

CASIHR Journal On Human Rights Practice

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- REVIEWING CUSTODY LAWS IN INDIA FROM A CHILD RIGHT'S PERSPECTIVE-WITH SPECIFIC REFERENCE TO THE CHILD'S RIGHT TO PARTICIPATION UNDER CUSTODY DISPUTES
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- RELEVANCE AND IMPACT OF HUMAN RIGHT EDUCATION IN A GLOBALISED WORLD



**A Bi- Annual Journal of
Centre for Advance Studies in Human Rights
RAJIV GANDHI NATIONAL UNIVERSITY OF LAW, PUNJAB**

ISSN:2581-4834
RNI: PUNENG/2017/74243

Vol. 3 Issue II

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Price: Rs. 200/-

A Refereed and Peer Reviewed Journal

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CASIHR journal in Human Rights Practice is published from Rajiv Gandhi National University of Law, Punjab at Sidhuwal, Bhadson Road, Patiala and printed from Doaba Stationery & Printing Solutions Pvt Ltd, E-14, Industrial Area Focal Point, Derabassi - 140 507

Mode of Citation: 3(II) CJHRP (2019)

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HUMAN RIGHTS AND INDIAN JUDICIARY

Raj Aryan^{*}

1. INTRODUCTION:

Human Right is an idea of bringing every human on the same platform and giving them the basic requirement of living. In the Protection of Human Rights Act, 1993, in India, Section 2(d) defines 'human rights' as rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts of India. The concept of human rights is based on the dignity and worth of the individual, the unit of creation without reference to man-made artificial divisions based on color, race, sex, religion etc. Human Rights are the essentials for realization of the true potential of every human being. So, basically Human Rights are those rights which are obtained by birth to all human beings irrespective of gender, race, caste, ethnicity, religion etc. It's different thing that by keeping the basic meaning of human rights in mind, the scope of human rights keeps changing and evolving from time to time i.e. from the very starting period till now.

1.1 BEFORE INDEPENDENCE:

The need and the idea that human beings should be endorsed with a set of basic rights and freedoms i.e. natural rights has been emerged from the landmark developments in Britain which include the Magna Carta of 1215, the Habeas Corpus Act of 1679, the Bill of Rights of 1689. In Preamble of the French constitution (1789) after the French Revolution, the Declaration said: “men are born and remain free and equal in rights”. The Virginia Bill of Rights (1776) proclaimed “all men are by nature equally free and independent and have certain inherent rights... namely, the enjoyment of life and liberty...”; and the American Declaration of Independence further said: “we hold these truths to be self evident: that all men are created equal and have given equal inalienable rights which include life, liberty and pursuit of happiness. The concept of human rights, embodying the minimum rights of an individual against his own State, assumed a concrete and justifiable shape when these individual rights came to be guaranteed against the State in written Constitutions adopted

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since the Constitution of the U.S.A. in 1787, to which the Bill of Rights² was formally added in 1791. The concept of human rights is as old as the ancient doctrine of 'natural rights' founded on natural law, the expression 'human rights' is of recent origin and has emerged after the Second World War. The first concrete step by way of formulating the various human rights was taken by the U.N. General Assembly in December, 1948, by adopting the Universal Declaration of Human Rights⁴. This was the first attempt made to bring all the human beings under the umbrella of a global level the fundamental rights and freedoms. Subsequently there has been further codification, particularly on an international and pan-national level in the form of International Covenants, Conventions, European Court of Human Rights⁵ and remedies provided under Human Rights Act, 1998⁶.

The involvement of the Indian Judiciary for the enforcement of basic freedoms did not begin after the World War II on achieving freedom from the colonial rule with the enforcement of national Constitution which guarantees Fundamental Rights with the help of Universal Declaration of Human Rights and the international covenants.

Indian history is well versed with the instances which laid emphasis on human dignity with zeal for justice in some of kings, namely, Akbar, Jehangir, Vikramaditya, Ashoka, and many more. In the administration of justice during the British rule also, some Indian Judges stood for social justice and respect for human dignity as the essence of basic human freedoms.

Before the enactment of the Constitution of India, 1950, there were judges like Justice Mahmood and Justice Vivian Bose, who was far ahead of his time and is an original exposition of the principles of 'natural justice' with emphasis on the concept of 'equal justice'. Once Justice Mahmood has given a dissenting judgment than the remaining English judges, he held that the decision of a jail appeal without hearing the prisoner did not satisfy the statutory requirement of the appeal being 'heard' for its decision⁷.

²Jean E. Krasno (ed.), *The United Nations-Confronting the challenges of a Global Society*, 2005, p. 61.

³D.D.Basu, *Human Rights in Constitutional Law*, Lexis Nexis, Nagpur, 1994, p.5.

⁴Jean E. Krasno (ed.), *The United Nations-Confronting the challenges of a Global Society*, 2005, p.8.

⁵Supra Note 20, p.101.

⁶P.M. Roth QC, *Remedies under Human Rights act: A Community law perspective*, published in Jeffrey L. Jowell and Jonathan Cooper (ed.), *Delivering rights: how the Human Rights Act is working*, 2003, p.116.

⁷*Queen Empress v.Pohpi*, ILR 13 All 171 (F.B.).

1.2 AFTER INDEPENDENCE

After the enactment of the Constitution of India, 1950, the Judiciary played a major role in the understanding and the transformation required in the scope of Human Rights as the per changing needs and requirements of the human

In India the judiciary has shown a fair degree of sensitivity to the questions raised against the protection of human rights through various techniques like: Public Interest Litigation, giving expansive interpretation to right to life and liberty, protecting minority rights, promoting gender justice, creating new kind of compensatory jurisprudence, holding executive responsible for avoiding public duty and requiring transparency and probity in conduct of public affairs, the judiciary in India has attempted to strike the balance between all. Justice must include 'equality' and also something more which is required.

The beginning in 1950 on enforcement of the Constitution was a phase where they were greater emphasis laid on the literal interpretation of the articles which guaranteed the freedoms in the Constitution. But this was also a phase where some exceptions of purposive construction had taken place by the judiciary keeping in mind the broad constitutional philosophy of a welfare state.

1.2.1 JUDICIARY

The Constitutional remedy for the enforcement of human rights i.e. fundamental rights is provided in Article 32. It itself is a fundamental right in the Constitution, which falls under the original jurisdiction of the Supreme Court of India emphasizing the significance of role of judiciary for the protection of human rights. And the order necessary for doing complete justice can be made with the aid of Article 142. A similar power is given to the High Courts in Article 226 of the Constitution. Judicial review is also a basic feature of the Constitution and therefore, falls a part of the basic structure which cannot be taken away by amendment⁸. This helps in the protection of human rights as it keeps a dual check on every single change made to the basic structure of Constitution.

1.2.2 TRANSFORMATION OF HUMAN RIGHTS

Transformation of the meaning and the basic requirements of life established by judiciary through which life would not be possible can be understood into four phases:

⁸ *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1461.

1.2.2.1 Phase I

*A.K Gopalan v. State of Madras*⁹ is an example of a conservative decision made during initial years of Supreme Court of India. In this case, the Supreme Court add the expression 'procedure established by law' in Article 21 which now read as no person shall be shall be deprived of his life and personal liberty except in accordance with the procedure established by law. But this decision intervening into the life and liberty of a person was finally buried later.

In 1952¹⁰, Justice Vivian Bose interpreted the right to equality in Article 14 to include the essential element of fairness and said that the action of state to satisfy Article 14 must be 'reasonable, just and fair'. In *State of Madras v. V.G. Row*¹¹ the meaning of reasonable restriction was talked about in the context of fundamental rights. It was said that the test of reasonableness is for the court to examine each and every aspects of law and society from the point of view of reasonableness.

Domiciliary visit by the police without authority of law was held to be violative of Article 21, assuming right to privacy as fundamental right under Article 19(1)(d) as well as personal liberty under Article 21¹².

The significance of human rights was realized more because of the excesses of emergency and realization of the adverse effect of the violations. Supreme Court of India began to expand the meaning of guaranteed freedoms. The guarantee of equality as given under Article 14 and right to life under Article 21 were interpreted widely to cover fairness as well as every aspect of human dignity. Article 14 was constructed so as to include the requirement of fairness and non-arbitrariness; and Article 21 was constructed to guarantee life with dignity. This era showed concern for the socio-economic rights, particularly of the have-nots. This gave the rise to Public Interest Litigation (PIL) and marked the beginning of the era of judicial activism.

One of the darkest times, when Supreme Court took the issue of maintainability of writs filed in case of emergency situations (conferred by Article 352 to Article 360 of the

⁹ AIR 1950 SC 27.

¹⁰ *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75.

¹¹ AIR 1952 SC 196.

¹² *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 149.

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Constitution of India) in *A.D.M., Jabalpur v. Shiv Kant Shukla*¹³. It was held by majority (4 to 1) that Article 21 is the sole repository of right to life and personal liberty; and since Article 21 had been suspended during emergency (clamped by Indira Gandhi on 25 June, 1975; and the fundamental rights, including Articles 14 and 21 were suspended), no writ petition could be entertained in respect of any right claimed by the detainee. This decision was retrograde in the Supreme Court's history as the sentinel on the qui vive by the virtue of Article 32.

1.2.2.2 PHASE II

The decision intervening into the life and liberty of a person was finally buried in the case of *Maneka Gandhi*¹⁴ in 1978. As this case held that the principle of reasonable procedure is mandated by the fundamental rights guaranteed under Articles 14, 19 and 21. The decision further held that the procedure established by law to deprive a person of life and personal liberty must also be reasonable, just and fair. This decision also tells that the fundamental rights are not distinct and mutually exclusive.

The Supreme Court also acted as a catalyst in prison justice. In *Sunil Batra v. Delhi Administration*¹⁵ it was held that right to speedy trial is a fundamental right implicit in the guarantee under Article 21 of which an essential element is 'reasonable, fair and just' procedure. The right to free legal service was also held to be essentially connected with Article 21 without which the procedure can't be termed as fair and reasonable. In short, expression 'procedure established by law' added to Article 21 in *A.K. Gopalan case* was interpreted to mean law which is right, just and fair and not arbitrary, fanciful or oppressive.

The Supreme Court through many judgments as given in case of *Hussainara Khatoon v. Home Secretary, State of Bihar*¹⁶, *Kadra Pehadia v. State of Bihar*¹⁷, *Anil Yadav v. State of Bihar*¹⁸, and *Citizen for Democracy v. State of Assam*¹⁹ recognized many new rights of under trails and have even taken care of dignity of persons being arrested as not forcing to use handcuffs and other fetters upon a prisoner while lodged in jail or during transit to and from

¹³ AIR 1976 SC 1207.

¹⁴ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

¹⁵ AIR 1978 SC 1675.

¹⁶ AIR 1979 SC 1390.

¹⁷ AIR 1981 SC 939.

¹⁸ AIR 1982 SC 1008.

¹⁹ AIR 1996 SC 2193.

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the court. 'Right to know' guarantees freedom of speech and expression²⁰ under Article 19(1) (a).

In *Bandhua Mukti Morcha v. Union of India*²¹ it was held that a person acting bona fide in the public could move the court for enforcement of a fundamental right on the behalf of a person or class of persons who comes in category of have-nots and cannot approach the court for relief.

In *Olga Tellis v. Bombay Municipal Corporation*²², the Supreme Court of India held that right to shelter and livelihood is implicit in Article 21 and in this way expanded the frontiers of justice by redefining the fundamental rights. The Court also took suo-moto cognizance on the basis of press reports on matters relating to disadvantaged and underprivileged have-nots who don't get their rights which should be provided to every human.

The High Courts normally perform a similar role in the States. Several High Courts has enforced human rights during emergency till the Supreme Court's decision in *ADM, Jabalpur*. Moreover, the Rajasthan High Court by its decision in *Suryanarain Chowdhary v. State of Rajasthan*²³ ensured entry of dalits without any discrimination in the Nathdwara Temple by affirmative action. In one another decision given by High Court in *Jani Bai v. State of Rajasthan*²⁴ the gender bias reflected in the law granting right only to an adult son of the land holder was neutralized to extend the same right to a married daughter by judicial creativity.

