations.pdf> Gender as a concept has little to do with the biological categories of 'men' and 'women'. Rather it is about the social roles ascribed to individuals. Incorporating a gender analysis renders visible underlying power relations in society in order to expose what is valued and what is marginalized; and how these assumptions and hierarchies, if ignored, can fundamentally distort what might otherwise be well intentioned policy prescriptions. Introducing gender into transitional justice should not further entrench an essentialization of women as victims and men as perpetrators, but instead problematize these simplifications. The aim is to highlight gendered social relations, hierarchies and assumptions in order to provide a more complex and comprehensive picture which can then inform transitional justice policy prescriptions which are able to achieve their objectives and are not thwarted by faulty premises. See, Moser and Clark, supra n 2; Sites of Violence: Gender and Conflict Zones, eds. Wenona Giles and Jennifer Hyndman (Berkeley and Los Angeles: University of California Press, 2004).

[14] Caroline O.N. Moser and Fiona C. Clark, 'Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence' (London and New York: Zed Books, 2001); Susanne Schmeidl with Eugenia Piza-Lopez, 'Gender and Conflict Early Warning: A Framework for Action' (International Alert and Swiss Peace Foundation, June 2002).

[15] Supra note 6

Globally, the United Nations has established a strong mandate for gender justice. The focus on gender equality and gender justice has been there since the inception of the UN. In 1946, a separate body was formed to work on the "advancement of women". The Commission on the Status of Women worked from its inception to collect and compile data on women's situation around the world, to promote women's human rights and raise awareness of, and support for, their contribution to development. The Decade for Women (1976-1985) and four world conferences on women (between 1975 and 1995) contributed significantly to raising awareness and commitment to gender equality and gender justice. In 1995, the Beijing Declaration and Platform for Action had been framed for guiding work at national level.[16]

The UNIFEM (United Nations Development Fund for Women) was created in 1976 to provide technical and financial assistance for women's empowerment. The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) was adopted in 1979 by the United Nation General Assembly, sometimes described as an international bill of rights for women. It is shocking that the United States is the only developed nation not to ratify this convention.

In July 2010, the United Nations General Assembly created UN Women, the United Nations Entity for Gender Equality and the Empowerment of Women. In doing so, United Nations Member States took an historic step in accelerating the Organization's goals on gender equality and the empowerment of women. Apart from that the Commission on the Status of Women, a global policy making body of ECOSOC is dedicated exclusively to gender equality and advancement of women.[17] The United Nation Development Program has developed the two most well-known gender justice indexes – Gender Related Development Index and the Gender Empowerment Measure to compare and rank member states with regard to gender justice performance.

IMPACT: POSITIVE & NEGATIVE

Globalization which initially arose as merely an economic phenomenon has had a spillover effect on the socio-cultural and even political arenas. Though it has had a milieu of negative effects on society, some of the outcomes have been decidedly positive. Globalization is a double edged process as far as women are concerned. On the one hand, majority of women in

[16] Ibid

[17] The Economic and Social Council (ECOSOC) is the United Nations' central platform for reflection, debate, and innovative thinking on sustainable development <www.un.org/en/ecosoc/about/> Accessed: 08.10.2016

India and other developing countries find themselves stripped off the benefit of social security, government subsidy protection of labour rights and safety nets. On the other hand there are possibilities of better education facilities and opportunities at the transnational sense which are very attractive to the privileged few. It is however necessary to understand that effective development requires full integration of women in the development process as agents of change as well as beneficiaries because Indian women can be utilized as development resources in many ways.[18]

Positive Impact:

- Globalization has opened up broader communication lines and brought more companies as well as different worldwide organizations into India. This provides opportunities for not only workingmen, but also women, who are becoming a larger part of the workforce. With new jobs for women, there are opportunities for higher pay, which raises self-confidence and brings about independence. This, in turn, can promote equality between the sexes, something that Indian women have been struggling with their entire lives. Globalization has the power to uproot the traditional views towards women so they can take an equal stance in society.
- Globalization brought about some changes in the economic, political, social, cultural, psychological and religious aspects of life. These changes are visible in the form of transformation of traditional characteristics, such as development of scientific attitudes, industrialization and urbanization, increase in political awareness, technological development and in per- capita income, consequently leading to education of women and improvement of her economic status to some extent. The increase in means of transportation and communications led to exchange of ideas and some attitudinal shifts. Besides this there was improvement in health and welfare services etc. These are the offshoots of modernization and globalization.[19]
- Consequently traditional blind faiths and narrow mindedness in women were left behind and they are to become increasingly aware of their interests, rights and very existence. Besides they are becoming much more aware about the legal safeguards to

[18] Ms Kalpana Dasgupta, 'Globalization and Indian Women : Problems, Possibilities and Information needs – An Overview' [2003] World Library and Information Congress: 69th IFLA General Conference and Council IFLA Women's Issues, Public Libraries and Information Science Journals Sections

[19] Supra note 1 citing, Mishra Saraswati, Status of Indian women (New Delhi, Gyan Publishing house, 2002), p. 151-152.

secure their position.[20] Today through NGO's and women's movements, they have mustered the strength to protest against atrocities. Direct or indirect information about other developed countries has helped them to become more aware of their interests and now they are active in trying to establish the fact that they are not inferior to men in any manner and they have barged into the fields which were considered limited only men.[21]

- The technological revolution specifically in cities has greatly reduced the burden and made their life easier and increased their infinite information about the world. In this way, globalization and technological development in all aspects of status of rural and urban women, such as educational, occupational, financial, marital, familial, social and political, etc., has improved their position
- Due to globalization a number of industries and corporations have got flourished, in which not only men but women also got sufficient opportunities of occupation. As a result, women also started working outside homes as men and started competing with them. Their economic independence raised their self esteem and consequently emancipated her from the traditional norms to some extent.
- The Self-Employed Women's Association (SEWA) in India is a union of women laborers. Globalization has aided their opportunities in various ways. SEWA has established a Women's Cooperative Bank with 125,000 members, and through the aid of globalization, they have even reached the women in the rural areas. Markets in different areas can now be reached by Indian women who have a part in businesses, or by craft-making women who have licenses to export their goods. With more freedoms and opportunities, these women are raising their standard of living by generating more income.
- The communication revolution has connected the world and brought countries very close with each other which has helped the women all over the country & world to establish close relationships among themselves. As to induction into the women's movement, creation of healthy public opinion towards women's problems and extension of women's leaders view and decision-making process in the world, have been facilitated.

[20] Ibid
[21] Ibid

- Media can be viewed as a positive aspect of globalization. Media has the opportunity to reach people, and convey a message to people all over the world.

Negative Impact:

- The Structural Adjustment Policies (SAP) promoted by the World Bank and IMF affected women more deeply and its objectives are decontrol and deregulate; freedom of entry of foreign goods and investment; adoption of market friendly fiscal Exchange, trade and credit policies; cut back in public expenditure; adoption of new technologies; exit policy; withdrawal of subsidies.[22]
- Elimination of public subsidies for health, education and other social services transfered the 'welfare' function of the state on to families. Both globalization and present strategy of economic development are anti women that lead to the feminization of poverty. The change from welfare development to economic development has made women the victims of globalization therefore their position in society is not actually much better.[23]
- The majority of the women in developing countries even today carry the double burden of poverty and of discrimination. They are almost invariably paid less than men for the same work, and their entry into better paid jobs is often blocked.
- Another area, which is likely to have a negative impact, is inflation. The stark reality is that India women even in the globalize world largely are backward, illiterate, overburdened with excessive traditions and morality and contraceptive burdens, and work mainly in the primary sector of economy. Economically, globalization today criticized as it was sharpening the divide between haves and have-nots in India as well as world. Even within women's group it has created the haves and have-nots i.e. those who are in an advantageous position due to globalization and those relegated further into disadvantaged position under the new economic policy.
- An increasing trend towards consumerism, violence individualism and sexual promiscuity has had negative consequences for society and especially for women. It has led to increasing violence, both inside and outside household and consequently increasing trend of crime against women.

[22] Ibid

[23] Sethi Raj Mohini, 'Globalization, Culture and Women's Development' (New Delhi, Rawat Publications, 1999) 74

- While globalization has brought jobs to rural, developing areas such as India where there was previously no employment, these jobs seem to be wolves in sheep's clothing. The work available to women is almost always poorly paid, mentally and physically unhealthy, demeaning, or insecure.
- Women are suffering two fold. As women in developing countries move into the work force, their domestic responsibilities are not alleviated. Women work two full time jobs. One in a factory, where they are paid next to nothing, the second is in the home where they are paid nothing.

GENDER JUSTICE AND STATUTORY FRAMEWORK

There are various legislations that have been passed in India with a view to curb the imbalance in gender hierarchy and aid in women's empowerment. The constitution of India guarantees various rights for women in this regard. This is evident by Part III of the Constitution which deals with fundamental rights and Part IV which deals with Directives Principles of State Policy. *Article 14* states that there shall be equal protection of the law and equality before the law which means that the Courts or any Law enforcement agency should not discriminate between a man and a woman. The right to equality is the foundation on which other laws are formulated and can be implemented. *Article 15* guarantees the right against discrimination. The prejudice and bias against women is rampant an issue to be countered by the right to equality, hence the right against discrimination. *Article 15(3)* talks about the special protection for women. *Article 16* provides the right to equal opportunity in terms of public employment irrespective of the sex of the person. *Article 19* guarantees freedom of speech and expression, to assemble peaceably and without arms, to forms associations and unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India; to practice any profession, or to carry on any occupation, trade or business. *Article 39* talks about the certain principles of policy that need to be followed by the state which are securing adequate means of livelihood equally for men and women, equal pay for equal work among men and women, and the health and strength of workers, men and women are not abused. *Article 42* requires the state to make provision for securing humane conditions of work and maternity relief.

In India, several laws, legislations, policies and institutional reforms have been enacted to carry out the gender action plan for the development of women. Legislation is an important instrument for bringing about a change in the unequal economic and social status in India. In

order to ameliorate the condition of women in India, legislature enacted the large volume of enactments and many of these legislations were enacted in colonial period which are as follows:

i) 1829: Abolition of Sati
ii) 1856: Widow Remarriage made legal
iii) 1870: Female infanticide banned
iv) 1872:Inter caste, intercommunity marriages made legal
v) 1891: Age of consent raised to 12 years for girls
vi) 1921: Women get rights to vote in Madras province
vii) 1929: Child Marriage Restraint Act was passed
viii) 1937: Women get special rights to property
ix) 1954: Special Marriage Act was passed
x) 1955: Hindu Marriage Act was passed
xi) 1956: Suppression of Immoral Traffic in Women and Girls Act was passed
xii) 1961: Dowry Prohibition Act was passed
xiii) 1981: Criminal Law Amendment Act was passed
xiv) 1986: The Indecent Representation of Women (Prohibition) Act was passed
xv) 1987: Commission of Sati (Prevention) Act was passed.

Apart from these above mentioned laws there are some enactments pertaining to industry which contain special provisions for women such as:

i) The Workmen Compensation Act, 1921
ii) Payment of Wages Act, 1936
iii) Factories Act, 1948
iv) Maternity Benefit Act, 1961
v) Minimum Wages Act, 1948
vi) Employees State Insurance Act 1948 and
vii) Pensions Act 1987.

Recently the Government's piecemeal approach to protect women has taken a step forward enacting a law providing protecting women from sexual abuse and domestic violence. With the establishment of National and State Human Right Commissions and National Commission for Women, gender issues are receiving greater attention. Further the Supreme

Court's approach in *Vishaka and others* v. *State of Rajasthan*[24], *Apparel Export Promotion Council* v. *A K Chopra*[25], *Madhu Kishwar* v. *State of Bihar*[26], *Gaurav Jain* v. *Union of India*[27], *Delhi Domestic Working Women's Forum* v. *Union of India*[28], *Bodhisathwa Gautam* v. *Subhra Chakraborty.*[29]

CONCLUSION

Some say a woman is the better half of a man; some use women or motherly traits to define nature and the world around us; for example 'mother nature'. We give great attention to women and hold them to such dear characteristics, and yet there has been a decline in the interest to keep our women safe, secure, and free in the era of globalization. As the United Nations Educational Scientific and Cultural Organization (UNESCO) highlights, globalization is a multidimensional process of economic, political, cultural, and ideological change. It has had a mixed impact on women's rights in India and around the world. On the one hand, it has led to increasing violations of women's economic, political, and cultural rights in large measure due to the withering away of the welfare state, the feminization of poverty, the expansion of religious fundamentalism, and new forms of militarism and conflict. It has been noted by many international women's organizations, that the new trade agreements contravenes the spirit and often the letter of international conventions on human rights, labor rights, and women's rights. On the other hand, aspects of globalization have provided women with increasing opportunities to work in solidarity at regional, national and international levels, who are becoming a larger part of the workforce, to demand their rights. With new jobs for women, there are opportunities for higher pay, which raises self-confidence and brings about independence. This, in turn, will promote equality, something that Indian women have been struggling for. Their objective is to help promote mechanisms that strengthen the positive aspects and consequences of globalization, especially with respect to women's rights and gender equality. The Constitution of India guarantees equality between sexes and recognizes the rights of women. It has provisions to curb the imbalance in gender hierarchy and aids in the empowerment of women. Apart from the Constitutional provisions, various statutes have been enacted to protect the rights of the women. The Supreme Courts

[24] AIR 1997 SC 3011
[25] AIR 1999 SC 625
[26] AIR1996 SC 1864
[27] AIR 1990 SC 292
[28] 1995 SCC (1) 14
[29] AIR 1996 SC 922

proactive approach in plethora of cases has also played a major role to strengthen their position. Further, the decision of Supreme Court in recognizing transgender people as the third gender and advocating their human rights has been one major step that the Indian judiciary has taken. This decision of the Supreme Court is to have a global impact on gender identity and is to take gender justice way beyond the binary gender identification as males or females.

MEDICAL NEGLIGENCE AND SOCIO LEGAL ASPECTS

Sanjana Shrivastava*

ABSTRACT

The right to health is one of the most important constitutionally recognized rights granted to the citizens of India. Citizens have a right to not only obtain treatments or health facilities but also to be treated by health care providers who are competent to treat them. While we may logically conclude that a health care provider cannot work magic, it needs to be understood that this cannot absolve a medical practitioner from liability during the course of provision of their services. The concept of medical negligence while not directly recognized by the legislature expressly under the law has been duly recognized by the courts wherein the courts have attributed civil and criminal liability to medical practitioners in cases of proven negligence.

Most of the cases dealing with medical negligence end with the payment of compensation to the aggrieved or to the relative of the aggrieved. It is important that the compensation payable by the liable person is fairly and justly computed with reference to certain principles which are only advisory in nature. There can never be a fixed amount which the law can prescribe as compensation.

This paper attempts to explain the concept of medical negligence along with the judicial interpretation thereof. The judicial trend has evolved with the increasing instances of cases filed before consumer forums claiming for compensation. Whilst one cannot put a value on the life of an individual, an endeavor has been made by the courts to try and lend some comfort to an aggrieved person. This paper also attempts to make the reader understand the judicial interpretation with regard to compensation payable in cases of medical negligence along with certain suggestions to improve the redressal system available to the citizens who wish to approach the consumer forum for justice.

Keywords: Liability, Judicial Interpretation, Compensation, Multipier Method, Suggestions

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MEDICAL NEGLIGENCE: SOCIO LEGAL ASPECTS

Medical negligence is any act or omission conducted by a health care provider which causes detriment to the service recipient irrespective of whether the detriment or damage is of a temporary or permanent character. The act of deviating from the normal health standards as are typically followed by the health care providers constitutes medical negligence. For an act to be construed as medical negligence, it is required to be satisfactorily proved that the health provider has not acted in a manner which is reasonably required of him and has been specifically careless in the provision of his duties.

Medical negligence is no longer purely a social issue. The fact is that with the increasing cases initiated by aggrieved consumers before the consumer forum, the concept has taken a legal turn wherein the duties of health care providers are now subject to intense scrutiny by the judicial forums across the nation. The onus to prove that a health care provider has been negligent in pursuing the duties lies on the complainant who is required to show case how the health provider has deviated from the normal course of his duties. This principle is dependent on the legal principle of law that a person is presumed innocent until proven guilty. This has often been the reasons why health care providers get away with limited punishments irrespective of the gravity of the injury caused due to their negligence.

Excerpts from the newspapers show that the health care providers no longer feel morally bound to their duties and consider themselves on par with any other professional or service provider. This has created a huge discontent in the society and has aggravated the society to take up the issue more proactively with the judiciary. Medical service providers however argue that they are not miracle workers and therefore, every failure to save a life cannot be construed as negligence from their side. The fear of litigation and the loss of reputation linked to the initiation of such claims have also created a lot of apprehension in the minds of the medical services provider in the discharge of their duties. In light of this, the judiciary has intervened in a very successful manner to try and comprehend what are the standards of care expected out of a health care provider and what deficiencies in the service would really constitute medical negligence.

JUDICIAL INTEPRETATIONS

The first and foremost point in context to the Indian law is that there is no specific defined law applicable to health care providers for medical negligence. Since negligence is a tortuous

crime, medical negligence often leads to civil penalties as opposed to criminal penalties. The Indian Penal Code, 1860 provides for certain criminal activities which do cover medical negligence in its ambit. There are three essential constituents required for negligence: there must be the existence of a duty and such duty must be acknowledged; there has to be a breach of the duty and the aggrieved has suffered damage. It must be agreed by most of the people that when a doctor commences his practice, there is an implied warranty given by him that he is competent to provide medical advice. It is to be clearly understood that like most professionals, a doctor is permitted to have an error of judgment. This often leads to confusion that if there is an injury caused to a person due to the error of judgment of a doctor, would it be construed as medical negligence. This has been clarified by the Supreme Court in the *Jacob Matthews* v. *State of Punjab*[1] wherein the court observed that: "*In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution…. He does not assure his client of the result…A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on… …Judged by this standard, a professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices. …A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence*.

[1] AIR 2005 SC 3180

To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent."

A reading of the above excerpt from the judgment indicates that the parameters required to refute an allegation of medical negligence is that the health care provider should have acted in a reasonable manner and as an ordinary person possessing his skill set would have acted. The law has never placed any parameters on the skill of a person to form a case of medical negligence. Another interesting point to note in this case was that the health care provider refuted allegations of criminal liability to say that there was no mens rea or bad faith to cause harm and therefore, mensrea being an essential factor for criminal liability, there was no criminal liability. Secondly, the case sought to make a distinction between simple negligence wherein a doctor would compensate the aggrieved and a case of gross neglect wherein the negligence quotient was high enough to endanger the life of a patient and in such cases, doctors would be subject to criminal liability.

For an extremely long time, the judgment in the Jacob Matthews case was followed and agreed upon as being accurate in relation to health care providers. In the case of *Martin D'Souza* v. *Mohd Ishfaq*[2], Justice Katju and Justice Singhvi have stated that the principles laid down in the Jacob Matthews case are purely subjective. It is difficult to determine what constitutes reasonable care which is required to be given by a medical professional. Further, the distinction between simple and gross negligence is an extremely subjective idea and again depends on the understanding of the judge in the particular case. They have further acknowledged that the judges do not possess medical knowledge and to a large extent each case would also be determined in accordance with the notions of the judges. The judges stated: *"The law, like medicine, is an inexact science. One cannot predict with certainty an outcome of many cases. It depends on the particular facts and circumstances of the case, and also the personal notions of the Judge concerned who is hearing the case. However, the broad and general legal principles relating to medical negligence need to be understood."*

Another important point laid down by this court was that to avoid the increasing litigation against the medical fraternity, any notice issued by the consumer court to a doctor pursuant to

[2] AIR 2009 SC 2049

the filing of a complaint by an aggrieved would have to be done only after ensuring that the case was referred to a medical committee who assess the facts of the case and decide whether a notice should be issued to the concerned doctor.

This requirement of referring the case to an expert was done away with in the case of *V. Kishan Rao* v. *Nikhil Super Specialty Hospital*[3] wherein the court laid down that no expert opinion was required if at all the negligence was prima facie such as rendering of the wrong treatment or administering of prescribing wrong medication.

In the case of *Marghese* v. *Dr. Mehta*[4], the Supreme Court gain took cognizance of the principles raid down in the Kishan Rao case and stated that where the facts of the case prima facie indicated medical negligence, the courts would have to acknowledge that irrespective of an expert opinion.