1.2.2.3 Phase III

A significant trend is the development of complimentary between the Supreme Court and the National Human Rights Commission of India (NHRC) in enforcement of human rights. The ability of NHRC to directly monitor performance of institutions regarding the implementation of human rights has been utilized by the Supreme Court to aid its function of issuing directions in appropriate cases like monitoring the Mental and Protective Homes, Child Labour, Bonded Labour, etc. This complementarity makes the mechanism more effective in the enforcement of human rights by acting as a catalyst to improve the quality of governance. Even some believed that an independent judiciary along with a democratically

²⁰ *Lily Thomas v. President of India*, AIR 1982 SC 149.

²¹ AIR 1984 SC 802.

²² AIR 1986 SC 180.

²³ AIR 1989 RAJ 99.

²⁴ AIR 1989 RAJ 115.

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elected parliament are sufficient for the protection of human rights and even to punish those who violate it. But the experience conveys something other. An institution separated from the responsibilities of executive governance and judicial administration, collaborated with NGOs will always take a leading role in the field of human rights. Maintaining distance from the government, an organisation like NHRC can make a unique contribution to the country's effort to protect human rights and to develop a culture of human rights within its jurisdiction. The NHRC was also involved at the time of natural calamities, such as Orissa cyclone (1999) and Gujarat earthquake (2001) to ensure that the human involved and got trapped there; rights of those affected were not ignored but were kept at the centre of focus of all involved in the relief and rehabilitation measures. The recommendations made by the commission were considered important in monitoring the work.

The decision in *Narmada case*²⁵ has invoked strong criticism from human rights activists. The permission to raise the height of the dam without effective environmental clearance appears to be inconsistent with the Supreme Court's earlier decision recognizing the right to environment as an essential facet of sustainable development²⁶.

In *J.P. Unnikrishnan v. State of Andhra Pradesh*²⁷ right to education was held to be implicit in the right to life with dignity guaranteed in Article 21 referring to directive principles in Article 45 for free and compulsory education up to the age of 14 years. Right to health was considered as an integral facet of right to life in *Consumer Education and Research Centre v. Union of India*.²⁸

The concept in Article 51A of Constitution of India talks about the fundamental duties of every citizen that are complementary to the fundamental rights guaranteed therein. Protection and preservation of environment free from pollution and maintenance of ecological balance emphasizing the principle of sustainable development was the thrust in several cases like *Virendra Gaur v. State of Haryana*²⁹, *Indian Council for Enviro-Legal Action v. Union of India*³⁰ and *T.N. Godavarman Thirumulpad v. Union of India*³¹. In making orders, the Supreme Court placed reliance not only on Article 21 but also on the

²⁵Writ Petition (Civil) No. 319 of 1994, decided on October 18, 2000.

²⁶'The Narmada Decision' published in THE HINDU, 3 November, 2000.

²⁷AIR 1993 SC 2178.

²⁸AIR 1995 SC 922.

²⁹1995 (2) SCC 577.

³⁰1996 (5) SCC 281.

³¹AIR 1997 SC 1228.

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directive principle in Article 48A and to the fundamental duty of every citizen in Article 51A(g). These decisions helped to make people understand that it is the duty of every generation to make judicious use of, and to preserve the natural resources and environment for the future generations.

Right to privacy in telephonic conversation, so that unauthorized telephone tapping is illegal, has been accepted³². In the era of PIL, judicial activism was up to its peak. In *M.C. Mehta v. State of Tamil Nadu*³³ it was held that right of child against exploitation was guaranteed in Article 24, addressed zealously and several orders made to identify child labour and provide for their proper rehabilitation and development.

Right to corruption-free governance is also treated as a human right on the basis that corruption in institutions of governance derogates the human dignity of people and even effect the public in many ways violating their human rights. The Supreme Court took up this issue for enforcing probity in public life and accountability of public men in the Hawala case³⁴. Free and fair elections so as to enable the people to discharge their participatory role and to empower them to make informed decisions were considered to human development through respect for human rights. One another decision to focus on criticism is the JMM Bribery case³⁵. It was held that the bribery taker MPs who voted against no-confidence motion to save the government in power are immune from prosecution for the offences because of the immunity of members of Parliament under Article 105(2). And so, violates the basic human rights of the public men.

The Supreme Court also held in *Geeta Hariharan v. RBI*³⁶ that a Hindu mother has the same right to guardianship of child as the father. These steps were taken to advance gender-equality and promote gender justice.

1.2.2.4 PHASE IV

Most recently, Supreme Court interpreted the fundamental i.e. human right in very different way. Supreme Court in its recent order in the case of *Satish Chandra Verma v. Union of India*³⁷ held that “Right to travel abroad is an important basic human right for it nourishes independent and self-determining creative character of the individual, not only by extending

³² *People's Union for Civil Liberties v. Union of India*, AIR 1997 SC 568.

³³ AIR 1997 SC 699.

³⁴ *Vineet Narain v. Union of India*, AIR 1998 SC 889.

³⁵ *P.V. Narasimha Rao v. State*, AIR 1998 SC 2120.

³⁶ AIR 1999 SC 1149.

³⁷ Civil Appeal No. 3802 of 2019, decided on April 9, 2019.

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his freedoms of action, but also by extending the scope of his experience. The right also extends to private life; marriage, family and friendship are humanities which can be rarely affected through refusal of freedom to go abroad and clearly show that this freedom is a genuine human right.”³⁸ As what were considered are the words of Justice Douglas, it was held that “Freedom to go abroad has much social value and represents the basic human right of the great significance.”³⁹

This Phase looks to have just started with this decision, or, even bringing up the idea of this decision. So, there is a way long of coming up of these kinds of decision where importance will also be given for those things which sense as luxury for major part of population of India; the ratio of poor as compared to the rich people in India is very high.

The core values of our constitution philosophy as shown in the Preamble to the Constitution of India are 'dignity of the individual' and 'unity and integrity of the nation'. These two co-exist and are not incompatible. The Constitution of India provides for restriction on the human rights i.e. fundamental rights only in exceptional situations, and amendment of Article 359 even gives protection, as expressly makes non-derogable Article 20 (protection against ex post facto penal law, double jeopardy and testimonial compulsion) and Article 21 (protection of life and personal liberty) even during national emergency i.e. exceptional situations. The Constitution of India respecting these basic human rights requires combating terrorism under the rule of law within the constitutional mandate.

The protection of Human Rights Act, 1993 was enacted to provide a constitution for National Human Rights Commission, State Human Rights Commission in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto. The functions of the Commission as laid down under Section 12 covers a wide area to enable the Commission in prevention of violation of human rights and also to promote the human rights culture and perform activities necessary for the promotion of human rights. Since its constitution in 1993, the NHRC has been discharging a role complementary to that of the Supreme Court of India by performing the tasks which NHRC can perform better i.e. monitoring any situation or functions of an institution.

³⁸'Right to travel abroad is a basic human right' published in THE HINDU, 18 April, 2019.

³⁹*Kent v. Dulles* 357 US 116.

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Supreme Court has ruled that the basic structure is indestructible and beyond the amending power of the Parliament. Justice, liberty, equality and fraternity are promised in the constitution to be secured to all citizens assuring the dignity of the individual and the unity and integrity of the nation. The Constitution has been framed in such a way as to embody the universal principles of human rights and provides guiding principles to govern as to establish a welfare state.

The enumeration of fundamental duties of the citizens in article 51A indicates the people's participation in this behalf. The bond which exists between fundamental rights, duties, and the directive principles has been judicially recognised in India. The right to clean environment has been read into the right to life (Article 21) with the support of directive principles of state responsibility for protection and improvement of environment and ecology (Article 48A) as the fundamental duty of every citizen to the same effect (Article 51A). Preservation of ecology and environment with the preservation of healthy environment has been judicially recognised as a facet of right to life. And any damage happening to the environment is being checked by judicial intervention.

2. SUMMARY

The track record of the Supreme Court of India in the protection of human rights till now has been fairly satisfactory. The concept of equality and meaning of the words 'life', 'liberty' and 'law' in articles 14 and 21 respectively have been judicially enlarged. As the word equality has been understood as reasonable, just and fair and the word life has been constructed to mean life with dignity and not mere physical existence. Liberty has been constructed in terms of the Preamble i.e. liberty with social norms. The word law means a law, which is fair in content and procedure. Some judicial evolved principles which have now become a part of constitutional law is the right to speedy trial, right to privacy, right to know, prisoner's right to a dignified life during imprisonment, right to adequate Medicare etc. are all judicially recognised rights within the ambit of Articles 14 and 21 and the scope is even continuously increasing and will be keep going on.

Now, the essential freedoms which falls under the scope of human rights are: Freedom from discrimination-by gender, race, ethnicity, national origin or religion, freedom from want-to enjoy a decent standard of living, freedom to develop and realise ones' potential, Freedom from fear of threats to personal security, from torture, arbitrary arrest and other violent acts,

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Freedom from injustice and violations of the rule of law, Freedom of thought and speech and to participate in decision-making and to form associations, Freedom for decent work-without exploitation, and many more which will add in future. So, the purpose of the article is just not to show what has been done; along with that what it need to show is the evolution of the protection of human rights by the way of judicial process and in what way it is going and what will be the ultimate destination of the human rights.

As Mahatma Gandhi used to say “There is a higher court than courts of justice and that is the court of conscience. It super cedes all other courts.” Judge Learned Hand said “A society so riven that the spirit of moderation is gone, no court can save, a society where that spirit flourishes, no court need save. In a society which evades its responsibility thrusting upon the courts the nurture of that spirit, that spirit in the end will perish. The spirit of moderation is not taking partian advantage to its bitter end, which can understand and respect the other side, which feels a unity between all citizens and which has faith in the sacredness of the individual.”

There need to be established a correlation between rights and duties of humans. Discussion of human rights without reference to duties or responsibility is incomplete treatment of the subject itself. For realisation of the human rights of all, it is necessary for all to perform their corresponding duties. Mahatma Gandhi in a letter to Julian Huxley in 1947 said that, “All rights to be deserved and preserved come from duty well done. From this fundamental statement, it can be easily understood that to define duties of man and woman and correlative every right to some duty to be first performed.”

Article 51A has given all the provisions, which tells “citizens” their fundamental duties. This Article is not like some other articles relating to fundamental rights (e.g. article 21) which extend to “all persons”. The clauses added or kept in the scope as well as within the boundary of article 51A is because of the necessity to protect the sovereignty, unity and integrity of India, to promote harmony and the spirit of brotherhood amongst all the people of India, to safeguard humanism, to safeguard public property, and many more which itself comes under the Part IVA of fundamental duties⁴⁰. One more clause, by seeing the necessity

⁴⁰Part IVA (containing article 51A) ins. by the Constitution (Forty-second Amendment) Act, 1976, sec. 11 (w.e.f. 3-1-1977).

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added to the scope of fundamental rights, who is a parent or guardian to provide opportunities for education to his child or, as the case maybe, ward between the age of six and fourteen years.

Provisions as to fundamental duties cannot be enforced by writs. They can be promoted by constitutional methods. Even after all provisions, the fundamental duties are not given much importance as compared to fundamental rights, when it comes to its implementation. The reason can be the procedure established for the implementation of the fundamental rights, not the same as the procedure for the enforcement of fundamental duties. One need to understand the importance of fundamental duties, as without duties there can be no rights, and so called, there cannot be any fundamental right. Rights is all about duties; it should be like, one who perform their fundamental duties or the one who don't violate their fundamental duties will be only eligible to take the benefit of the fundamental rights. After the implementation of this, the scope of the human rights i.e. fundamental rights will largely be enlarged and even will be followed strictly. It is as simple as that, why to give someone rights, when they are not performing their duties. As if it continues, after a while, the people will only ask for their rights and won't perform their respective duties. It should be made clear that the idea of rights itself has emerged from duties itself, otherwise, why will people want to do their duties.

Taking this in reference of our topic of human rights, what can be said is that, those who perform their duties, necessary, being a human will only be given with the rights, so called, human rights which means the rights necessary being a human.

3. CONCLUSION

The way the transformation of human rights is taking place, as before, right to life and personal liberty comes under the scope of human rights. But by seeing the needs as well as necessity of the people, it was realised that the life without the dignity of an individual is worthless, so dignity was included under the human rights. Further, it was taken into consideration that the prisoners are tortured very much and have no rights as such, so the concept that every person should be provided with some basic human rights, the judiciary has played a very important role and has introduced that some particular rights should be given to prisoners as well. A situation was brought, again, before Supreme Court in which by seeing the needs, or necessity, of the slum dwellers, it was recognized and held that right to

⁴¹Added by the Constitution (Eighty-sixth Amendment) Act, 2002, sec. 4 (w.e.f. 1-4-2010).3-1-1977).

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livelihood and shelter also comes under the scope of right to life. Due to the increasing trend of exploitation of children, through child labour, the Supreme Court held that right of child against exploitation was guaranteed in Article 24 and provide for their proper rehabilitation and development. Right to health and education was held to be implicit in the right to life with dignity guaranteed in Article 21. These changes were taking place with times after the enactment of Constitution of India. Moreover, gender-equality to promote gender justice, right to corruption free governance and most recently the Supreme Court interpreted right to travel abroad also as a basic human right. If we will observe carefully, the transformation of the human rights is following a pattern on which different rights are being enacted falling under the scope of right to life that too with dignity.

From the article written above, what can be understood is the pattern through which the scope of human right i.e. the right to life is being changed with time. In the beginning, some provisions considering it to be absolute were added in Part III of the Constitution of India. As, considering these rights essential to be given to all persons and should be kept above from rest other provisions and that's why special provisions of writ petition was also brought; as a person can directly approach the High Court and Supreme Court on the violations of these so called fundamental rights. Now, in these fundamental rights the concept of human rights emerged. By thinking of that concept, it was told that every human should have some right, from their birth like right to life and personal liberty and right to equality too considering a different form of same aspect as one can't have full right on our life and liberty until we are considered equal before the law. As, during that time, freedom was considered the most essential part of people being ruled from many years and were discriminated on different basis. So, what was considered necessary at that time was giving freedom to live the way they want and the state should not discriminate them any person equality before the law. And that's why this was given to them which now come under Human Rights Act, 1993.

When the right or the social standard of society started increasing and the right to life to already include in general, then the needs of the people started increasing. So, as to raise the standard of living further the demand was there to increase the meaning of the word life. So, further it was realised that without dignity, life has no meaning. As, what matters is not the duration of life by the way of life of life. So, by seeing the changing requirements and needs of people life with dignity was considered as a basic human right. Likewise, every time the scope or limit of human right i.e. fundamental right is being enlarged or increased has

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followed the same pattern of necessity. As, what happens is that when a right is given to people, it totally impact their life and as being practised it becomes like a habit; like it was there with them from the very beginning. So, their needs and expectations become more and every time any expectations becomes a need or becomes necessary for the people consisting of masses, the thing used to be included within the scope of life. By saying that, in the modern era, life without this and that will have no meaning and that's the thing which is happening, and we will get to know, if observed carefully. Like the decisions of Supreme Court saying about rights of prisoners, child exploitation, child education, and many more. All falls under the same pattern or scope of necessity and laying down impact on society at large.

In the recent judgment, the pattern has been added with one more component by shorting down the existing one. I am talking about the decision which added right to travel is a basic and important human right. This clearly depicts the picture of what I was talking about in the above paragraph. It can be said as luxury; question will arise, who so as many persons used to travel abroad on daily basis. Yes, they do. But let's go back to the concept of human rights. The concept for providing or giving this right special attention was to provide with the basic needs of life, without which the life would have no meaning. But with the change in time, needs and priority of the people; judiciary is interpreting the human rights as the way ahead, thinking of the future generations. As, if we look carefully from the day of enactment of Constitution (human rights i.e. fundamental rights), the requirements of people through which they sustain their life has kept changing till now. And that's basically the reason of the broad interpretation of human rights being done by the judiciary till date. As, people's needs is changing and will change in the coming time, and the scope of the sustainability of life with keep enlarging with time. The judiciary along with the organisation like NHRC and many other small organisations like Ngo at local level are acting as a catalyst to support and help people in getting their basic requirements of life. One more thing is make difference from earlier i.e. before, the thing which had impact the society at large was being taken care of. But now, the thing or situation which affects only the big class people has been taken care of. Even if doesn't have any relation to majority of people of the country. One possible reason of this could be the realisation that since the society is evolving at such a faster rate; that time is not far away when the thing which is looking luxury today will become the basic needs of life and without of which life won't be able to sustain.

4. SUGGESTION

The Judiciary playing its role of provide justice and acting as the final interpreter along with some other organisations who are contributing by doing their best to protect and spread it to maximum number of people. As, any law, idea or philosophy or even our Constitution should not be something called like static or absolute. With time, everything changes; even

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the people, their belief, necessity, priority, way of living, social standards and social beliefs. So, why should any law be considered as absolute; it should also change accordingly with time and with the necessity of people. So the interpretation done by the judiciary since the independence till now in the scope of human rights and the meaning of life can be well understood, and should also be appreciated. The judiciary should be encouraged to take these decisions by taking in mind the upcoming generation, its social status and how their life would be i.e. meaning of life according to upcoming generation. But the problem is about duties which are not taken up seriously. Fundamental Duties given in Article 51A should be given much more importance than the fundamental rights. What's the need of giving right to those people who does not perform his fundamental duties; and this is the place where the changes is required to be made for better governance and fulfilment of meaning of life. Giving all fundamental rights even to those people, who don't perform fundamental duties, is a curse to them who perform their duties. So, this need to look upon with greater concern by the judiciary so as to provide justice and equality of every individual which itself comes under the human rights.

**REVIEWING CUSTODY LAWS IN INDIA FROM A CHILD RIGHT'S
PERSPECTIVE- WITH SPECIFIC REFERENCE TO THE CHILD'S RIGHT TO
PARTICIPATION UNDER CUSTODY DISPUTES**

Sugandh Saksena*

1. INTRODUCTION

Unlike other disputes of civil nature, the custody disputes arising out of marital discords are one such unique kind of disputes where in the subject matter is a human entity (a child) and the parties contesting the dispute (estranged parents) try to assert their individual rights over this entity with almost no or negligible consideration of what the child would want or what is it that would make the child happy.

In custody battles a child suffers on many fronts. On the one hand, where a child undergoes the trauma of separation with either of his parent, on the other, he also is likely to become a mere chattel between the parents in a tug of war for his/her very own custody. Apart from this, the child might also have to face in certain cases, separation from sibling, near and dear ones, and very importantly, friends who have been his company to play with, which is but a vital component of a meaningful childhood and a healthy development of the child in question.

Though, the magnitude of the impact of a marital discord on a child may vary from mild to extreme varying from case to case, it is pertinent to note that when the parents are embroiled in a legal battle clouded by their own interests, the interest of their child (ren) is often at a compromise. At this juncture the legal mechanism involved in the process of settling matrimonial disputes and deciding upon the custody of the child has a crucial role to play. Pertinent questions surrounding the issue therefore come out as, whether the mechanism prevailing in a country provides for adequate room for a child friendly dispute resolution? Whether the best interests of the child are upheld, and if so, what are the considerations? And most importantly, whether the child gets an opportunity of being heard in matters concerning his vital interests, so that not just he feels excluded from the entire process, but also, as an active participant of the family unit, helps in an amicable and inclusive resolution of matrimonial dispute.

It must be noted that as far as the jurisprudence on the subject in India is concerned, it is more conclusive and settled with respect to the former two questions as compared to the last, but

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before embarking upon the legal position adopted in India, it is important to have an insight into the international legal regime which has taken a significant leap forward in uplifting the status of children from mere objects of control to right bearing individuals who are active members of the family unit as well as participants in the social process, guaranteeing amongst many others, also, the 'right to participate' and to 'make their views known' which finds a special mention under the *United Nations Convention on the Rights of Child 1989 (UNCRC)*².

2. INTERNATIONAL LAW ON CHILD RIGHTS

The *United Nations Convention on The Rights Of Child 1989 (UNCRC)*, is though a significant development in this regard, the international law and the human rights regime has been playing a significant role when it comes to the recognition of 'child rights' much before the coming into force of this convention. A note shall be made to the *universal declaration of human rights (UDHR) 1948*, which entails the recognition of basic human rights and entitles the children along with mothers, to special care and assistance², and the *international covenant on civil and political rights (ICCPR) 1966*, which provides that if a marriage is dissolved, provision must be made for the protection of any children³, and that “every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state”⁴.

Apart from the above, the *UDHR* also states that “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers⁵”, while the *ICCPR* reaffirms “everyone shall have the right to hold opinions without interference”⁶.

Where these international instruments have been pivotal in laying down the foundations of the child rights regime under international law, the *UNCRC*, has taken a significant leap forward with respect to the development and recognition of child rights. While the convention affirms that the 'best interests' of the child is the primary consideration in all

²Article 25(2), *UDHR*.

³Article 23(4), *ICCPR*.

⁴*Ibid*.

⁵Article 19, *UDHR*.

⁶Article 19(1), *ICCPR*.

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actions concerning children⁷, article 12(1) of the convention provides for a child's right to express his/her views on matters affecting his interest. It states that:

“State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”.

This provision ensures that the child is given a voice in all decisions that affect them, and this would apply to all actions that concern a child. The fact that no specific age has been specified does lead to a lack of clarity and legal uncertainty; however there is great individual variability in how a child's abilities develop and thus the convention provides no support to an idea of setting up a lower age limit, instead, in order to assess maturity, factors that must be taken into account include character, the level of understanding, the decision that must be taken and the specific context within which the decision is taken⁸. Article 12 does not use the term “child participation” but the objective of the provision is to advance child participation⁹.

In terms of article 12(2): *“for this purpose the child shall in particular be provided with the opportunity in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural laws of national law”*, it places an obligation on state parties to ensure that a child can express his or her opinion freely and that his or her opinion will be taken into account in any judicial or administrative proceedings affecting the child. Although article 12 does not give a child the right to say that outweighs that of their parents or their families, it does give a child the opportunity to express their opinion when matters affecting them are discussed. In certain circumstances a child may need to be protected from their parent's views and be allowed to state their own views. This can be accomplished only by giving a child the opportunity to make their views known in juridical and other proceedings.

In this context, whether and how far, the legal system in India is conducive to the idea of children's participation in custody disputes is a subject matter of concern and therefore calls for an analysis.

⁷Article 3(1), CRC.

⁸Implementation Handbook on the CRC, Part 1, p.153, also available at https://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_1_of_3.pdf assessed on 16 September, 2018.

⁹*Ibid* at p.150.

3. LEGAL FRAMEWORK IN INDIA

In India, the laws of widest application on the subject of custody and guardianship are the *Hindu Minority and Guardianship Act* and the *Guardians and Wards Act, 1890*. Where the former applies to Hindus, the latter, a secular law, regulates questions of guardianship and custody for all children within the territory of India irrespective of their religion. Apart from these legislations the questions of custody and guardianship in cases of marital discords are covered by the various personal laws of respective communities, *vis* the *Shariat Application Act, 1937*, the *Indian Divorce Act 1869*, and the *Parsi Marriage and Divorce Act, 1936*.

4. THE WELFARE PRINCIPLE AND THE JUDICIAL OPINIONS

The *Hindu Minority and Guardianship Act 1956* provides that whenever a court appoints a guardian for a Hindu minor, the 'best interests of the child' shall be of paramount consideration. It further stipulates that no party can claim a right if it is violating the principle and is against the welfare of the child¹⁰. Further, the *Guardians and Wards Act 1890*, too lays down that while appointing the guardian of a minor the court has to keep in mind the welfare of the minor¹¹, but it must be noted that Section 19 (b) of the said Act, also states that a court is not authorized to appoint a guardian to the person of a minor, whose father or mother is alive, and who, in the opinion of the court, is not unfit to be a guardian¹². Reading the above provisions together, it can be concluded that in appointing a guardian to the person or property of a minor under the *Guardians and Wards Act 1890*, courts are to be guided by concern for the welfare of the minor/ward, at the same time, the implication of Section 19(b) is that unless the court finds the father or mother to be particularly unfit to be a guardian, it cannot exercise its authority to appoint anyone else as the guardian. Thus, the power of the court to act in furtherance of the welfare of the minor must defer to the authority of the parent to act as the guardian¹³. Furthermore, a comparison between the two legislations may also be taken to imply, that where under the *Guardians and Wards Act 1890*, the parental authority

¹⁰Section 13 of Hindu Minority and Guardianship Act 1956.

¹¹Section 17 (1) of Guardians and Wards Act 1890.

¹²Section 19 (b) of Guardians and Wards Act 1890.

¹³Law Commission of India Report No. 257 on *Reforms in Guardianship and Custody Laws in India*, May 2015, p. 15.

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supersedes the welfare principle, under the *Hindu Minority and Guardianship Act 1956*, the welfare principle is of paramount consideration in determining guardianship¹⁴.