Another extremely crucial point which has been debated upon widely is that of the compensation awarded to the aggrieved persons. The importance of awarding just and fair compensation has been stressed on many cases especially awarding uniform compensation in those cases wherein the facts of the litigation are the same. The practice of awarding uniform compensation in uniform situations is extremely important in maintaining the satisfaction and trust in the system.[5]

Typically and until the Kunal Saha case, the courts have followed a multiplier method which awarded the compensation. The multiplier method, primarily, uses two numbers – the multiplicand and the multiplier – to arrive at a number, which shall be the compensation. Typically, one of the numbers – the multiplicand – is the quantum of compensation determined for every year's loss of earning minus the amount the victim would have spent on himself, and the other number – the multiplier – is the difference between the average life, as per the life expectancy data available, and the age of the deceased minus the number of years for which he would be unproductive, and also taking into account any other risk factors of bad health, accident, etc. which would have shortened the productive age without any negative contribution of the medical negligence. Thus, the multiplier used for arriving at the

[3] 2010 (5) SCR 1
[4] 2011 SC 249
[5] *Sarla Verma & Others* v. *Delhi Transport Corporation & Others* (2009) 6 SCC 121

compensation is much lesser than simply the difference between average age and the age at the time of suffering from medical negligence.[6]

The main aim of the judiciary has always been to award a uniform and just compensation which may render some comfort to the aggrieved. If the multiplier system is deemed just as per the facts of the case, that particular method should be used. The judiciary changed the trend of consistently using the multiplier method in the case of *Nizam Institute of Medical Sciences* v. *Prashanth Dhanaka & Ors*.[7] Wherein the court has stressed that the *"The kind of damage that the complainant has suffered, the expenditure that he has incurred and is likely to incur in the future and the possibility that his rise in his chosen field would now be restricted, are matters which cannot be taken care of under the multiplier method."*

This principle has been stressed upon by the court in the case of *Dr. Balaram Prasad & others* v. *Dr. Kunal Saha*[8] wherein the court has held that *"The multiplier method was provided for convenience and speedy disposal of no fault motor accident cases. Therefore, obviously, a "no fault" motor vehicle accident should not be compared with the case of death from medical negligence under any condition. The aforesaid approach in adopting the multiplier method to determine the just compensation would be damaging for society for the reason that the rules for using the multiplier method to the notional income of only Rs.15,000/- per year would be taken as a multiplicand. In case, the victim has no income then a multiplier of 18 is the highest multiplier used under the provision of Ss. 163 A of the Motor Vehicles Act read with the Second Schedule…. Therefore, if a child, housewife or other non-working person fall victim to reckless medical treatment by wayward doctors, the maximum pecuniary damages that the unfortunate victim may collect would be only Rs.1.8 lakh. It is stated in view of the aforesaid reasons that in today's India, Hospitals, Nursing Homes and doctors make lakhs and crores of rupees on a regular basis. Under such scenario, allowing the multiplier method to be used to determine compensation in medical negligence cases would not have any deterrent effect on them for their medical negligence but in contrast, this would encourage more incidents of medical negligence in India bringing even greater danger for the society at large."* This case has seen one of the highest amounts of compensation awarded to an aggrieved person. There can be no second opinion that preservation of human life is of paramount importance. That is so on account of the fact that once life is lost, the

[6] http://www.iimahd.ernet.in/assets/snippets/workingpaperpdf/15451890132014-03-27.pdf
[7] (2009) 6 SCC 1
[8] (2014) 1 SCC 384

status quo ante cannot be restored as resurrection is beyond the capacity of man. The patient whether he be an innocent person or a criminal liable to punishment under the laws of the society, it is the obligation of those who are in charge of the health of the community to preserve life so that the innocent may be protected and the guilty may be punished. Social laws do not contemplate death by negligence to tantamount to legal punishment. Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statute or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way.[9]

In light of the same, the judiciary has come forward to protect the interests of the aggrieved persons by not applying the multiplier method in all cases of medical negligence. The concept of fair and just remuneration still remains the bedrock on which the judiciary functions and the discretion is left to the judiciary to determine the manner in which the compensation should be computed.

CRITICAL ANALYSIS

It is important that a balance is brought between the societal expectations and the judicial decisions to maintain harmony and to secure the belief of the citizens in the judicial system. However, there are still some lacunae which are noticed in the way the legal system tackles the issue. A doctor who renders service free of charge does not come under the purview of the Consumer Protection Act, 1986 since his duties do not cover under the purview of "services" under the Act.[10] This would essentially mean that no action can be brought under the Act against a doctor who works in a government hospital or charitable hospital without charging any fee. This needs severe redressal by the government since majority of our population resorts to government hospitals for lack of affordability of private hospitals.

In most cases, the quantum of compensation awarded differs from case to case even though the facts of the case are principally the same. For this purpose, a set of guidelines need to be evolved by the legislature for reference by the judiciary in determining the quantum of

[9] *Parmanand Kataria* v. *Union of India* 1989 AIR 2039
[10] *Indian Medical Association* v. *VVP Santha* 1996 AIR 550

compensation of each case. This would greatly aid in bringing about some element of uniformity in judicial decisions which would reinforce the faith of the people in the judicial system. Statistical studies could be conducted to understand what the kinds of negligence committed are and an endeavor could be made to classify them for better understanding. These guidelines or consultative papers could purely be for reference purposes, they need not be made the law of the land.

It has become extremely difficult to affix liability of medical negligence on a health care provider. The most commonly adopted argument by the health care provider is that the doctor is not the only concerned person in charge and responsibilities also lie on the hospital and other staff assisting in the treatment. For this purpose, the judiciary needs to be assisted by a panel of medical practitioners who are not interested in the suit at hand to understand and review from where the negligence has emanated. While this is done by the judiciary in a few cases, it is strongly suggested that an independent panel be set up with experienced practitioners who shall mandatorily review and render advice in each case. Keeping in mind that the judiciary may not always be well versed with the medical complications in each case, the panel as suggested may aid in the better understanding of each case thereby assisting in determining the compensation.

The recent trend of health care providers commercializing their services has led to catastrophic consequences. There are increasing instances of doctors refusing to treat patients who are critically ill on frivolous grounds such as delay in filling the relevant forms. With the recent demonetization policy, we have seen instances wherein the doctors have refused to treat patients including minors due to lack of available currency. This refusal to treat patients needs to be strictly and stringently penalized more severely than medical negligence. Whilst refusal to treat patients' does not constitute negligence in a direct manner, failure to do anything regarding it will lead to more instances.

Right to health is one of the most important rights of society. It is important to conduct workshops amongst the lower sections of society to make them aware of the rights available to them in case they are aggrieved by the act of any health care provider. It is essential that the trend of the judiciary also progresses with the societal changes and the demands of the society. Since the society is the service recipient, their grievances and complains are of paramount importance. The governmental organs including the judiciary are present to serve the interests of the general public. Efforts should be made to ensure that medical practitioners

do not absolve themselves from liability merely due to lack of mens rea or on account of vicarious liability. Criminal liability should be affixed in relevant cases to emphasize on the importance of their profession and their professional duties. This would be the contribution of the judiciary in ensuring that the health of every individual becomes their wealth.

JUDICIAL STRUCTURE: A COMPARATIVE STUDY OF INDIA AND ITS SUB-CONTINENT

Aparajita Kumari*

INTRODUCTION

The Indian judicial system is one of the oldest and lengthiest legal systems in the world.[1] The Constitution secures justice to all its citizens apart from securing liberty, equality, and promoting fraternity. The judiciary occupies a pivotal under the Indian Constitution. It organized the country's judicial system with a striking unity. It works as the final authority in interpreting legal issues and constitutional arrangements. Appeals progress up a set of hierarchically organized courts, whose judges interpret law under a single national constitution. Although states may pass their own laws, there are no separate state constitutions, and the same set of courts interprets both state and national law. Upon closer scrutiny of this seeming cohesiveness, however, two types of clear divisions quickly become evident that between the judiciary's federal units and its different levels.

As India's first Attorney-General most distinguished jurists, Mr. M. C. Setalvad, points out in the Hamlyn Lectures "an impartial and independent judiciary was gradually built up times. The Constitution of India continued and strengthened this incorporating into it what may be called an integrated judicial system to function impartially beyond the range of executive influence and except by Parliament under circumstances prescribed by the Constitution. Judicial system of this nature was essential in order to preserve and ideals of democracy and freedom and of the Rule of Law embodied Constitution"[2]

While it is debatable whether India's political structure is federal with unitary features or unitary with federal features, it is incontestable that its judicial structure is unitary.[3] At the apex of the hierarchy of courts is the Supreme Court of India with jurisdiction wider than that of any High Court. The powers of the various courts are distributed in such a way that every citizen in this country has access to judicial system. The present judicial system of India was

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[1] Rita Singhania, Civil Court System , Singhania & Partners LLP, <www.Singhania.in> accessed on 10 September 2016

[2] M. C. Setalwad, *The Common Law in India* (Hamlyn Lectures 12th series; Stevens & Sons Ltd.,1960) 200.

[3] A. G. Noorani, 'The Indian Judiciary Under The Constitution, Law and Politics in Africa, Asia and Latin America' [1976] 9 VRU Law Review 335-341

not a sudden creation. It has been evolved as the result of slow and gradual process and bears the imprint of the different period of Indian history. The period which however, have made the greatest impact on the existing system are those nearest to the present times and it is not surprising that the period preceding and following the down of independence, more particularly that one after the coming into force of the constitution have been the greatest molding factors.[4]

HISTORY OF DEVELOPMENT OF INDIAN JUDICIAL SYSTEM

History comprises of the growth, evolution and development of the legal system in the country and sets forth the historical process whereby a legal system has come to be what it is over time. The legal system of a country at a given time is not the creation of one man or of one day but is the cumulative fruit of the endeavor, experience, thoughtful planning and patient labor of a large number of people through generations.[5]

Ancient India represented a distinct tradition of law, and had a historically independent school of legal theory and practice.[6] The political structure in the Vedic Period consisted of kingdoms, each tribe forming a separate kingdom. The basic unit of political organization was the *kula* (family). A number of *kulas* formed a *grama* (village), *Gramani* being the head. A group of *gramas* formed a*vis* (clan) and a number of *vis* formed the *jana* (tribe). The leader was *Rajan* (the Vedic King). The king (raja) was the supreme head of the legislative, executive and judiciary branches. The members of the council of minister could give advice to the king, but final decisions were left to the king. The ministers and other officials were directly appointed by the king. The *sabha* and the *samithi* were responsible for the administration of justice at the village level.

According to *Brihaspati Smiriti*, there was a hierarchy of courts in Ancient India beginning with the family Courts and ending with the King. The lowest was the family arbitrator. The next higher court was that of the judge; the next of the Chief Justice who was called Praadivivaka, or adhyaksha; and at the top was the King's court.