Apart from this anomaly the Supreme Court of India has used the 'welfare principle' and interpreted the 'best interests' of the child very carefully and sensitively in multiple cases giving it the widest possible scope. For instance, *Rosy Jacob v. Jacob A. Chakramakkal*¹⁵, is a case where the Court stated that an order of custody granted shall be 'interim' in nature so that with changing needs of the child the order may also be changed. Deeming an order passed as final, and sticking to it, was considered as being against the spirit of the principle of 'best interest of the child'. Similarly, *Dr. (Mrs.) Veena Kapoor v. Shri Varinder Kumar* is yet another decision where the Court made it clear that "the paramount consideration is the welfare of the minor and not the legal right of this or that particular party"¹⁶. In *Surinder Kaur Sandhu v. Harbax Singh*, the Court while giving the custody of minor boy to his mother, stipulated that the laws cannot overlook the settled principle that the welfare of the child is of paramount consideration¹⁷. Further, in *Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw & Anr*, the Court laid down that legal rights of the parties are not to be taken into consideration, but the case is to be decided on the 'sole and predominant criterion of what would best serve the interest'¹⁸. The Supreme Court in many of its decisions have even granted custody to the grandparents of the child(ren), to the exclusion of either the mother or the father, when it deemed so to be in the 'best interest' of the child, settling the position on custody disputes to satisfy the test of welfare and the 'best interests' of the child(ren) in question, for instance, *Anjali Kapoor v. Rajiv Baijal*¹⁹ and *Shyamrao Maroti Korwate v. Deepak Kisanrao Tekram*,²⁰ are illustrations where the Court stating the welfare of the child to be the paramount consideration, granted the custody to the grandparents.

Therefore, it may be well stated that the judicial approach in India has widened the scope and ambit of the welfare principle to its maximum extent possible where we do not find adherence to any rigid criteria when it comes to the grant of custody, however, the adjudication of disputes concerning a child's vital interests is doubtful without due concern

¹⁴*Ibid* at p. 17.

¹⁵AIR 1973 SC 2090.

¹⁶AIR 1982 SC 792.

¹⁷AIR 1984 SC 1224.

¹⁸(1987) 1SCR175.

¹⁹AIR 2009 SC 2821.

²⁰(2010) 10 SCC 31.

to the other aspects pertaining to the welfare of children *vis* their adequate participation and consideration to their opinions *etc.*

5. PARTICIPATION OF CHILDREN UNDER CUSTODY DISPUTES

The question of participation of children in custody disputes, particularly by providing them with an opportunity of being heard, is a crucial one to answer, because of the diverging opinions to the point with respect to the very understanding and acknowledgement of child's rights altogether, and even more so, owing to certain innate concerns pertaining to the age and maturity of children in question.

The Courts in India, in the cases pertaining to child custody exercise *parens patriae* jurisdiction²¹ and therefore, due to their protective approach, may often undermine the very need for giving any opportunity to the minors to have a say.

The other crucial question surrounding the issue of child's opinion in the matters of custody is the determination on whether a child is able to form an 'intelligent' preference, which finds its place under Section 17 of the *Guardians and Wards Act 1890*. Support may be taken from some of the decisions on the point where the opinions of the minors have played a decisive role in determination of their custody; but at the same time these can also be seen as instances illustrating the quantum of subjectivity and inconsistency in the pattern while considering a minor's opinion.

For instance, *Murarilal v. Saraswati*²² is a case where the two minor siblings (aged 16 and 14) swore that the appellant guardian neglected them and consequentially were not forced to live under the guardianship of the appellant²³, while in another case²⁴ a 16 year old girl was not considered being able to make an intelligent appreciation of her own welfare²⁵. *Mst. Makher and Anr v. Karim Baksh*²⁶ is another instance where a minor of 14 years of age was considered incapable of forming an 'intelligent opinion' by the trial court, but the same minor on appeal was found 'old enough to know something about his own mind'²⁷. In one of

²¹K.R. Ramaswamy Iyengar, *Commentory on the Guardians and Wards Act, 1890*, 3rd Edition, 2018, Delhi Law House, p. 166.

²²AIR 1925 Lah. 375.

²³K.R. Ramaswamy Iyengar, *Commentory on the Guardians and Wards Act, 1890*, 3rd Edition, 2018, Delhi Law House, p. 211.

²⁴*Mst. Mansa Devi v. Makhar* AIR 1936 Peshawar 207.

²⁵*Supra* note 23.

²⁶AIR 1923 Lah. 283.

²⁷*Supra* note 23, p. 212.

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its recent decisions²⁸, the Supreme Court took into consideration the wishes of the minors and accordingly awarded custody to the mother. The Court observed that, the children of a particular age (seventeen and thirteen in this case) “are better equipped, mentally as well as psychologically, to take a decision”²⁹.

Participation to whatever limited extent possible, is only provided under the *Guardians and Wards Act 1890*³⁰, but considering the subtle difference between 'custody' and 'guardianship', the said Act may not be invoked in all cases of custody disputes owing to marital discords. Moreover on having an insight to the relevant provision of the said Act³¹, along with the welfare of the minor which shall be of paramount consideration, an inclination towards the opinion of the minor may be noticed, but the use of the word 'may' is indicative that it is not imperative to consult the wishes of the minor, or, having consulted, to give effect to the same³².

6. ROLE OF COUNSELLORS UNDER THE FAMILY COURTS ACT

The *Family Court Act 1984* allows for the Family Courts in each state to formulate and institutionalize their sets of procedures and rules. This has led to significant differences between the States on the effective implementation of the Act. Where the counsellors appointed *vide* section 6 of the Act are primarily engaged in reconciling the dispute of the estranged couple, their role in assisting the child (ren) by lending them an ear to hear their grievances or concerns seems to be minimal. Moreover, there also exists a substantial variation with respect to their recruitment criteria, eligibility and composition in the workforce of Family Courts across the States³³.

²⁸ *Purvi Mukesh Gada v. Mukesh Popatlal Gada & Ors*, AIR 2017 SC 5407.

²⁹ Law Commission of India, *Consultation Paper on Reform of Family Law*, August 2018, p. 64.

³⁰ Section 17(3) of Guardians and Wards Act 1890.

³¹ *Ibid.*

³² *Supra* note 23.

³³ Namita Singh Jamwal, “Have Family Courts lived up to Expectations?” *Mainstream Weekly*, 1999; National Commission for Women, *Family Courts: Report on working of family courts and model family courts*, New Delhi, 2002; Flavia Agnes, *Family Law (Volume II): Marriage, divorce, and Matrimonial Litigation*. (New Delhi: Oxford University Press, 2001), as cited by Sujata Sriram and Chetna Duggal, “Family Courts Act in India: Perspectives from Marriage Counsellors” at https://www.researchgate.net/publication/283715313_The_Family_Courts_Act_in_India_Perspectives_from_Marriage_Counsellors assessed on 20 September 2018.

7. CONCLUSION

In the absence of any adequate provision regarding the representation of children's opinion in the relevant legislations governing the issue of child custody as well as a subtle silence on the point in the various judicial opinions as of now, there is a grave likelihood of absolute denial of any opportunity what so ever to put forth their opinion in certain cases. Moreover, the very issue of children's opinion intertwined with their 'best interests' is a complex one, as only seldom will their opinions correspond to their 'best interests' owing to age and maturity, hence there stands a need for a specialized professional's role in the process.

India, despite of its ratification of the United Nations Convention on the Rights of Child 1989, and its Constitutional obligations under Article 51(c) and Article 253 still lacks in providing a framework recognising the child(ren)'s right to express their opinion in custody disputes. The limited scope for child's participation, how so ever provided in the *Guardians and Wards Act 1890* as well as the *Family Courts Act 1984*, stands inadequate from this perspective.

Therefore, when it comes to participation of children under custody disputes, the legal framework in India is not clear on the question of whether a child over a certain age is entitled to have a say in custody disputes as a matter of right, and something close to a legal representation is nowhere provided. The opportunity to be heard is solely dependent on the fine sense of judgement of the Court with respect to his/her maturity. This position certainly gets its basis in the 'welfare principle', but this leaves open an intriguing question, of whether even assuring an opportunity to be heard can be detrimental to the 'interests of the child'?

1. INTRODUCTION

On 11 August, 2018 the Criminal law (Amendment) Act received the accent of President. The Act has increased the punishment for the offence of rape and has also brought some procedural changes as far as proceedings in rape cases are concerned. The (Amendment) Act tightens the law against rape by providing stringent punishment for rape and death in case of child rape. The reason for the amendment is the increasing instances of sexual offences in the country. The (Amendment) Act amends the Indian Penal Code, 1860, the Indian Evidence Act 1872, the Code of Criminal Procedure, 1973 and the Protection of Children from Sexual Offences Act, 2012¹. In this article the researcher will be analyzing the changes brought by the Act to the existing provisions of rape laws.

The Act was preceded by an Ordinance that was promulgated by the President of India on 21 April, 2018¹. The immediate cause that led to the passage of the Ordinance was the alleged rape and murder of girls in Jammu and Kashmir's Kathua and Gujarat's Surat district. In Kathua, an eight year old girl was allegedly kidnapped, sedated gang-raped and then murdered by a group of men. This led to a national outrage. The Delhi Commission for Women Chairperson Swati Maliwal, also sat on a hunger strike and had sent the Prime Minister Office (PMO) multiple letters asking the PMO to introduce death penalty for rape. The incident was reported world over². There was mounting pressure on the government to enact stricter laws to deal with such crimes. This paved way for promulgating an Ordinance by the President of India. Thereafter, the Jammu and Kashmir government has also brought in amendments in line with the changes made by the Criminal Law Amendment Ordinance 2018.

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¹PTI, Governor promulgates 'Code of Criminal Procedure (Amendment) Ordinance, 2018', *Greater Kashmir*, April 30, 2018.

²Annie Gowen, An 8-year old girl's gang rape and murder trigger new outrage over India's rape culture, *The Washington Post*, April 19, 2018.

2. RAPE CASES

Rape means sexual intercourse by a man with a woman without her consent³. Simply put, the offence of rape is “ravishment of a woman” without her consent or against her will by force, fear or fraud and also includes the “carnal knowledge” of a woman⁴. Section 375 of the Indian Penal Code defines rape. Till 2013, the definition of rape meant only “sexual intercourse” or “penetration” by the male genitals into the vagina of the female in the circumstances defined in the statute. However, in 2013 the definition was expanded to include penetration of the mouth, anus, urethra or vagina with penis or any other object without consent⁵.

2.3 INCIDENTS OF RAPE REPORTED

Rape is the most heinous crime against women. A rapist not only violates the victim's personal integrity but leaves indelible marks on the very soul of the helpless female⁶. The National Crime Records Bureau under the Ministry of Home Affairs collects crime statistics at the National level. The data mentioned in table 1 is the incidents of rape reported in the country during the past. It is pertinent to note that many a times the victims do not report, largely because they fear overbearing, hostile police and-should a trial ensue-vicious attacks on their character. Table 1 shows that the incidents of rape reported in the country during the past few years (2008 – 2016).

The incidents have constantly increased from 2008 to 2016. What is worrisome is that within the span of eight years the number has almost doubled (in 2008 only 21 thousand incidents were reported whereas in 2016 the figure has arose to 39 thousand approximately).

³*Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490.

⁴*Bhupendra Sharma v. State of HP*, (2003) 8 SCC 551.

⁵Sec. 375 of Indian Penal Code, 1860.

⁶*State of Maharashtra v. Rajendra Jawanmal Gandhi*, (1997) 8 SCC 386.

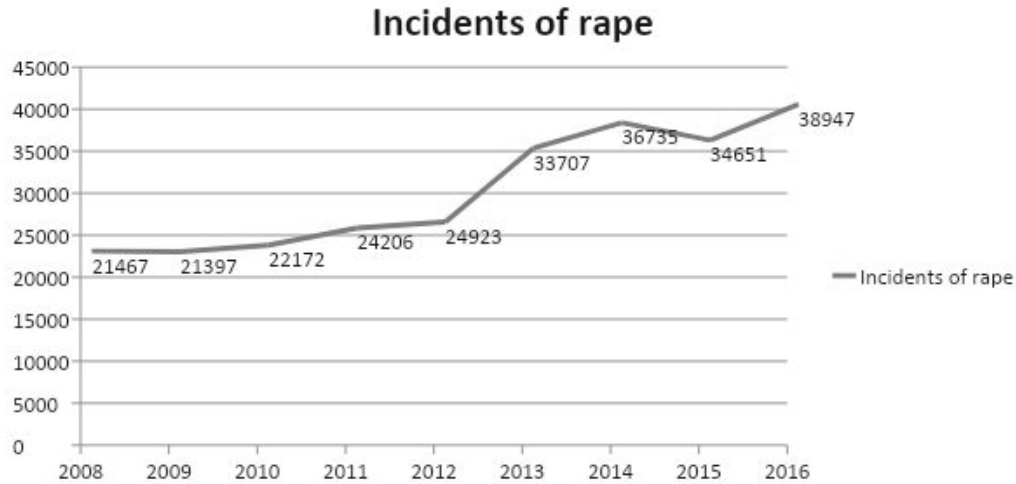


Table 1

2.4 AGE OF RAPE VICTIMS

Rape can be committed against the women of any age. Table 2 and 3 reflects the age group of rape victims in India. It is evident that the incidence of rape with minor children is constantly increasing.

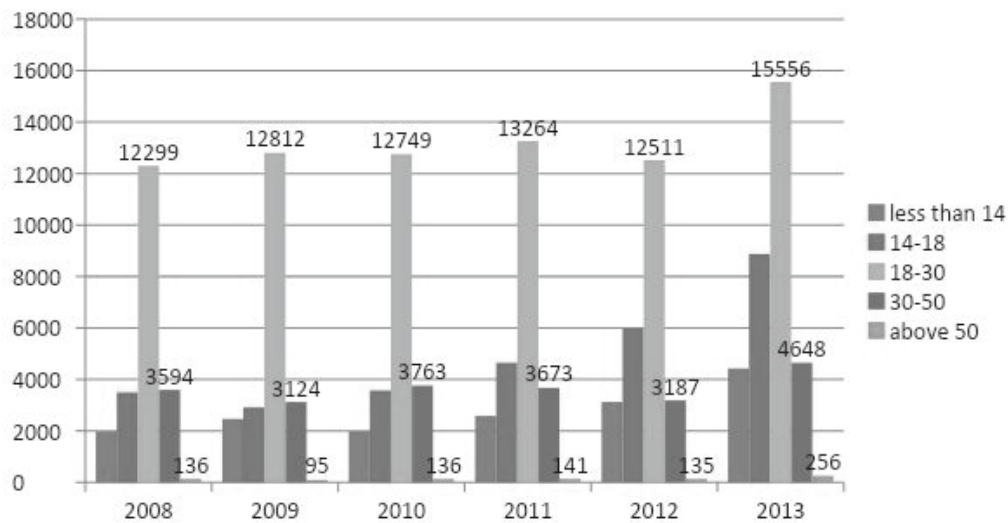


Table 2 (age in years)

Source: Data from National Crimes Records Bureau, Crime in India.

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From 2013 the National Crime Record Bureau started collecting for rape in case where the age of victim was less than six years.

Table 3

The following table shows the total number of minor and major victims of rape.

Year	No. of Victims (Minor)	No. of Victims (Major)
2008	5466	16029
2009	5382	16031
2010	5545	16558
2011	72281	7078
2012	9082	15833
2013	13304	20460
2014	14535	23146
2015	11393	23378
2016	16863	22205

The above data clearly shows that the incidence of rapes in the country is constantly increasing and the incidents of child rapes have also increased.

3. ANALYSIS OF THE CRIMINAL LAW (AMENDMENT) ACT, 2018

The Criminal Law (Amendment) Act of 2018 is divided into five chapters. Chapter I is preliminary and states the title of the Act and states that the Act shall come into force on 21st April, 2018. Chapter II enlists the amendments made in the Indian Penal Code, 1860. Chapter III enlists the amendments made in the Indian Evidence Act, 1872. Chapter IV enlists the amendments made in the Code of Criminal Procedure, 1973 and chapter V tells about the amendments made in the Protection of Children from Sexual Offences Act, 2012. The researcher in this part of the article will be analyzing these amendments.

4. AMENDMENTS IN THE INDIAN PENAL CODE, 1860

4.1 PUNISHMENT ENHANCED

4.1.1. PUNISHMENT FOR THE OFFENCE OF RAPE ENHANCED

Section 376 of the Indian Penal Code (IPC) prescribes punishment for the offence of rape. Under sub section (1) the punishment for the offence of rape is imprisonment for a term that shall not be less than seven years but may extend to life and fine. The Criminal Law (Amendment) Act of 2018 has enhanced the minimum punishment to “ten years”. That is, whoever commits rape shall be punished with imprisonment that shall not be less than ten years but may extend to life and fine.

4.1.2 PUNISHMENT FOR RAPE OF WOMAN UNDER SIXTEEN YEARS ENHANCED

Sub section (2) of section 376 prescribes enhanced punishment in certain cases⁷. According to clause (i) of sub section (2) if rape is committed on a woman under sixteen years of age then the punishment is imprisonment for a term which shall not be less than ten years but may extend to life which shall mean imprisonment for the remainder of that person's natural life and fine. The Criminal Law (Amendment) Act of 2018 has enhanced the punishment in cases where a rape is committed on a woman under sixteen years of age by inserting a new sub section (3). According to section 376 (3), whosoever commits rape on a woman under sixteen years of age shall be punished with imprisonment which shall not be less than twenty years but may extend to life which shall mean imprisonment for the remainder of that person's natural life and fine.

⁷Sec. 376(2) of Indian Penal Code, 1860.

4.2. NEW OFFENCES INTRODUCED

4.2.1. PUNISHMENT FOR RAPE ON WOMAN UNDER 12 YEARS

It is pertinent to note that due to increase in rape cases with young children, the Criminal Law (Amendment) Act has introduced a separate section for enhanced punishment when rape is committed on a woman under twelve years of age. The Act has added section 376 AB to IPC. Under this section whoever commits rape on a woman under twelve years of age shall be punished with imprisonment for a term which shall not be less than twenty years but may extend to life which shall mean imprisonment for the remainder of that person's natural life and fine or with death.

4.2.2. PUNISHMENT FOR GANG RAPE ON WOMAN UNDER SIXTEEN YEARS OF AGE

Section 376 D of the Code prescribes punishment for gang rape. This section was inserted by the Criminal Law (Amendment) Act, 2013. The punishment prescribed for gang rape is rigorous imprisonment for a term which shall not be less than twenty years but which may extend to life which shall mean imprisonment for the remainder of that person's natural life and with fine. The (Amendment) Act of 2018 provides a graded punishment for gang rape. Under section 376DA where a woman under sixteen years of age is raped by one or more persons constituting a group or acting in furtherance of criminal intention shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and with fine.

4.2.3. PUNISHMENT FOR GANG RAPE ON WOMAN UNDER TWELVE YEARS OF AGE

Section 376 DB has been inserted by the Criminal Law (Amendment) Act 2018 which provides that where a woman under twelve years of age is raped by one or more persons constituting a group or acting in furtherance of criminal intention shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and fine or death.

4.3. GUIDELINES FOR IMPOSITION OF FINE

The Act of 2018 provides that in cases where rape is committed on a woman under sixteen years of age⁸ or under twelve years of age⁹ the fine imposed should be paid to victim. This fine shall be just and reasonable to meet the medical expenses and rehabilitation of the

⁸Sec. 376 (3) Proviso 2 of Indian Penal Code, 1860.

⁹Sec. 376 AB Proviso of Indian Penal Code, 1860.

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victim¹⁰. Similarly when gang rape is committed on a woman under sixteen years of age¹¹ or under twelve years of age¹² the fine imposed should be paid to victim¹³. This fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim. It is pertinent to note that in the 2013 Amendment these statutory guidelines for payment of fine and quantum of fine were laid down for the gang rape victims only. But in 2018 Act these guidelines have been extended to rape victims if they are below sixteen years of age.

4.4 FAILURE TO RECORD INFORMATION

Section 166 A sub section (c) of IPC imposes criminal liability on a public servant if he fails to record any information given to him in relation to cognizable offence of rape or gang rape, acid attack, outraging the modesty of a woman, assault or use of criminal force with intent to disrobe, trafficking or exploitation of a trafficked person and insulting modest of a woman. This section has been amended to include within its sphere the newly added sections that is, 376 AB, 376 DA and 376 DB. The punishment shall be rigorous imprisonment for a term that shall not be less than six months but may extend to two years and fine.

4.5 DISCLOSURE OF IDENTITY OF THE VICTIM

Section 228 A of IPC imposes criminal liability on those who print or publish the name or make known the identity of the victim in cases of offences of rape. The section has been amended by the 2018 Act to include within its sphere the newly added offences. The liability for such disclosure is imprisonment of either description for a term that may extend to two years and fine.

4.6 AMENDMENTS IN THE INDIAN EVIDENCE ACT

In rape cases consent is the foremost issue. It is pertinent to note that in cases of rape when a woman is under eighteen years of age, consent does not matter¹⁴. However, the Act of 2018 has introduced changes in the Indian Evidence Act pertaining to sections that regulate evidence in cases where consent is in issue.

¹⁰Sec. 376 (3) Proviso 1 and Sec. 376 AB Proviso 1 of Indian Penal Code, 1860.

¹¹Sec. 376 DA Proviso 2 of Indian Penal Code, 1860.

¹²Sec. 376 DB Proviso 2 of Indian Penal Code, 1860.

¹³Sec. 376 DA Proviso 1 and Sec. 376 DB Proviso 1 of Indian Penal Code, 1860.

¹⁴Sec. 375 Clause Sixthly of Indian Penal Code, 1860.

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4.6.1 EVIDENCE OF CHARACTER OF PREVIOUS SEXUAL EXPERIENCE NOT RELEVANT IN CERTAIN CASES

Section 53 A was added to the Indian Evidence Act through the Criminal Law (Amendment) Act, 2013. According to section 53 A in prosecution for an offence relating to rape or attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of consent or quality of consent. The 2018 Act has amended the section to include within its sphere the newly added offences that is section 376 AB, 376 DA and 376 DB.

4.6.2 QUESTIONS LAWFUL IN CROSS EXAMINATION

Section 146 of the Indian Evidence Act lays down that when a witness is being cross examined then in addition to other questions, he may be also asked such questions which tend to test his veracity or to discover his position in life or shake his credit by injuring his character. A proviso was inserted in this section in 2013 which provides that in prosecution of offences of rape (including 376A-E) or attempt to commit such offence, where the question of consent is in issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience of such victim with any person.

4.7 AMENDMENTS IN THE CODE OF CRIMINAL PROCEDURE

4.7.1 TRIAL OF RAPE CASES BY A COURT PRESIDED OVER BY A WOMAN

Section 26 of the Code of Criminal Procedure (CrPC) lays down the jurisdiction of the courts to try offences. The proviso to the section lays down that an offence of rape (376 A/B/C/D/E) shall be tried as far as practicable by a Court presided over by a woman. The proviso has been amended by the Act of 2018 to incorporate that the newly added offences to Indian Penal Code, that is section 376 AB, section 376 DA and 376 DB shall also be tried as far as practicable by a Court presided over by a woman.

4.7.2 RECORDING OF FIR

Section 154 of CrPC lays down the procedure for recording of FIR. A proviso was inserted in this section to provide that when information of an offence of rape, acid attack, outraging the modesty of a woman (A/B/C/D) or insulting the modesty of a woman is given by the woman

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herself, then the information is to be recorded by a woman police officer or any woman officer. The second proviso further provides that if the victim is temporarily or permanently mentally or physically disabled then such information must be recorded at the residence of the person or at a convenient place of such person's choice, in the presence of a special educator or an interpreter, as the case may be. The 2018 Act has amended the provisos to include within its sphere the newly added offences, that is, section 376 AB, 376 DA and 376 DB.

4.7.3 RECORDING OF STATEMENTS BY POLICE AND MAGISTRATE

Section 161 of CrPC provides for the examination of witnesses by police. The second proviso to the section provides that the statement of a woman against whom the offence of rape, acid attack, outraging the modesty of a woman (A/B/C/D) or insulting the modesty is alleged to have been committed shall be recorded by a woman police officer or any woman officer. The 2018 Act has amended these sections to include within its sphere the newly added offences, that is, section 376 AB, 376 DA and 376 DB.