[4] Rakesh Singh Bhadoria, 'Ancient Judicial System Of India- Satayamev Jayate', *Lex Hindustan* (New Delhi, 7 August 2016)
[5] Rashika Chaddha, 'Evolution of Law: A short history of Indian legal Theory', *Legal India* (New Delhi, 13 May 2011)
[6] S.D. Sharma, *Administration of Justice in Ancient India* (Harman Publishing House, 1988) 170

Early in this period, which finally culminated into the creation of the Gupta Empire, relations with ancient Greece and Rome were not infrequent. The appearances of similar fundamental institutions of international law in various parts of the world show that they are inherent in international society, irrespective of culture and tradition.

The ideal of justice under Islam was one of the highest in the middle ages. The administration of justice was regarded by the Muslim kings as a religious duty. Sources of Islamic Law are divided into Primary and Secondary Sources. *Quran* is the first and the most important source of Islamic law. It is believed to be the direct words of God as revealed to Muhammad through angel Gabriel in Mecca and Medina. Muslim jurists agree that the *Quran* in its entirety is not a legal code. *Sunna* is the traditions or known practices of Prophet Muhammad, recorded in the *Hadith* literature. *Quran* justifies the use of *Sunna* as a source of law. *Ijma* and Qiyas are the secondary sources of Islamic law. There are 72 Muslim sects in all with the *Shia* sect being the most popular in India

Under the Moghal Empire the country had an efficient system of government with the result that the system of justice took shape. The unit of judicial administration was Qazi. Every provincial capital had its Qazi and at the head of the judicial administration was the Supreme Qazi of the empire (Qazi-ul-quzat). Moreover, every town and every village large enough to be classed as a Qasba had its own Qazi. During this period, the personal laws of the non-Muslims were applied in civil matters, but the criminal law was Islamic in nature. Whenever there was a conflict between Islamic Law and sacred laws of the Hindus, the former prevailed.

After that, the British rule in India brought about the introduction and development of the common law legal system, on which India has based its present judicial framework.[7] In the early seventeenth century, the Crown, through a series of Charters, introduced a judicial system functioning under its authority in the three "presidency" towns (Bombay, Madras and Calcutta), i.e. the largest and most important towns under British rule (the courts were called 'Admiralty Courts' in Bombay and Madras and 'Collector's Court' in Calcutta).

These judicial systems were formulated independently by the Governor and the Council of those towns, and had authority to decide both civil and criminal matters. However, the towns

[7] K.G. Balakrishnan, '*An Overview of the Indian Justice Delivery Mechanism'*, International Conference of the Presidents of the Supreme Courts of the World (Abu Dhabi, March 2008)

functioned independently, and there was a lack of coherence due to dissimilarities in functioning. Moreover, the courts did not derive their authority directly from the Crown, but from the East India Company. This also contributed in making the system unsystematic

In the eighteenth century, with the fortifying of the British burden in India, a more uniform example developed. All "administration" towns now had a uniform legal framework (called a *Mayor's Court*). Before long, by Royal Charter, the courts got their power specifically from the Crown. An arrangement of speaks to the Privy Council was started, and this denoted a noteworthy historic point in the advancement of the Indian Judicial framework, on the grounds that the Privy Council worked as the last court of bid in India for over 200 years. Be that as it may, the courts worked under the English law, with no respect for nearby laws, which raised questions with respect to their adequacy. Additionally, a great part of the nearby criminal equity, at the grass root level, was left in the hands of nearby landowners.

In the late eighteenth century, the Mayor's Court was supplanted with an incomparable Court (in administration towns). This was the main endeavor to make a particular and autonomous legal organ in India, under the immediate power of the Ruler. The Chief Justice and Pusine Judges were selected by the King. This Court had purview over common, criminal, admiral's office and ministerial matters and was required to detail standards of practice and method. Requests from this court lay to the Privy Council.

At the outset, the regional purview of the court amplified as it were to British subjects and "His Majesty's" subjects (every one of those in work of the East India Company and those going into an agreement with one of "His Majesty's" subjects). In regions aside from the administration towns (called "mofussil"), the Organization ruled over every single legal matter. Its ward had no connection with the Crown. Nearby thoughtful and criminal equity was left in the hands of local people, working under a framework known as the "adalat framework".

By the mid nineteenth century, a consistent chain of importance of courts and a sound procedural practice had advanced. The announcement by Queen Victoria that made India a British reliance called for supreme sovereign control over India. The adalat framework and Supreme Court were canceled, a High Court was built up in every administration town, and more were conceived in different territories also. Bids from them went to the Privy Council. Accordingly, this made a uniform legal framework in India, which, in substance, has to a

great extent proceeded till today. The forerunner of the present Supreme Court of India was the Federal Court (built up in 1937), which heard bids from the High Courts, and whose choices were appealable to the Privy Council. The present Supreme Court of India appreciates the joined locale of the Privy Council and the Federal Court, which are no more in presence.

STRUCTURE OF THE INDIAN JUDICIARY & DIFFERENT COURTS OF APPEAL

The Indian judiciary is well knit and integrated. There is one unified judicial system for the entire republic of India. The judicial system provided by the Constitution of India is comprised the three type of courts. At the top, it is Supreme Court, at middle the High Courts and at bottom the subordinate Courts in addition to the Constitution, there are other laws and rules which direct the composition, power and jurisdiction of these courts.

The Supreme Court of India

The Supreme Court of India is the highest court of the land as established by Part V, Chapter IV of the Constitution of India. It acts as the guardian and protector of the Constitution of India more specifically of fundamental rights.[8] It also acts as the only arbiter in matters of relations between the union and the states and the states inter se.

Composition: The Supreme Court originally consisted of a Chief Justice and seven other judges (Art. 124). The strength has been increased several times by the Acts passed by the Parliament. Presently it consists of the Chief Justice of India and not more than 30 other Judges.

Appointment: The Chief Justice of India is appointed by the President in consultation with judges of the Supreme Court and the State High Courts, as he may think necessary, besides taking the advice of the Council of Ministers. As per convention the senior most judge of the Supreme Court is usually appointed as Chief Justice. The President in consultation with the Chief Justice of Supreme Court appoints the other judges of the Supreme Court. A judge takes his oath of office before the President or someone appointed by President for the purpose in the form prescribed in the constitution. The constitution through its Article 124 (6)

[8] Bernard D'Sami, *Indian Legal System and its Relevance for Marginalized and Disadvantaged Groups* (Indira Gandhi National Open University, 2012) 238.

and (7) prohibits a person holding office of Supreme Court Judge from practicing law before any court in territory of India.

Qualification: To be appointed as judge of the Supreme Court, a person must be (i) a citizen of India and (ii) must have been a judge of a High Court or of two such courts in succession for a period of five years or (iii) an advocate of High Court for at least 10 years or a distinguished jurist. There is no minimum age fixed for appointment as a judge.

Term of Office and Removal: A judge of Supreme Court continues in office until he/she attains the age of sixty five years. However, one can resign from office earlier by addressing his resignation to the President. A judge may be removed from his office only by an order of the President on the ground of misbehavior or incapacity but the removal is possible only through regular procedure laid down in the Constitution. If the two Houses of Parliament supported by a majority of the total membership of that House and by a majority of not less than 2/3rd of the members of each House, present and voting recommend the President for the removal of Judge from office, contrary to the common belief, there is no provision in our constitution for the impeachment of a judge.

Seat of the Supreme Court: The seat of the Supreme Court is at Delhi. But the Chief Justice of the Supreme Court, with the previous consent of the President can enable the Supreme Court to sit elsewhere in India, besides Delhi.

Jurisdiction and Power: The Supreme Court has a three-fold jurisdiction. They are classified as: (i) original, (ii) appellate and, (iii) advisory.

Original Jurisdiction: Original jurisdiction means the power to hear and determine a dispute in the first instance. The Supreme Court has original jurisdiction in cases, which extends to disputes: a) between the Government of India and one or more States; b) between the Government of India and any state or States on one side and one or more States on the other; c) between two or more States, and d) disputes regarding the enforcement of fundamental rights. No other Court in India can deal any such suit. Thus the Supreme Court is a federal court. But, there are certain exceptions to this original jurisdiction. This jurisdiction shall not extend to a dispute arising out of a treaty, agreement etc. which is in operation and excludes such jurisdiction. The Supreme Court's jurisdiction may also be excluded in certain other matters like inter-State water disputes (Art. 262), matters referred to the Finance Commission, (Art. 280) adjustment of certain expenses as between the Union and the States

(Art. 290). State cannot claim recovery of damages against the Government of India (Art. 131). The original jurisdiction of the Supreme Court also extends to cases of violation of one's fundamental rights (Art. 32). Under Art. 139A, Supreme Court may transfer cases from High Court to another in the interests of justice.

Appellate Jurisdiction: The Supreme Court is the highest court of appeal from all courts in India. It hears appeals in cases related to civil, criminal and constitutional matters. The appellate jurisdiction of Supreme Court may be divided under three heads:

i) Cases involving interpretation of the Constitution – Civil, Criminal or otherwise

ii) Civil cases, irrespective of any constitutional question

iii) Criminal matters, irrespective of any constitutional question.

Supreme Court accepts appeals by special leave from any judgment, decree or final order in civil proceeding if there is a substantial question of law or interpretation of constitution is required. In a criminal proceeding of a High Court, the appellate jurisdiction of Supreme Court lies as of right (a) where High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death, or (b) where High Court has withdrawn for trial before itself or High Court certifies a case fit for appeal.

Advisory Jurisdiction: The Supreme Court renders its advice on any question of law or fact of public importance referred to it for consideration by the President. The advice is not binding on the President, who may or may not accept it. The main use of this provision is to enable the Government to get an authoritative opinion as to the legal validity of a matter before action is taken upon.

Other Powers: Supreme Court enjoys numerous other powers also. These are:

(a) Article 129 declares that Supreme Court is a 'court of record'. The decisions of the Supreme Court are recorded and these form precedents for other cases of similar nature. If any person, body or institutions of the country show disrespect to the decisions of Supreme Court, it may institute 'contempt of court' proceeding against that person, body or institutions. It has the power to punish by fine and imprisonment any person guilty of contempt of its authority.

(b) The decision of the Supreme Court is binding on all courts within the territory of India. However, the Supreme Court is not bound by its earlier decision. It can come to a different decision if it is convinced that it had made an error or harmed public interest.

(c) The Supreme Court looks into disputes regarding the election of the President and the Vice- President under Art. 71.

(d) The Supreme Court can make rules regarding the practice and procedure of the Court with the approval of the President.