Further, section 164 (5A)(a) provides that in cases of rape, acid attack, outraging the modesty of a woman(A/B/C/D) or insulting the modesty, the Judicial Magistrate shall record the statement of the victim as soon as the commission of the offence is brought to the notice of the police. The 2018 Act has amended this section to include within its sphere the newly added offences, that is, section 376 AB, 376 DA and 376 DB.

4.7.4 COMPLETION OF INVESTIGATION

Section 173 of the Code lays down that every investigation under the chapter shall be completed without delay. However, no time period for completion of investigation is prescribed. In 2009 a proviso was inserted in the section that provided that the investigation in relation to rape of a child may be completed within three months from the date on which the officer in charge of the police station recorded the information. This proviso has been amended by the Act of 2018. Keeping in mind, the need of a swift investigation in heinous crimes like rape, the 2018 Act provides that investigation in an offence of rape shall be completed within two months from the date on which the officer in charge of the police station recorded the information. Thus the time period has been reduced from three months to two months and this time frame has been prescribed for all offences in the genre of rape (whether rape committed with a child or adult). Further, the command earlier was directory as the word used in the section was “may” whereas now the word used in the section is “shall”. This shows a reflection of compulsion, that is, the investigating agency is under a mandate to complete investigation within two months from the date of recording of FIR.

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As soon as the investigation is completed, the officer-in-charge of the police station shall forward the report in the prescribed offence to the Magistrate¹⁵. The report shall contain among other things¹⁶, particulars of medical examination of the woman in cases of rape under section 376, 376 A-E. The 2018 Act has amended this section to include within its sphere the newly added offences, that is, section 376 AB, 376 DA and 376 DB.

4.7.5 NO SANCTION REQUIRED TO PROSECUTE A PUBLIC SERVANT FOR ALLEGED OFFENCE OF RAPE

Section 197 of CrPC provides for obtaining sanction before prosecuting judges and public servants. Explanation attached to the section provides that no sanction is required for prosecuting a public servant in case he is alleged of certain offences¹⁷. The Act of 2018 amends the explanation to include within its sphere newly enacted offences, that is, section 376 AB, 376 DA and 376 DB.

4.7.6 SPEEDY TRIAL

In order to ensure speedy trial in rape cases proviso attached to section 309 provides that the inquiry or trial in such cases shall be completed within a period of two months from the date of filing of charge sheet as far as possible. The newly added offences have also been included in this section.

4.7.7 CAMERA TRIAL

Section 327 provides that the trial for an offence should be held in an open court. However, sub section (2) provides that in rape cases the trial shall be held in camera. This is also applicable for the trial of offences under section 376 AB, 376 DA and 376 DB.

4.7.8 COMPENSATION TO BE IN ADDITION TO FINE

Section 357B provides that the compensation payable by state government under Victim Compensation Scheme to the victim of acid attack or gang rape shall be in addition to the payment of fine. The Act of 2018 provides that in case of rape with a woman below twelve years or gang rape with a woman below sixteen years or twelve years the same provision shall be applicable. That is, compensation paid by the state government to the victim shall be in addition to the payment of fine.

¹⁵Sec. 173(2) of Code of Criminal Procedure, 1973.

¹⁶Sec. 173(2) of Code of Criminal Procedure, 1973.

¹⁷ Explanation- For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, section 376A, section 376C, section 376D or section 509 of the Indian Penal Code (45 of 1860).

4.7.9 TREATMENT OF VICTIMS

Section 357 C obligates all public and private hospitals to provide first aid or medical treatment to the victims of offences of acid attack and rape. The treatment shall be provided free of cost. It is pertinent to note that non treatment is an offence under section 166 B of the Indian Penal Code, 1960 and the person in charge of such a hospital can be punished with imprisonment for a term which may extend to one year or fine or both. The section has been amended to include within its sphere the newly created offences, that is, 376 AB, 376 DA and DB.

4.7.10 TIME PERIOD FOR DISPOSAL OF APPEAL

Section 374 gives a person the right to file an appeal against conviction. Section 377 empowers the state government to file appeal for inadequacy of sentence. The offence of rape is triable by Court of Sessions¹⁸ and therefore the appeal in both cases can be filed to High Court¹⁹. Till now, there was no time period prescribed for disposal of appeals. The Act of 2018 provides that when an appeal is filed against conviction or for inadequacy of sentence for an offence under section 376, section 376 A-E, section 376 AB, 376 DA and DB, the appeal shall be disposed off within a period of six months from the date of filing of such appeal. For the purpose of same sub section (4) and sub section (3) has been inserted in section 374 and 377 respectively.

4.7.11 ANTICIPATORY BAIL

Section 438 empowers the High Court or the Court of Sessions to grant anticipatory bail. The Act of 2018 specifically provides that anticipatory bail shall not be granted to a person accused of committing an offence of rape or gang rape on a woman below sixteen years or twelve years of age. For the purpose of same sub section (4) has been inserted in section 438.

4.7.12 SPECIAL POWERS OF HIGH COURT OR COURT OF SESSIONS TO GRANT BAIL

Section 439 gives special powers to Sessions Court or High Court for grant of bail. The proviso to the section provides that before granting bail in cases exclusively triable by Court of Sessions, the Public Prosecutor must be given a notice unless it is not practicable to give

¹⁸Schedule I of Code of Criminal Procedure, 1973.

¹⁹Sec. 374(2) of Code of Criminal Procedure, 1973.

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such notice. The reasons for not giving notice are to be recorded in writing. It is pertinent to note that all offences under the genre of rape are triable by Court of Sessions. The Act of 2018 has inserted a proviso to section 439. It provides that the High Court or the Court of Sessions shall give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice, before granting bail to an accused for an offence of rape or gang rape when the offence is committed on a woman below sixteen years. Further, the presence of an informant or any person authorized by him shall be obligatory at the time of hearing of such bail application²⁰.

4.8 AMENDMENTS MADE IN THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

The Protection of Children from Sexual Offences Act, 2012 (POCSO) is a special Act to protect children from sexual assault²¹. Under the Act the punishment for the rape of a minor is imprisonment for at least seven years that may extend to life and fine²². For rape of minors below the age of twelve years or for gang rape of minors the punishment is imprisonment for at least ten years that may extend to life and fine²³. Section 42 of the Act provides that when an act is an offence under this Act as well as under IPC then the Act that provides for higher punishment shall apply. The section has been amended to include within its sphere the newly added offences.

²⁰Sec. 439 (1A) of Code of Criminal Procedure, 1973.

²¹Preamble of Protection of Children from Sexual Offences Act, 2012.

²²Sec. 4 of Protection of Children from Sexual Offences Act, 2012.

²³Sec. 6 of Protection of Children from Sexual Offences Act, 2012.

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5. COMPARATIVE CHART

AMENDMENTS IN IPC				
Sr. No.	Section	Existing Provision	Amendment as per the Criminal law (Amendment) Act, 2018	Explanation
1	166 A (c) Public servant disobeying direction under law	Whoever being a public servant (c) fails to record any information given to him under sub-section (1) of section 154 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to cognizable offence punishable under section 326A, section 326B, section 354, section 354B, section 370, section 370A, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509, shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine.]	In section 166A, in clause (c), for the words, figures and letters "section 376B, section 376C, section 376D,"the words, figures and letters "section 376AB, section 376B, section 376C section 376D, section 376DA, section 376DB" shall be substituted.	Criminal liability to be imposed on public servant if he fails to record FIR in cases of rape or gang rape on a girl below sixteen years.
2	228 A (1) Disclosure of identity of the victim of certain offences etc.	(1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.	In sub-section (1),for the words, figures and letters "section 376A, section 376B, section 376C, section 376D", the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB" shall be substituted.	Criminal liability to be imposed if the identity of rape victim is disclosed.

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3	376 (1) Punishment for Rape	(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.	In sub-section (1), for the words “shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine”, the words “shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine” shall be substituted.	Minimum punishment for the offence of rape enhanced from seven years to ten years.
4	376 (2) (i)	Whoever commits rape on a woman when she is under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.	Omitted	-
5	376 (3) Punishment for rape on woman under sixteen years of age		<p>After sub-section (2), the following sub-section shall be inserted, namely:—</p> <p>“(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:</p> <p>Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:</p> <p>Provided further that any fine imposed under this sub-section</p>	<p>Minimum punishment for the offence of rape committed on a woman below sixteen years enhanced from ten years to twenty years.</p> <p>Also the fine imposed shall be just and reasonable to meet the medical expenses and rehabilitation of the victim and shall be paid to victim.</p>

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			shall be paid to the victim".	
6.	376 AB Punishment for rape of a woman under twelve years of age		<p>After section 376A, the following Section shall be inserted, namely:—</p> <p>“376AB. Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and with fine or with death:</p> <p>Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:</p> <p>Provided further that any fine imposed under this section shall be paid to the victim”.</p>	<p>Minimum punishment for the offence of rape committed on a woman below twelve years is imprisonment for life meaning remainder of that person’s natural life and maximum is death penalty.</p> <p>Also the fine imposed shall be just and reasonable to meet the medical expenses and rehabilitation of the victim and shall be paid to victim.</p> <p>Earlier there was no separate punishment for rape with a woman below twelve years and the minimum punishment that could be awarded was ten years and maximum was life meaning remainder of that person’s natural life.</p>

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7.	<p>376 DA</p> <p>Punishment for gang rape of a woman under sixteen years of age</p>		<p>After section 376D of the Penal Code, the following section shall be inserted, namely:</p> <p>“376DA. Where a woman under sixteen years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine:</p> <p>Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:</p> <p>Provided further that any fine imposed under this section shall be paid to the victim.</p>	<p>Punishment for the offence of gang rape committed on a woman below sixteen years is imprisonment for life meaning remainder of that person's natural life.</p> <p>Also the fine imposed shall be just and reasonable to meet the medical expenses and rehabilitation of the victim and shall be paid to victim.</p> <p>Earlier there was no separate punishment for gang rape with a woman below sixteen years and the minimum punishment that could be awarded was twenty years and maximum was life meaning remainder of that person's natural life.</p>
8.	<p>376 DB</p> <p>Punishment for gang rape</p>		<p>The following section shall be inserted, namely:</p> <p>“376DB- Where a woman under twelve years of age is raped by</p>	<p>Minimum punishment for the offence of gang rape committed on</p>

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	<p>of a woman under twelve years of age</p>		<p>one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death.</p> <p>Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:</p> <p>Provided further that any fine imposed under this section shall be paid to the victim.</p>	<p>a woman below twelve years is imprisonment for life meaning remainder of that person's natural life and maximum punishment is death.</p> <p>Also the fine imposed shall be just and reasonable to meet the medical expenses and rehabilitation of the victim and shall be paid to victim.</p> <p>Earlier there was no separate punishment for gang rape with a woman below twelve years and the minimum punishment that could be awarded was twenty years and maximum was life meaning remainder of that person's natural life.</p>
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AMENDMENTS TO THE INDIAN EVIDENCE ACT				
9.	53 A Evidence of character or previous sexual experience not relevant in certain cases	In a prosecution for an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.	In section 53 A for the words, figures and letters -section 376A, section 376B, section 37, section 376D", the words, figures and letters "section 376A, section 376AB, section 3760, section 376C, section 376D, section 376DA, section 376DB" shall be substituted.	In issue of consent evidence of character of victim or previous sexual experience shall not be relevant.
10.	146 Questions lawful in cross-examination	Provided that in a prosecution for an offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent.	In section 146 of the, proviso, for the words, figures and letters "section 376A, section 376B, section 376C, section 376D", the words, letters and figures "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB" shall be substituted	In issue of consent evidence of character of victim or previous sexual experience shall not be relevant.

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AMENDMENTS TO THE CODE OF CRIMINAL PROCEDURE				
11.	26 (a) proviso Courts by which offences are triable	Provided that any offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code shall be tried as far as practicable by a Court presided over by a woman.	In clause (a), in the proviso, for the words, figures and letters "section 376A, section 376B, section 376C or section 376D", the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB" shall be substituted.	Trial of cases of rape or gang rape with a woman below sixteen years to be conducted by a court presided over by a woman as far as practicable.
12.	154 (1) provisos Information in cognizable cases	<p>Provided that if the information is given by the woman against whom an offence under section 326A, section 326B, section 354A, 354B, 354C, 354D, section 376, section 376A, section 376B, section 376C, Section 376D, Section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer.</p> <p>Provided further that:</p> <p>(a) in the event that the person against whom an offence under Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of a special educator or an interpreter, as the case may be.</p>	<p>In section 154 of the Code of Criminal Procedure, in sub-section (1),-</p> <p>(i) in the first proviso, for the words, figures and letters "section 376A, section 376B, section 376C, section 376D", the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB," shall be substituted;</p> <p>(ii) in the second proviso, in clause (a), for the words, figures and letters "section 376A, section 376B, section 376C, section 376D," the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB," shall be substituted.</p>	Information regarding offence of rape or gang rape with a woman below sixteen years to be recorded by a woman police officer or a woman officer if the information is given by the victim herself.