The High Courts

At the State level, the Constitution provides establishment of a High Court which is the highest organ of judicial administration in the State. At present, there are 24 High Courts in India. According to Art. 214 of the constitution, there shall be a High Court in each state but Article

231 empower Parliament to establish a common High Court for two or more states. Parliament may by law constitute a High Court for a Union Territory or declare any Court in any such territory to be a High Court (Article 241). Delhi has a separate High Court, but other Union Territories come under the jurisdiction of different High Courts.

Appointment of High Court Judges: Every High Court consists of a Chief Justice and such other judges as the President may appoint from time to time. The strength of all the High Courts is not the same. The Chief Justice of the High Court is appointed by the President in consultation with the Chief Justice of India and the Governor of the State concerned. In the appointment of the other judges, the President also consults the Chief Justice of that High Court. Besides, the President has the power to appoint additional judges for temporary period or acting judges in absence of permanent judges.

Qualification: To be eligible for appointment as a judge of a High Court a person must a) be a citizen of India not being over 62 years; and must have b) held a judicial office for at least ten years; or c) should have been for at least 10 years an advocate of High Court or of two or more such courts in succession [Art. 217 (2)]

Term of Office: The judges of the High Court hold office until they attain the age of 62 years. They may resign earlier by writing to the President. A judge of the High Court may be

removed by the President on the grounds of proved misbehavior or incapacity on an address by both Houses of Parliament supported by the vote of two-thirds of members present and voting in each House under Article 217(4). The mode of removal of a judge of High Court is the same as that of a judge of the Supreme Court. The office of a judge may also be vacated if he is appointed a judge of the Supreme Court or being transferred to any other High Court by the President.

Jurisdiction and Function: Each High Court exercises power of superintendence over all the courts and tribunals within its jurisdiction (exceptions being that set by law relating to the armed forces). The High Court can take steps to ensure that the lower courts discharge their duties within the bounds of their authority. It can withdraw case pending before a subordinate court which involves a substantial question of law as to the interpretation of the Constitution and may itself decide it or determine the said question of law and return the case to court for determination.

The High Court can also transfer cases from one lower court to another lower court for disposal. Every High Court is a court of record and has all the powers of such a court, including the power to punish for its contempt. It is the highest court of appeal in the State in both civil and criminal cases. It also hears cases relating to matrimonial matters and the admiralty. A High Court Judge's power to hear specified class of cases is derived only from the application of business by the Chief Justice.

The High Court also has power to issue writs for the enforcement of fundamental rights under Article 226. Besides this, it can issue writ even in case of infringement of legal right of a person, provided the writ must be the appropriate remedy for that. In this way, the power of High Court is much wider than the Supreme Court which is confined only to the enforcement of fundamental rights. The High Court's power to issue extend to the matter of defect of jurisdiction, non-observance of the rules of natural justice, error of law apparent on the face of the record and alternative remedy.

The Subordinate Courts

Chapter VI under Part VI of the Constitution provides the provisions regarding subordinate courts. The subordinate courts, at district level and lower, have almost similar structure all over the country. They deal with civil and criminal cases in accordance with their respective jurisdictions and administer the Code of Civil Procedure and the Code of Criminal Procedure.

Each State is divided into judicial districts. The subordinate judiciary in each district is headed by a District and Sessions Judge. The usual designations on the civil side are District Judge, Additional District Judge, and Civil Judge. On the criminal side, it's Sessions Judge, Additional Sessions Judge, Chief Judicial Magistrate, Judicial Magistrate etc. The Governor in consultation with the High Court appoints the district judges. A person who is not already in Government Service should have at least seven years' experience at the bar to become eligible for the position of a district judge.[9]

In matter of appointment of person other than district judge to the judicial service of a State shall be made by the Governor in accordance with rules made there under. Besides the State Public Service Commission, the High Court has to be consulted in the matter of such appointments.[10] The administrative control of the High Court over the district courts and other lower courts is complete in almost all aspect regarding postings, promotions and grant of leave etc. to any person belonging to the judicial service of a State and holding any post inferior to the post of a judge is vested in the High Court.

District Court: These courts are primarily Civil Courts to hear generally the appeals from the courts of original civil jurisdiction in the Districts and Tehsils (Talukas). However these courts have also been given original civil jurisdiction under many enactments. This court exercises jurisdiction within its territorial or local jurisdiction of the District. These courts are again depending upon the workload classified into Principal District Court, I Additional District Court, and II Additional District Court etc. The Principal District Judge of these courts makes over all supervision of subordinate civil courts.

Session Court: The State is to establish a court of the session court for every district. The court is to be presided over by a judge appointed the High Court.[11] These courts are primarily Criminal Courts, with jurisdiction to revise the orders from the subordinate Magistrates as well as to try serious offences, as prescribed by law. Nevertheless these courts have also been given original criminal jurisdiction under many enactments. This court exercises jurisdiction within its territorial or local jurisdiction of the District.

Principal Civil Judges (SD& JD) Courts: Depending on the monetary jurisdiction assigned to the category of the court, all the civil litigation matters are filed before the courts of the

[9] Article 233
[10] Article 234
[11] Cr.P.C 1973, s. 9

original civil jurisdiction, either the Senior Division or the Junior Division depending upon the workload of the court. These courts again classified into I Additional Civil Judge Senior Division, II Additional Civil Judge Senior Division and Civil Judge Junior Division, I Additional Civil Judge Junior Division, II Additional Civil Judge Junior Division. Most of the times there are more than one Judges of the Junior Division in every Tehsil, and of Senior Division in every District.

The Chief Judicial Magistrates and other Judicial Magistrates' First Class: In every district the State government may, after consultation with the High Court, establish as many Courts of Judicial Magistrates of the First Class and of the second Class, depending upon the work load. The presiding of these courts shall be appointed by the High Court.[12] The Chief Judicial Magistrate heads over the other Judicial Magistrates of First Class in every tehsil. Every Chief Judicial Magistrate shall be subordinate to the Sessions Judge and other Judicial Magistrates shall, subject to the general control of the sessions Judge, be subordinate to the Chief Judicial Magistrate. These courts are primary criminal courts, where every offender is first produced after arrest by the police.

Courts of the Metropolitan Magistrates: In every Metropolitan area, the State Government may, after consultation with the High Court, establish courts of Metropolitan Magistrates, at such places and in such numbers as it thinks necessary. The presiding officers of such courts are appointed by the High Court. The Jurisdiction and powers of every such Magistrate shall extend throughout the Metropolitan area.[13] In every Metropolitan area, the High Court shall appoint Metropolitan Magistrate as Chief Metropolitan Magistrate.[14] The Chief Metropolitan Magistrate and every Additional Chief Metropolitan Magistrate shall be subordinate to the Sessions Judge and every other Metropolitan Magistrate shall, subject to the general control of the Session Judge, be subordinate to the Chief Metropolitan Magistrate.[15] Again another legacy of the British Raj is the courts of original criminal jurisdiction in the presidency towns of Mumbai, Kolkata and Chennai. Though under certain Acts, they have exclusive jurisdiction, where every offender is first produced after arrest by the police.

Other Courts of Appeal

[12] Cr.P.C 1973, s.11(2)
[13] Cr.P.C 1973, s.16
[14] Cr.P.C 1973, s.17
[15] Cr.P.C 1973, s. 18

Besides the courts set up within the framework of the Constitution, the following courts are set up taking into consideration the needs and interests of the people and demands of the time.

(a) *Administrative tribunals:* The Parliament enacted Administrative Tribunals Act in 1985. Through this the Central Administrative Tribunal (CAT) was set up in November 1985, to provide speedy and expensive justice to the central government employees in respect of the service matters. Besides CAT, there are many other tribunals such as Industrial Tribunals, Motor Accident Claim Tribunals, Commercial Tribunals, Cooperative Institutional Tribunals, Commercial Tax Tribunals, etc.

The Family Court Act, 1984 aims at promoting conciliation and securing speedy settlement of disputes relating to marriage and family affairs. These courts are to be set up in a city or town with a population of more than ten lakhs or in such other cases the State government may deem necessary.

(b) *Special Court:* There are specific courts with focused purposes like Labour Courts for labour and industrial related issues; special Indian Legal System and Its Relevance for Marginalized and Disadvantaged Groups courts for corruption related cases or CBI affairs, or special courts for dealing with atrocities on scheduled castes and scheduled tribes. Recently, fast track courts have also been set up in some States for speedy and quick disposal of legal matters.

(c) *Lok Adalat:* these are voluntary agencies at present, which are monitored and overseen by State legal aid and advisory boards. It is proved to be a successful alternative forum for resolution of disputes through conciliatory methods. The Legal Services Authority Act, 1987 has been enacted which provides a statutory footing to the legal aid movement. Under this Act the lok adalats will acquire statutory authority. Every award of the Lok Adalat will be deemed to be a decree of a civil court or order of any other court or tribunal and shall be final and binding on all the parties to the disputes.

FEATURES OF INDIAN JUDICIAL SYSTEM

One of the features of Indian judiciary is that it is mostly based on the common law system. The orders and decision made by the Judges in the Court are taken as the final verdict.

Statutory and regulatory laws are also taken into consideration and many times decisions are based on reference to the similar precedent. Some of the key features are as follows:

1. *Single Integrated System*: The Constitution of India provides for a single integrated judicial system. The structure of the judiciary in India is pyramidal with the Supreme Court at the top, High Courts below them and district and subordinate courts at the lowest level. The lower courts function under the direct superintendence of the higher courts. The unitary character of the judiciary is not an accident but rather a conscious and deliberate act of the constitution makers for whom a single integrated judiciary and uniformity of law were essential for the maintenance of the unity of the country and of uniform standards of judicial behavior and independence.[16]
2. *Independence of Judiciary:* Independence of Judiciary is sine qua non of democracy.[17] It primarily means the independence of judiciary from the control of legislature and executive. The underlying purpose of independence of judiciary is that judges must decide the dispute impartially according to law and not under the influence of any other factor. Explaining the expression "independence" and "judiciary" separately, he says that the judiciary is "the organ of government not forming part of the executive or the legislative, which is not subject to personal, substantive and collective controls, and which performs the primary function of adjudication." [18]It is ensured by various provisions of the constitution in the matter of appointment, security of tenure, salary, allowances, privileges, leave, pension ,power and jurisdiction of Supreme Court , no discussion on the conduct of judges in the Parliament or State Legislature, power to punish for contempt and removal. The basic need for independence of judiciary is based on the following points:

(i) *To maintain proper check and balance*: Judiciary serves as the watchdog by ensuring that all the organs are working in their demarcated areas and according to the law of the land. There is no such encroachment of any organ over the working of other organ. So it basically tries to maintain separation of power among the different organs of the state.

[16] Granville Austin, *The Indian Constitution: Cornerstone Of A Nation* (Oxford University Press, 1999), See also Mahendra P. Singh, *Constitutionality of Market Economy: In Legal Dimensions of Market Economy* (M.P. Singh Et Al. Eds., 1997); H. M. Seervai, *Constitutional Law Of India* (4th Ed. Central Law Publication Co. Pvt. Ltd. 2015) 2484 -2944

[17] Raghvendra Singh Raghuvanshi & Nidhi Vaidya, 'Independence of Judiciary- Indian Experiance' (Social Science Research Network, 25 February 2015).

[18] Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges, In Judicial Independence: The Contemporary Debate* (Shimon Shetreet & Jules Deschanes eds., 1985) 597-98.

(ii) *Interpreting the provisions of the constitution*: the framers of the constitution were well known that in future with regards to the provision of Constitution uncertainty will definitely occur, so they made all the effort to make the judiciary independent and self-competent to interpret any of the provision in such a manner that such interpretation must be clear and unbiased. If it would not be so, the other organ may have pressurized the judiciary to interpret it according to their will and convenience. Judiciary is given the job to interpret the constitution according to the constitutional philosophy and the constitutional norms.[19]

(iii) *Disputes referred to the judiciary*: it is required from the judiciary to deliver justice in an impartial manner i.e. free from any kind of biasness. It should not do committed or partial justice to the masses by focusing on any particular aspect and not considering all the aspects as a whole.

3. *Judicial Review:* the doctrine of judicial review was first established in the famous case of *Marbury v Madison*[20] in which Marshall, C.J. asserted that 'it is emphatically the province and duty of the judicial department to say what the law is'. Judicial Review in its most widely accepted meaning is the power of the courts to consider the constitutionality of acts of organs of Government (the executive and legislature) and declare it unconstitutional or null and void if it violates or is inconsistent with the basic principles of Grundnorm i.e. Constitution.[21] In other words the power and duty of the courts to disallow all legislative or executive acts of either the central or the State governments, which in the Court's opinion transgresses the Constitution.[22] This judicial functions stems from a feeling that a system based on a written Constitution can hardly be effective in practice without an authoritative, independent and impartial arbiter of constitutional issues and also that it is necessary to restrain governmental organs from exercising powers which may not be sanctioned by the Constitution.[23] The power of judiciary is not limited to enquiring about whether the power belongs to the particular legislature under the question it extends also as to whether the laws are made in conformity with and not in violation of other provisions of the Constitution. In our constitution, if the courts find that the law made by legislature Union or State is

[19] Atin Kumar Das, 'Independence of Judiciary in India: A Critical Analysis', *Legal India* (Delhi, April 12 2014)
[20] [1803] 1 Cr. 137
[21] Rasmi Pradhan, 'Doctrine of Judicial Review in India: Relevancy of Defining Contours', *Legal Service India* (Delhi, July 16, 2014)
[22] Smith, Edward Conard and Zurcher, Arnold Jhon, *Dictionary of America Politics, Barnes and Noble* (New York, 1959) 212.
[23] M. P. Jain, *Indian Constitutional Law* (6th Edn, Lexis Nexis Butterworths Wadha Publications 2015)

violation of the various fundamental rights guaranteed in part III, the law shall be struck down by the courts as unconstitutional under Art. 13(2). In *A.K. Gopalan v State of Madras*[24], Kania, CJ observed that 'the inclusion of Art. 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the Fundamental rights was infringed by any legislative enactment, the court has always the power to declare the enactment, to the extent it transgress the limits'. Apart from this case there are number of cases in which the court applied this doctrine like *State of Madras v Row*[25], *Hanif Qureshi v state of Bihar*[26], *State of Rajasthan v Union of India*[27], *Gupta v Union of India*[28] etc. Similarly where the courts find that the law is violation of Art. 301 which make available to all persons the freedom of trade, commerce and inter-course throughout the territory of India, the law shall be struck down. Again where the courts find that there has been exclusive delegation of legislative power a particular case, the parent Act as well as the product, i.e. delegated legislation shall be struck down as unconstitutional.[29] It is the cornerstone of constitutionalism which implies limited Government.[30] In this connection Prof. K.V. Rao remarks – "In a democracy public opinion is passive, and in India it is still worse, and that is all the reason why it is imperative that judiciary should come to our rescue. Otherwise …. the Constitution becomes ill-balanced, and leaves heavily on executive supremacy, and tyranny of the majority; and that was not intention of the makers".[31]

4. *High Court for each states as well a Provision for Joint High Courts*: Constitution lays down that there is to be a High Court for each state. However, two or more states can, by mutual consent, have a Joint High Court.
5. *Supreme Court as the Arbiter of legal disputes between the Union and States:* the Supreme Court is the only arbitrator of disputes between the Government of India and one or more states or between the Government of India and any state or states on one side and one or more states on the other or between two or more states. This comes under the original jurisdiction of the Supreme Court. Since there is division of power

[24] [1950] SCR 88 (100)
[25] [1952] SCR 597 (605)
[26] AIR [1958] SC 731
[27] AIR [1977] SC 1361
[28] AIR [1982] SC 149
[29] In *Hamdard Dawakhana v Union of India* [1960] 2 SCC 554; the Supreme Court for the first time struck down as unconstitutional an Act made by union Parliament on the ground of excessive delegation
[30] S.C. Dash, *The Constitution of India: A Comparative Study* (Chaitanya Publishing House, 1960) 334
[31] K.V. Rao, *Parliamentary Democracy of India* (The World Press Pvt. Ltd., 1961)

between the Union and the states, any conflict arising out of this would be decided by the apex authority itself.

6. *Guardian of Fundamental Rights:* As the protector and guardian of fundamental rights, from the very beginning the Supreme Court has adopted the stance that it acts as the 'sentinel on the qui vive' vis-a-vis fundamental rights and has stressed this role in several cases. The Constitution underlines this role of the court through article 32(1), which reads: *"the Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this article."*

   The Constitution-makers made the right of a citizen to move the Supreme Court under article 32, and claim an appropriate writ against the unconstitutional infringement of his fundamental rights, itself a fundamental right.[32]

7. *Judicial Activism:* judicial activism deals with the political role played by the judiciary, like the other two branches of the State viz, the legislature and the executive. Judicial Activism is that way of exercising judicial power which seeks fundamental re-codification of power relations among the dominant institutions of State, manned by members of the ruling classes.[33] The justification for the judicial activism comes from the near collapse of responsible government and the pressures on the judiciary to step in aid which forced the judiciary to respond and to make political or policy-making judgments.[34] In the Indian Context, the framework of judicial activism is wider because of the unique position given to the judiciary especially to the Supreme Court, under the Constitutional scheme. The Supreme Court is at once, the arbiter of federal principle, the guardian of fundamental rights of the citizens, final interpreter of the constitutional and other organic laws and last but not the least the final judge to determine the validity of even a constitutional amendment. Therefore in India, the judiciary mainly the Supreme Court and the 24 High Courts have a greater scope to be active while discharging various judicial functions in comparison to USA. The touchstone of activism is a failure to interpret

[32] S.K. Verma, *Fifty Years of the Supreme Court of India: It's Grasp and Reach* (Indian Law Institute, 2000).
[33] Upendra Baxi, *Courage Craft and Contention -The Indian Supreme Court in the Eighties* (Bombay University Press,1985)
[34] T.R.Adhyarujina, *Judicial Activism and Constitutional Democracy in India* (Bombay University Press, 1992)

the constitution according to the intent of its drafters.[35] Thus it is generally understood and accepted that, it is activism for courts to act beyond their capacities, their expertise and their traditional functions. It marks a significant change in the court's earlier jurisprudence. Now, it is appropriate to understand that what impact the court has made on the quality of life which we daily live and to what extent the judiciary has been able to preserve and establish the values of the Constitution which we so dearly cherish.[36]

THE STRUCTURE OF JUDICIAL SYSTEM IN BANGLADESH

The roots of the Bangladeshi legal system go back to ancient times on the Indian subcontinent. The system developed gradually, passing through various stages in a continuous historical process. The process of evolution has been partly indigenous and partly foreign. The current legal system emanates from a "mixed" system in which the structure, certain legal principles, and specific concepts are modeled on both Indo-Mughal and English law.[37]

Bangladesh became an independent and sovereign nation on December 16, 1971. In order to ensure legal continuity, the Laws Continuance Order of 1971, effective as of March 26, 1971, legalized and made effective all the existing laws inherited from Pakistan, subject to the Proclamation of Independence of 1971. Thereafter, Presidential Order No. 5 of 1972 set the judiciary of the country in motion with the appointment of the judges of the High Court. Subsequently, Presidential Order No. 91 of 1972 established the Appellate Division.[38] According to the Constitution of Bangladesh, the apex of the judiciary is the Supreme Court, which comprises the Appellate Division and the High Court Division. The Chief Justice of the Supreme Court, who is appointed to the Appellate Division, is constitutionally known as the Chief Justice of Bangladesh.

[35] Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge: Harvard University Press, 1977)

[36] I.P.Massey, 'Judicial Activism and The Growth of Administrative Jurisprudence in India: A Retrospect' [1990] 17 Indian Bar Review 55-56

[37] Pranab Kumar Panday and Md. Awal Hossain Mollah, 'The judicial system of Bangladesh: An overview from historical viewpoint' [2011] 53 International Journal of Law and Management 1

[38] Anand M. Bhattarai & Kishor Uprety, *Institutional Framework for Legal and Judicial Training in South Asia: with Particular Reference to Bangladesh and Nepal* (Law and Development Working Paper Series No. 2, The World Bank)

Further acts and ordinances were introduced in later years. These include the Ombudsman Act (Act XV of 1980), the Administrative Tribunals Act (Act VII of 1981), the Income Tax Ordinance (Ordinance XXV of 1984), the Land Reforms Ordinance (Ordinance X of 1984), the Family Courts Ordinance (Ordinance XVIII of 1985), and the Companies Act of 1994. Pursuant to the recommendations of a Law Committee set up in 1976, the Law Reform Ordinance of 1978 amended civil and criminal procedural laws, laws related to court fees, and the law on arbitration. At present, a permanent Law Commission in Bangladesh suggests suitable changes to existing laws, as necessary, so that the national laws can meet the demands of modern times.[39]

The Bangladeshi court system is based on the British model. The judicial system consists of a Lower Court and a Supreme Court, both of which hear civil and criminal cases.[40] The Lower Court consists of administrative courts (magistrate courts) and session judges. The Supreme Court's High Court Division hears original cases and reviews decisions of the Lower Court, and the Appellate Division hears and determines appeals of judgments, decrees, orders, and sentences of the High Court Division. The highest court of appeal is thus the appellate court of the Supreme Court. At the level of local government, the country is divided into divisions, districts, sub-districts, unions, and villages.