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13.	161 (3) Examination of witnesses by police	Provided further that the statement of a woman against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.	In section 161 in sub-section (3), in the second proviso, for the words, figures and letters "section 376A, section 376B, section 376C, section 376D," the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB," shall be substituted.	Statement of woman against whom rape is alleged to have been committed is to be recorded by a woman police officer or any woman officer.
14.	164 (5A) Recording of confessions and statements	(a) In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section (1) or sub-section (2) of section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police.	In section 164 (5A), in clause (a), for the words, figures and letters "section 376A, section 376B, section 376C, section 376D," the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB," shall be substituted.	Statement of woman against whom rape is alleged to have been committed is to be recorded by a judicial magistrate as soon as the offence is brought to the notice of police.
15	173 (1A) and (2) - Report of police officer on completion of investigation	(1A) The investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer in charge of the police station (2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating (h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under section 376, 376A, 376B, 376C, 376D or section 376E of the Indian Penal Code	In section 173 (1A), for the words "rape of a child may be completed within three months", the words, figures and letters "an offence under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or section 376E of the Indian Penal Code shall be completed within two months", shall be substituted. In sub-section (2), in clause (i), in sub-clause (h), for the figures, letters and word "376A, 376B, 376C, section 376D or 376 E", the figures and letters "376A, 376AB, 376B, 376C, 376D, 376DA, 376DB, 376 E" shall be substituted.	Investigation in all cases of rape to be completed within two months from the date on which FIR was filed, Earlier time limit was three months and that too only for cases involving rape of a child. In rape cases the final report submitted by police after investigation shall contain along with other particulars, the report of medical examination of victim.

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16.	197 Prosecution of Judges and public servants	Explanation.--for the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, section 376A, section 376C, section 376D or section 509 of the Indian Penal Code.	In section 197 (1), in the Explanation, for the words, figures and letters "section 376A, section 376C, section 376D", the words, figures and letters "section 376A, section 376AB, section 376C, section 376D, section 376DA, section 376DB" shall be substituted.	No sanction is required for prosecuting public servant when he is accused of committing an offence of rape.
17.	309(1) proviso Power to postpone or adjourn proceedings	Provided that when the inquiry or trial relates to an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code, the inquiry or trial shall, as far as possible be completed within a period of two months from the date of filing of the charge sheet.	In section 309 (1), in the proviso, for the words, figures and letters "section 376A, section 376B, section 376C, or section 376D of the Indian Penal Code, the inquiry or trial shall, as far as possible", the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA or section 376DB of the Indian Penal Code, the inquiry or trial shall" shall be substituted.	Inquiry or trial to be completed within a period of two months from the date of filing of charge sheet. The language used in the section is "shall" which shows that it is a mandate whereas earlier the words used were "shall as far as possible". The words as far as possible have been deleted.
18.	327 Court to be open	Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code shall be conducted in camera:	In section 327 (2), for the words, figures and letters "section 376A, section 376B, section 376C, section 376D", the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB", shall be substituted.	Camera Trial

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19.	357B Compensation to be in addition to fine under section 326A or section 376D or Indian Penal Code	The compensation payable by the State Government under section 357A shall be in addition to the payment of fine to the victim under section 326A or section 376D of the Indian Penal Code	In section 357B for the words, figures and letters “under section 326A or section 376D of the Indian Penal Code”, the words, figures and letters “under section 326A, section 376AB, section 376D, section 376DA and section 376DB of the Indian Penal Code” shall be substituted.	Compensation paid by the state government under Victim Compensation Scheme shall be in addition to payment of fine. Earlier this provision was only for gang rape victims only. Now, it also includes cases where rape is committed with a woman below sixteen years of age.
20.	357 C Treatment of victims	All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under section 326A, 376, 376A, 376B, 376C, 376D or section 376E of the Indian Penal Code (45 of 1860), and shall immediately inform the police of such incident.	In section 357C, for the figures and letters “376A, 376B, 376C, 376D”, the figures and letters “376A, 376AB, 376B, 376C, 376D, 376DA, 376DB” shall be substituted.	First aid and medical treatment to be provided free of cost by public as well as private hospitals to victims.
21.	374(4) Appeals from Convictions		In section 374 after sub-section (3), the following sub-section shall be inserted, namely:- “(4) When an appeal has been filed against a sentence passed under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code, the appeal shall be disposed of within a period of six months from the date of filing of such appeal.”	When an appeal has been filed by an accused for conviction in a rape case, then the appeal shall be disposed off within a period of six months from the date of filing. Earlier there was no time period mentioned in the statute for disposal of appeals.

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22.	377 Appeal by State Government against sentence		<p>In section 377, after sub-section (2), the following sub-section shall be inserted, namely:-</p> <p>“(3) When an appeal has been filed against a sentence passed under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code, the appeal shall be disposed of within a period of six months from the date of filing of such appeal.”</p>	<p>When an appeal has been filed by state government against inadequacy of sentence for offence of rape, then the appeal shall be disposed off within a period of six months from the date of filing. Earlier there was no time period mentioned in the statute for disposal of appeals.</p>
23	438 Direction for grant of bail to person apprehending arrest		<p>In section 438, after sub-section (3), the following sub-section shall be inserted, namely:-</p> <p>“(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA and section 376DB of the Indian Penal Code.”.</p>	<p>Anticipatory bail not be granted to a person accused of committing an offence of rape or gang rape on a woman below sixteen years. There was no such prohibition earlier.</p>

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24.	439 Special powers of High Court or Court of Sessions regarding bail		<p>In section 439 (1) after the first proviso, the following proviso shall be inserted, namely:—</p> <p>“Provided further that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence triable under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code, give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.”;</p> <p>(b) after sub-section (1), the following sub-section shall be inserted, namely:—</p> <p>“(1A) The presence of the informant or any person authorized by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code.”</p>	<p>Public Prosecutor must be given a notice when the High Court or Sessions Court is hearing a bail application of a person alleged to have committed an offence of rape on a girl below sixteen years. Similar provision regarding notice was there (and is still there) earlier also. However, that provision allowed that in cases where it is not practicable to give notice, the court may proceed after recording the reasons for not serving the notice in writing. However, by the 2018 amendment it has been mandated that in cases of rape or gang rape with a girl below sixteen years the requirement of notice cannot be dispensed away with. Informant must be present when the bail application of a person alleged to have committed an offence of rape on a girl below sixteen years is heard by the Court.</p>
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25.	Schedule I		Entries of Section 376AB, 376 DA and DB made in Schedule	All are cognizable, non-bailable and triable by a Court of Sessions
AMENDMENT IN POCSO				
26.	Section 42 Alternative Punishment	Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.	In section 42, for the figures and letters “376A, 376B, 376C, 376D”, the figures and letters “376A, 376AB, 376B, 376C, 376D, 376DA, 376DB” shall be substituted	

6. CONCLUSION

The status of women in India, both historically and socially has been one of the respect and reverence. In spite of this, innumerable women are exploited, socially, economically and sexually because of orthodox tradition, superstitions, myths and beliefs. Rape is one of the most heinous crimes committed against women which affects the victim not only physically but also leaves a mental trauma on the victim. Rape destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is an outrage by all canons²⁴. The incidents of rape in the country as are continuously increasing. The victimization of small minor girls who have not attained the age of puberty is increasing. This reflects the mindset of a regressive era with patriarchal dominance. The government in its wisdom has amended the criminal law and has prescribed more stringent punishment for rape. However, the law alone cannot do anything. There is need to change the general attitude of society in favour of the dignity of women and sensitize the society towards such crimes.

²⁴ *Phul Singh v. State of Haryana*, AIR 1980 SC 249.

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A STUDY OF CONTEMPORARY HUMAN RIGHTS ISSUES INVOLVED IN SURROGACY IN INDIA AND ANALYSIS OF SURROGACY REGULATION BILL, 2016

Vatsala Pandey*

1. INTRODUCTION

Human Right is an idea of bringing every human on the same platform and giving them the Procreation is norm of the nature. The right to procreate is recognized worldwide in international instruments as well as under Indian constitution. Everyone has right to make reproductive choices. The law on the point of procreation and reproductive choices is matured in India. The picture becomes blurred when the people are unable to exercise their said right due to various reasons. Those reasons could be the issues related to physical health, mental health i.e. physical or mental or maybe sometimes economical when procreation may lead to termination of duties. This brings them to resort to various choices of alternative options available like adoption, IVF also called as test tube baby or arrangement of surrogacy.

Technology has taken over the world. Technological advances now days are providing aid to people who want to exercise their “right to procreate”. Such a technology driven arrangement is surrogacy which enables a person(s) willing to be parent but couldn't due to any or all of the conditions discussed above.

India used to be the hub for surrogacy before 2016, for the simple reason of cost effective medication and availability of cheap surrogate¹. Gradually the hub was hit by various human rights issues such as over exploitation of surrogate mother, rights of child if born with disability, nationality of child, underpayment by intending parents to surrogate mothers, improper medical assistance offered to surrogate mother or child and the list continues. Taking the ongoing issues in cognizance the parliament drafted 'Surrogacy (Regulation) Bill 2016'² which banned commercial surrogacy in India and only permitted altruistic surrogacy meanwhile government also issued legislation to ban commercial surrogacy.

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¹Surrogate is the one who carries baby of intending couple in the womb.

²Hereinafter referred as 'The Bill'.

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The step by the government received mixed response from the masses. It was lauded for being pro human right legislation whereas it was also criticized for being more than needed ambition in its approach of banning commercial surrogacy rather than regulating it.

This project is an attempt to analyze both the arguments arising out of bill relating to surrogacy on the touchstone of human rights which are guaranteed by Indian constitution and various other human right instruments. In the first part of the project I will make reader aware of the basic concepts and terminologies related to surrogacy then I will move forward with human rights which surrogacy arrangement faces and in the country like India what is the need to regulate such an arrangement. In the second part I will analyze the 2016 Bill on the grounds of human rights guaranteed under Indian constitution. Lastly I will try to find out discrepancies in the bill, removal of which may help in regulation of surrogacy in a better way and arrive at a path where no basic human rights of any parties are compromised.

2 UNDERSTANDING SURROGACY

2.1 MEANING AND DEFINITION

Surrogacy means an arrangement where one woman agrees to carry on gestation or keep a child in her womb till birth. Word surrogate is derived from word “subrogare” which means to act in place of³. In simple words surrogacy can be said as arrangement where a woman on behalf of intending parent(s) keeps the child in her womb throughout pregnancy till birth.

The parent(s) who wishes to have a child and enter into such an arrangement is called “intending parent” and the woman who carries the child in the womb for intending parents is called “surrogate”.

2.2 TYPES OF SURROGACY ARRANGEMENT

There are some recognized types of surrogacy arrangements. Indian Supreme Court in year 2008 while deciding upon the case of Baby Manji⁴ discussed a few type of possible arrangements which intending parent(s) adopt to procure a child through surrogacy.

³*Baby Manji Yamadav. Union of India*, (2008) 13 SCC 518.

⁴*Ibid.*

Altruistic surrogacy: It is the type of arrangement where the carrier women is not paid for the service of keeping baby in the womb. However, the basic medical expenses are beard by intending parent(s).

Commercial Surrogacy: Type of arrangement where surrogate is paid for the service of keeping baby in the womb. Usually this type of arrangement is entered into by economically strong people intending to be parent. In such an arrangement surrogate may be any relative, friend, colleague or even a stranger to whom intending parent(s) pay for carrying the baby.

2.3 METHODS OF SURROGACY

There were two main methods discussed in the judgment by the court which involved Straight method and host method.

Straight method: It is the traditional method where the surrogate is pregnant by her own biological child with the intention of relinquishing the child to biological father and his spouse. The child maybe conceived via home artificial insemination using fresh or frozen sperm or IUI (intrauterine insemination) or ICI (intra-cervical insemination)

Host method: Arrangement where surrogate is not biological mother but carries the child in her womb. The child is procured via embryo transfer or germ or egg donation. She relinquishes the child after birth and the biological parents are the intended parents⁵.