The Supreme Court serves as the guardian of the constitution and enforces the fundamental rights of citizens. It consists of a Chief Justice and a number of other judges, all appointed by the president. A judge can remain in office until the age of sixty-five. The Chief Justice and the Judges appointed to the Appellate Division sit only in that Division; other judges sit in the High Court Division. The High Court Division superintends and controls all subordinate courts (at the administrative levels of district and thana) and functions as the Appellate Court. In addition, it superintends a number of special courts and tribunals, such as the Administrative Tribunal, Family Courts, Labor Tribunal, Land, Commercial, Municipal, and Marine Courts. At the district level, the district court is headed by a District and Sessions Judge, who is assisted by additional District Judges, subordinate judges, assistant judges, and Magistrates.

[39] Abul Barkat, Mozammel Hoque, and Zahid Hassan Chowdhury, *State Capacity in Promoting Trade and Investment: The Case of Bangladesh* (Human Development Research Centre for the SocioEconomic Policy and Development Management Branch, Department of Economics and Social Affairs, UNDESA, 25 February 2004)
[40] Chapters I, II, and III of Part VI, Constitution of Bangladesh.

In addition to the constitution—the fundamental law of the land—there are civil and criminal codes. Civil law in Bangladesh also incorporates certain Islamic and Hindu religious principles relating to marriage, inheritance, and other social matters. The Bangladeshi Constitution guarantees a fundamental right to every criminally accused person in Bangladesh (whether or not a citizen) to have a "speedy and public trial" by an 'independent' and 'impartial' judiciary.[41]

It is worth noting that a landmark decision on *Secretary of the Ministry of Finance* v. *Masdar Hossain*[42] determined how far the Constitution actually secured the separation of judiciary from the executive organs of the state, and whether the Parliament and the executive followed the constitutional path. In essence, the case was decided on the issue of how far the independence of judiciary is guaranteed by the constitution and whether its provisions have been followed in practice. In that context, the court identified five preconditions for judicial independence: (a) security of tenure; (b) security of salary; (c) institutional independence of subordinate judiciaries; (d) judicial appointments made by a separate Judicial Service Commission; and (e) administrative independence and financial autonomy.[43]

It is appropriate to note that Article 22 of the Bangladeshi Constitution contains a fundamental principle of state policy to the effect that "the state shall ensure the separation of the judiciary from the executive organs." However, although the constitutional commitment to this principle is spelled out clearly, no positive, effective steps have yet been taken to separate the judiciary from the government administration. Although the Supreme Court gave specific guidelines on how to do so in its judgment, the executive, with the permission of the Supreme Court, has postponed the separation fourteen times already.[44]

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[41] Constitution of Bangladesh, Article 35(3)

[42] [1999] 52 DLR (AD) 82. In delivering its judgment in the Hossain case, the Supreme Court of Bangladesh tried to differentiate between the terms "independence" and "impartiality," saying that it would subscribe to the view of the Supreme Court of Canada in *Walter Valente* v. *Her Majesty the Queen* [1985] 2 RCS 673. Court held that "the concepts of *'independence'* and 'impartiality,' although obviously related, are separate distinct values or requirements. 'Impartiality' refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. 'Independence' reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others … particularly to the executive branch of government …"

[43] See Barrister Tureen Afroz, 'Independence of Judiciary: What Next*?*' *The Daily Star* (Bangladesh, January 4 2004).

[44] Debapriya Bhattacharya, *Globalization and the State: Human Development and Capacity Building Needs; A Review of Asian Country Experiences', in Globalization and the State: Challenges for Economic Growth and Human Development* (United Nations, New York 2004)

THE STRUCTURE OF JUDICIAL SYSTEM IN NEPAL

The preamble of the Interim Constitution of Nepal 2007 fully commits to democratic norms and values, an independent judiciary and rule of law. It also seeks a balance between the three organs of state - the executive, the judiciary and the legislature.[45]

The earliest Nepali laws were based on the Dharmashastras (sacred canons), and where these were silent, the ruler's order or word was law.[46] The Lichhavis were first to develop a judicial system of Adhikarans, such as Kuther Adhikaran for revenue administration and Sholla Adhikaran to hear more serious offences.[47] The Mallas also developed their own judicial system, including the Itachapali and Kotilinga courts to try criminal and civil cases. King Prithivi Narayan Shah later introduced courts presided over by Thakuris as Dittha, assisted by Magars as Bicharis and a Pandit as a legal professional. This system was in place until the Rana rule began in 1846.

The legal arrangements developed during the early periods of history were first consolidated and codified into an Ain (Code), which has been known as the Muluki Ain (Country Code) since its promulgation in 1853 by Prime Minister Jung Bahadur Rana. The preamble of this instrument said that it aimed to make penal provisions uniformly applicable to all persons, irrespective of their rank, class or caste.[48] Since its promulgation, the Country Code has seen several amendments, including the major changes that were made during the reign of King Mahendra Shah in 1963.

With the end of the Rana regime in 1951, the Interim Government recognized the Pradhan Nyayalaya[49] as the highest court. The British model had marked influences on the modern Nepali legal system: it was based on the principle of separation of power between the legislature, executive and judiciary, and envisaged an impartial, independent judiciary, legal profession, and court procedures.[50] No change was made in the trial court structure.

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[45] A Guide To Government In Nepal : Structures, Functions, and Practices, (The Asia Foundation, 2012)

[46] Bhim Bahadur Pandey, 'Nepalko Bittiya Prashashan Uhile ra Ahile', Antarrasthtriya Mancha Magazine, (Kathmandu , June-July 1988).

[47] Shastra Dutta Panta, 'Comparative Constitutions of Nepal', 2nd Edition, (SIRUD, Kathmandu, 2001).

[48] Shreekanta Poudel, 'The Experience of Structural Changes in Judiciary', Nyayeek Awaj (Kathmandu Society of Judicial Officers, 2009)

[49] The term "Pradhan Nyayalaya" was changed into Sarbochha Adalat in 1956.

[50] H.M.Kritzer(ed.), *Legal Systems of the World: A Political, Social and Cultural Encyclopedia*. It may also be noted that the system of law and justice in Nepal, until recently a Hindu kingdom, has its roots in the ancient

Since 1990, Nepal's judiciary has had a three-tier system of District Courts, appeals courts and the Supreme Court. There are 75 District Courts, 16 Appellate Courts and a Supreme Court in Nepal.

After the enactment of the State Cases Act 1961, Nepal moved from an inquisitorial system in criminal trials (where the judge investigates the case) to an adversarial system (where the judge decides based on evidence presented by adversaries), which was further consolidated through the State Cases Act 1992. Nepal has both statutory law — the constitution and laws enacted by parliament — and case law, based on decisions of the Supreme Court. A revision of the civil and criminal codes begun several years ago to replace the Muluki Ain would address Nepal's international treaty obligations, but the process remains to be completed.

Supreme Court: The Supreme Court is the highest judicial body. It comprises a Chief Justice and not more than 14 judges. Additionally, ad hoc judges may be appointed for a fixed term as needed. In practice, such ad hoc appointments have been limited to 10 judges. On the recommendation of the Constitutional Council, the President appoints the Chief Justice for a term of six years from among the Supreme Court judges who have served for at least three years. The Chief Justice then appoints other judges on the recommendation of the Judicial Council from among the judges of the appeals court or any person who has worked in an equivalent position in the judicial service for at least seven years. Senior, Class I judicial service personnel with 12 years of experience who have practiced law for at least 15 years, or distinguished jurists who have worked at least 15 years in the judicial or legal field are eligible for appointment. A judge recommended for appointment requires the approval of a parliamentary hearing for confirmation. Supreme Court judges, including the Chief Justice, hold office until 65 years of age. They can be impeached for reasons of incompetence, moral turpitude or dishonesty by a two-thirds majority of parliament. The Supreme Court has jurisdiction to hear both original and appellate cases, examine decisions referred for confirmation of sentences, review cases, and hear petitions as specified by law. Under extraordinary jurisdiction, it has the power to hear petitions and issue orders of habeas corpus, mandamus, certiorari, prohibito, and quo warranto. It may review its own judgments, revise decisions of a Court of Appeals, or decide the constitutionality of a law. It also has the

Hindu religion and culture. This tradition continued until 1950, when the country was opened to the external world. With the onset of democracy in 1950, Indian legal and judicial values were imported by succeeding generations of law graduates who came from India. Ananda M. Bhattarai, *The Judicial System of Nepal: An Overview, in Fifty Years of Supreme Court of Nepal* (Kathmandu 2006)13–34.

power to make rules for administering the courts and formulating policies. The Full Court, a forum of all sitting judges, is the highest policymaking body in the judiciary.

Court of Appeals: The Court of Appeals is the second in the hierarchy. The Chief Justice appoints its judges from among the judges of District Courts or Class I officers in the judicial service with at least seven years of experience. Senior advocates, advocates who have practiced for at least 10 years, or individuals who have taught or conducted research or worked in other fields of law and justice are also eligible for appointment. Judges of the Court of Appeals hold office until 63 years of age. The court mainly hears appeals of decisions of the District Courts and quasi-judicial bodies.

District Court: The District Court is a trial court with jurisdiction to hear all civil and criminal cases. A District Court judge holds office until 63 years of age. The Chief Justice appoints District Court judges from among Class II officers in judicial service who have worked for at least three years. There is a provision for lateral entry from the Bar Association: advocates with at least eight years of practice are eligible for appointment following a competitive examination conducted by the Judicial Council. The provision for examinations was introduced in the Interim Constitution, but in the absence of an act, this provision has not taken effect.

THE STRUCTURE OF JUDICIAL SYSTEM IN PAKISTAN

The judicial system of Pakistan has passed through several epochs, covering the Hindu era, Muslim period including the Mughal Empire, British colonial period and post-independence period. The post-independence period or the current era, commenced with the partition of India and the establishment of Pakistan, as a sovereign and independent State. During this process of evolution and growth, the judicial system did receive influences and inspirations from foreign doctrines/notions and indigenous norms/practices, both in terms of organizing courts' structure, hierarchy, jurisdiction and adopting trial procedures/practices. The judicial system during Hindu period has been somewhat sketchy, gathered mostly from scattered sources, such as ancient books like Dharamshastra, Smiritis and Arthashastra, and commentaries on the same by historians and jurists. These sources construct a well-defined system of administration of justice during the Hindu period.

The Muslim period in the Indian sub-continent roughly begins in the 11th century A.D. This period may be divided into two parts i.e. the period of early Muslim rulers who ruled Delhi

and some other parts of India and the Mughal period, which replaced such Muslim and other rulers in 1526 A.D. The Mughal Dynasty lasted until the middle of 19th century. During the period of Muslim rulers, the Islamic law remained the law of the land in settling civil and criminal disputes. During this period, different courts were established and functioned at the central, provincial, district and tehsil (Pargana) level. These courts had defined jurisdiction in civil, criminal and revenue matters and operated under the authority of the King. The supreme revenue court was called, the Imperial Diwan. Side by side, with civil and revenue courts, criminal courts, presided over by Faujdar, Kotwal, Shiqdar and Subedar functioned.[51] The highest court of the land was the Emperor's Court, exercising original and appellate jurisdiction.

In the British era, the East India Company was authorized by the Charter of 1623 to decide the cases of its English employees. The Company therefore established its own courts. The administration of justice was initially confined to the Presidency Town of Bombay, Calcutta and Madras. In view of the huge distances between these Towns and the peculiar conditions prevailing there, the administration of justice, which developed in these Towns, was not uniform. There were established two sets of courts, one for the Presidency Towns and the other for the Mufussil. The principal courts for the town were known as the Supreme Courts and Recorders Courts. The High Court of Judicature Act 1861 abolished the Supreme Courts as well as the Sadar Adalats, and in their place, constituted the High Court of Judicature for each Presidency Town. Besides the Presidency Towns, High Courts were also established in Allahabad in 1866, Patna in 1919, Lahore in 1919 and Rangoon in 1936. The Sindh Chief Court was established under the Sind Courts Act 1926. After that, the Government of India Act 1935 retained the High Courts and also provided for the creation of a Federal Court.[52] The Federal Court was established in 1937. The Federal Court exercised original, appellate and advisory jurisdiction.[53]

The Government of India Act 1935 was amended in 1954 with a view to empower the High Courts to issue the prerogative writs.[54] The subsequent Constitutions i.e. 1956, 1962 and 1973 did not drastically alter the judicial structure or the powers and jurisdiction of the superior courts. The changes effected were, renaming the Federal Court as the *Supreme Court* by the 1956 Constitution and the up gradation of the Chief Court of NWFP and Judicial

[51] Dr. Nasim Hassan Shah, *Constitution, Law and Pakistan Affairs* (Wajidalis Limited, Lahore, 1986)
[52] Government of India Act 1935, s. 200
[53] Government of India Act 1935, s. 204, 205, 207, 213
[54] Government of India Act 1935, s. 223-A

Commissioner Court of Baluchistan into full-fledged *High Courts*, by the 1973 Constitution. Later on, a new court called, *Federal Shariat Court* was created in 1980[55] with jurisdiction to determine, suo moto or on petition by a citizen or the Federal or a provincial Government, as to whether or not a certain provision of law is repugnant to the injunctions of Islam.[56]

Supreme Court: The Supreme Court is the apex Court of the land, exercising original, appellate and advisory jurisdiction.[57] It is the Court of ultimate appeal and final arbiter of law and the Constitution.[58] Its decisions are binding on all other courts. The Court consists of a Chief Justice and other judges[59], appointed by the President as per procedure laid down in the Constitution.[60] An Act of Parliament has fixed the number of Judges at 17 i.e. Chief Justice and 16 judges.[61] There is also a provision for appointment of acting judges as well as ad hoc judges in the court.[62] A person with 5 years' experience as a Judge of a High Court or 15 years standing as an advocate of a High Court is eligible to be appointed as judge of the Supreme Court.[63] The Court exercises original jurisdiction in settling inter-governmental disputes[64], be that dispute between the Federal Government and a provincial government or among provincial governments. The Court also exercises original jurisdiction concurrently with High Courts for the enforcement of Fundamental Rights, where a question of 'public importance' is involved.[65] The Court has appellate jurisdiction in civil and criminal matters.[66] Furthermore, the Court has advisory jurisdiction in giving opinion to the Government on a question of law.[67]

High Courts: There is a High Court in each province and yet another High Court for the Islamabad Capital Territory. Each High Court consists of a Chief Justice and other puisne judges. The strength of Lahore High Court is fixed at 60, High Court of Sindh at 40, Peshawar High Court at 20, High Court of Baluchistan at 11 and Islamabad High Court at 7. Qualifications mentioned for the post of a judge are, 10 years' experience as an advocate of a High Court or 10 years' service as a civil servant, including 3 years 40 experience as a

[55] Constitution of Islamic Republic of Pakistan, Article 203-C
[56] Constitution of Islamic Republic of Pakistan, Article 203-D
[57] Constitution of Islamic Republic of Pakistan, Article 184, 185 & 186
[58] Constitution of Islamic Republic of Pakistan, Article 189
[59] Constitution of Islamic Republic of Pakistan, Article 176
[60] Constitution of Islamic Republic of Pakistan, Article 175A
[61] The Supreme Court Number of Judges Act (Act No. XXXIII) 1997
[62] Constitution of Islamic Republic of Pakistan, Article 181 & 182
[63] Constitution of Islamic Republic of Pakistan, Article 177
[64] Constitution of Islamic Republic of Pakistan, Article 184(1)
[65] Constitution of Islamic Republic of Pakistan, Article 184(3)
[66] Constitution of Islamic Republic of Pakistan, Article 185
[67] Constitution of Islamic Republic of Pakistan, Art.186

District Judge or 10 years' experience in a judicial office. The Court exercises original jurisdiction in the enforcement of Fundamental Rights and appellate jurisdiction in respect of judgments/orders of the Subordinate Courts in all civil and criminal matters. Appeals are also entertained against orders/judgments of Special Courts. The High Court supervises and controls all the courts subordinate to it. It appoints its own staff and frames rules of procedure for itself as well as courts subordinate to it.

Federal Shariat Court: The Court consists of 8 Muslim judges including the Chief Justice. The judges of Federal Shariat Court are also appointed through the Judicial Commission, which comprises the Chief Justice of Pakistan, as Chairman with four senior most Judges of the Supreme Court, one former Chief Justice or a retired judge of the Supreme Court, appointed by the Chairman, in consultation with the four member judges of the Supreme Court, Attorney General for Pakistan, the Federal Minister for Law and Justice, Chief Justice of Federal Shariat Court and most senior judge of the Federal Shariat Court, as members. Of the 8 judges, 3 are required to be Ulema (Islamic scholars), who are well versed in Islamic law. The judges hold office for a period of 3 years and the President may further extend such period. The Court may, on its own motion or through petition by a citizen or a government (Federal or provincial), may examine and determine as to whether or not, a certain provision of law is repugnant to the injunctions of Islam. Appeal against its decision lies to the Shariat Appellate Bench of the Supreme Court, consisting of 3 Muslim judges of the Supreme Court and not more than 2 Ulema (Islamic scholars), appointed by the President. If a certain provision of law is declared to be repugnant to the injunctions of Islam, the Government is required to take necessary steps to amend the law, so as to bring it in conformity with the injunctions of Islam. The Court also exercises appellate and revisional jurisdiction over the criminal courts, deciding Hudood cases. The decisions of the Court are binding on the High Courts as well as Subordinate Judiciary. The Court appoints its own staff and frames its own rules of procedure.

Subordinate Courts: The Subordinate Judiciary may be broadly divided into two classes; one, civil courts, established under the Civil Courts Ordinance 1962, and two, criminal courts, created under the Code of Criminal Procedure 1898. In addition, there also exist other courts and tribunals of civil and criminal nature, created under special laws. Their jurisdiction, powers and functions are specified in the statutes, creating them. The decisions and judgments of such special courts are assailable before the superior judiciary (High Court

and/or Supreme Court) through revision or appeal. The civil and criminal courts judges and their terms and conditions are regulated under the provincial rules. The High Court, however, exercises administrative control over such courts. The civil courts consist of District Judge, Additional District Judge, Senior Civil Judge and Civil Judge Class I, II & III. Similarly, the criminal courts comprise of Sessions Judge, Additional Sessions Judge and Judicial Magistrate Class I, II & III. Law fixes their pecuniary and territorial jurisdictions. Appeal against the decision of civil courts lies to the District Judge and to the High Court, if the value of the suit exceeds specified amount. Similarly, in keeping with the quantum of penalty, appeals against criminal courts lie to Sessions Judge or High Court.

CONCLUSION

In a democracy, the legal system and the judiciary are important constituents within the larger political milieu. The modern judiciary in India derives its sources from the Constitution, and acts as a check on the arbitrary decisions of the legislature and the executive. The Constituent Assembly foresaw the significance of Judiciary as a guardian of rights and justice. While the Supreme Court is the highest court of law in India, whose decisions are equally binding on all, the High Courts and the Subordinate Courts ensure justice at the state and district levels respectively. The Indian Judicial System is a mix of the Courts and the Tribunals & Regulators, and all these entities working together as part of an integrated system for the benefit of the nation. The provision for judicial review ensure that the rule of law is maintained, thereby providing for a dignified living and rightful concern for all. A peculiar feature of the legal development in India is that the independence of the judiciary is fairly well assured by the constitution itself and adequate precautions have been taken to help the judiciary to discharge their functions effectively. Laws in India is now mostly codified and is uniform throughout the country and the objective is now to update, reform and bring the law in conformity with the new social conditions prevailing in the country. The nature of democracy and development of the state depends upon how the legal system conducts itself to sustain the overall socio-economic and political environment. So, it can be said that the Indian legal system provides all the machinery for the expansion and preservation of the law.

As far as the Indian judicial system is compared with the judicial system of Bangladesh, Nepal and Pakistan, the legal arrangement in all the sub-continent of India are almost similar. They all are influenced with the British Common Law system. In Bangladesh, it’s divided into Lower Court and a Supreme Court. The Supreme Court comprises of High Court

division and Appellate division and at lower level it's a District Court established in each district. Nepal's judiciary has had a three-tier system of District Courts, Appeals Courts and the Supreme Court. There are 75 District Courts, 16 Appellate Courts and a Supreme Court in Nepal till now. The judiciary of Pakistan has a four-tier system of Supreme Court, High Court, Federal Shariat Court and Subordinate Court. The Supreme Court of Pakistan deals with cases, far beyond its capacity to handle as compared to all other countries where few cases reach the highest Court of Appeal.