3. SURROGACY AND HUMAN RIGHTS

Surrogacy is debatable arrangement from the human rights point of view. There is divergent view on the practice. Advocates of surrogacy involve a pro human right approach by justifying that the method helps people to exercise their right of procreation and privacy as well as right to make reproductive choices while there are some school of thought which considers that practice of surrogacy is not favorable for human rights end because it leads to exploitation of women. In this part of the essay we will study and analyze both the arguments regarding surrogacy.

⁵*Ibid.*

3.1 SURROGACY AND RIGHT TO PRIVACY AND FAMILY

Universal Declaration of Human Rights also called as Bible for human rights protection enumerates in Article 12 that every person has right to protection of law against arbitrary decisions of government with regard to privacy, family, home or correspondence. Similarly ICCPR in Article 17 states that everyone has right to protection of law against unreasonable actions with regard to same components mentioned in UDHR⁶. Article 8 of ECHR is on the same lines and protects respect for one's private and family life. On the superficial reading of the provisions itself it is clear that all three provisions are on the same lines and ensures that there is no arbitrary intrusion into one's privacy, family, home or correspondence. Hence, one thing is clear that if any legislation or regulation or rule puts bar or interferes with aforementioned right is not a good law under international instrument like ICCPR, ECHR and UDHR.

On the same line judiciary in India via Article 21 has expanded horizon of right to life and right to life does not only means “mere animal existence” and hence whatever means it employs to make it worth living is covered under this right⁷. It may be interpreted that right to have a family also falls within “means” to make a life worth living and we may also infer that person is free to choose the means and methods he wants to utilize while exercising such a right. Surrogacy as a means to expand a family can be inferred as such a means to exercise such a right and such a right can only be restricted if there is “procedure established by law”⁸ and that procedure must be fair, just and reasonable⁹. Hence such procedure would need a “reasonability” check before it intrudes in practice of exercising such rights. So, if a person is restricted to enter into surrogacy arrangement by law then the law restricting should be fair just and reasonable. We shall talk about the current law and check its reasonability in later part of this article

3.2 RIGHT TO REPRODUCTIVE CHOICES AND SURROGACY

A series of documents were adopted at United Nations Conferences including documents regarding reproductive choices of women. One of the most important document adopted by UN is 1994 International Conference on Population and Development (ICPD). ICPD in its paragraph 7.3 of Plan of Action not only safeguards right of women but all individuals and also couples and says that they have right to decide freely and responsibly spacing, number

⁶ Article 12, Universal Declaration of Human Rights Article 12.

⁷ *P. Rathinam v. Union of India*, (1994) 3 SCC 394.

⁸ Article 21 of the Constitution of India, 1950.

⁹ *Maneka Gandhi v. Union of India*, 1978 SCR (2) 621.

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and timing of children and to have all the information and means to do so¹⁰. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents¹¹

On the similar lines in *B.K. Parthasarathi v. Government of Andhra Pradesh*¹² recognized reproductive rights as a fundamental right and upheld 'the right to reproductive autonomy' of an individual as a facet of his right to privacy. Hence these norms serve as platform for any individual who wants to undergo surrogacy as intending parents or as surrogate.

3.3 SURROGATE'S RIGHT AGAINST EXPLOITATION

The right to protection from exploitation, violence and abuse is contained in some of the main international charter including Article 20(2) of ICCPR¹³.

On the same line our Indian Constitution in its Article 23 has incorporated "Right against Exploitation" as a fundamental right under of Indian constitution. Supreme Court in *Bandhua Mukti Morcha v. Union of India* said that right to life means right to live with dignity and free from exploitation. This exploitation however used in context of workers also was made elaborate and extended to health and strength of workers, men , women and children and found it as DPSP particularly Art 39(e) and (f) and further Article 41 and 42. Under Article 39(f) there is duty upon state to make sure that citizens do not enter into something for economic necessity which is not in consideration of their health and strength. We will not be wrong in saying that there are sufficient provisions in constitutions¹⁴ apart from some other legislation which safeguard citizens against any sort of exploitation faced due to any reason even maybe economic necessity.

In the agreement of surrogacy where women enter either altruistically or commercially and consent to all the biological changes which may occur during process is it not against their fundamental right against exploitation and right to life?

¹⁰Twelve Human Rights Key to Reproductive Rights ;<https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/V4Repro%20Rights%20Are%20Human%20Rights%20-%20FINAL.pdf>last assessed on 15 May 2019 at 6:42 pm.

¹¹This definition of reproductive rights was re-enforced at the *United Nations Fourth World Conference on Women*. See Beijing Declaration and Platform for Action, *supra* note 21, at para. 95.

¹²*B.K. Parthasarathi v. Government of Andhra Pradesh*, 1999 (5) ALT 715.

¹³Article 19(1) of the Convention on the Rights of the Child (CRC) and article 16(1) of the Convention on the Rights of Persons with Disabilities (CRPD).

¹⁴Articles 23 , 21 and 39(f) of Directive Principle of State Policy.

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It also “Trafficking” as defined in Black's Law Dictionary is trade/sale/exchange of goods or the passing of goods or commodities from one person to another for an equivalent in goods or money¹⁵. Further PALERMO Protocol¹⁶ defines trafficking as:

“the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”¹⁷.

Further sub Article (b) of the same provision makes clear that consent of the person who is being exploited is immaterial if there is case of any of the act which are mentioned above.

Thus, in the practice of commercial surrogacy it will not be wrong to say that a women is recruited and paid consideration for her exploitation. Now whether the consensual usage of one's own body for the purpose to create a life within for commercial consideration falls under exploitation? The first question arises is whether consent, for such a practice is irrelevant? PALERMO Protocol negates the relevance of any such consent¹⁸. Similarly, Indian constitution also says anything which is harmful for health should not be dealt for economic purposes¹⁹. Hence if both the instruments taken into consideration we can conclude that women cannot consent for surrogacy for commercial purposes. Again, but the bone of contention for this argument is DPSP which is mere goals or guidelines for state to follow.

In *Jayashree Wad v. UOI*²⁰ it was held that human embryo is life in miniature form and buying and selling. So, trading of the human embryo must amount to trafficking. It is relief to take note of notification issued by the government banning all the commercial surrogacy

¹⁵Black's Law Dictionary 2nd Ed., P. 1742.

¹⁶Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000.

¹⁷Operational indicators of trafficking in human beings-https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_105023.pdf last assessed on 12 May 2019 at 4:00 p.m.

¹⁸Art. 3 (b) of Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

¹⁹39(F) of Directive Principle of State Policy, Constitution of India.

²⁰*Jayashree Wad v. Union of Indian & Others W.P. (C) No. 95/2015*.

arrangements in India and coming up with the draft bill²¹ which completely bans Commercial surrogacy in India.

3.4 CAN CONSENT OF SURROGATE BE CLAIMED AS WAIVER OF FUNDAMENTAL RIGHT?

After banning of commercial surrogacy the picture on point is clear that no one can offer consideration to a women for being surrogate to their child. In another type of arrangement where no consideration is charged and arrangement is altruistic. This type of arrangement generally takes place between close relatives of intending parents. There might be instances where women are under undue pressure by family members to act as surrogate. This is directly deprivation of her right to make choice which was considered as connotation of right to privacy in Putta swamy judgment²² Right to life under article 21 also incorporates right to privacy. There are two arguments in this context. First, it is infringement of their right to privacy and second the Fundamental rights cannot be waived²³ Hence of the main issue this arrangement suffers is determination of will and free consent of surrogate mother. If surrogate acts in pressure of family members then her fundamental rights are directly at stake and her consent cannot be observed as authenticity to such an act.

3.5 CHILD RIGHTS AND SURROGACY

All the international instruments have recognized extensive list of rights which are and should be available to child UDHR in Art. 25(1) says childhood and motherhood should be taken extensive care of and whether such childhood or motherhood is out of wedlock or not is not relevant. Further ICCPR and ICESCR in Article(s) 24 and 10.3 respectively ensure maximum standard for care and protection of child. Further, UNCRC²⁴

In Art. 2 which were intended to protect illegitimate child says that every child should be protected irrespective of issue of its legal guardian. The application of same can be very well extended to child born out of surrogacy as well.

²¹ Bill of 2016.

²² *K Puttaswamy v. Union of India*, (2017) 10 SCC 1.

²³ *Bashshwar Nath v. CIT* (1945) 013 ITR 0425.

²⁴ Art. 2 of United Nations Convention on Rights of Child, 1989.

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Secondly, all the conventions or arrangements which involve a child should be in their best interest²⁵. In India Juvenile Justice Act of 2015 via Section 2(9) and Guideline regarding Adoption 2015 via para 2(5) assert the same best interest principle.

Surrogacy witnesses many challenges when it comes to deciding nationality of child. If domestic law declares that surrogate mother is real mother then nationality of child is determined by the state where surrogate lives but if domestic law declares commissioning parent as real parent then their nationality is nationality of the child. Article 7 of Child Right Convention also says that every child should be registered instantly after birth. So, if national laws are not clear on the point, it is blatant violation of rights of the child. Hence, domestic laws as a duty to international convention must clear the confusion regarding right of such child via their national legislation.

4. FRAMEWORK OF SURROGACY IN INDIA: DEFENDER OR TRANSGRESSOR OF HUMAN RIGHTS?

India is called world capital of surrogacy²⁶. Commercial surrogacy was legalized by Baby Manji Yamada²⁷ by Supreme Court and Jan Balaz²⁸ case by High Court of Gujarat. Feeling the dearth of mechanisms to regulate the process Indian Council of Medical Research in 2005 drafted National Guidelines for Accreditation, Supervision and Regulation of ART

Clinics in India. This was the first ever drafted material to regulate the conduct of surrogacy in India. Later ART Bill was drafted in 2008 to serve as concrete legislation regulating surrogacy it was redrafted in 2010 and 2014 but never passed. Meanwhile Home Ministry issued notification dated 9th July 2008²⁹ banning issuance of medical visa for commissioning surrogacy. Another notification was issued by Ministry of Commerce on 26th October 2015 prohibiting import of human embryo except for research purposes. Lastly a notification was issued by Home Affairs in November 2015 banning PIO and OCI from conducting commercial surrogacy in India³⁰. A petition was filed by Mrs. Jayashree Wad a Supreme court lawyer³¹ demanding ban on commercial surrogacy to which court ordered legislature to come up with the laws to regulate surrogacy. As an effect The Surrogacy (Regulation) Bill, 2016

²⁵ Art. 3 (1) of United Nations Convention on Rights of Child, 1989.

²⁶ 102 Report of Related Parliamentary Standing Committee on Health and Family Welfare.

²⁷ *Baby Manji Yamadav. Union of India*, (2008) 13 SCC 518.

²⁸ *Jan Balazv. Anand Municipality*, AIR 2010 Guj 21.

²⁹ Notification No. 2502/74/2011-F-1. (links/ name/ reference).

³⁰ (No. 25022/74/2011-F-1).

³¹ *Jayashree Wad v. Union of Indian & Others W.P. (C) No. 95/2015*.

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was drafted and presented before Rajya Sabha on 10th August 2017 and laid on table of Lok Sabha on 10th August 2017 and passed by Lok Sabha 19.12.2018.

The objective of the bill says that the bill intends to serve as concrete legislation to regulate surrogacy and consider the issue of exploitation of surrogate mother and child born out of such an arrangement.

Some of the highlights of the bill are³²:

- Bill completely bans commercial surrogacy but altruistic surrogacy is allowed. No individual, clinic, doctor can enter into such an agreement for any consideration. Any kind of commercial favor apart from medical expenses to surrogate mother is prohibited by the bill
- The intending couple should be Indian national with at least one being infertile. The age of male should be between 26 to 55 and the age of female should be between 23 to 50. While the age of surrogate mother should be between 25-35 years and she should be married.
- Appropriate authority (central/state government) will grant eligibility certificates to the intending couple as well as surrogate women. They will also regulate all the clinics dealing in the same.
- If surrogacy is performed by taking economic consideration or if there is exploitation of women in such a case punishment is 10 years and fine up to 10 lacs.

5. ANALYSIS OF THE BILL

The bill of 2016 banning Surrogacy is a great step towards regulation of Surrogacy but the bill which aims to be comprehensive code for regulation of surrogacy suffers various anomalies for example bill allows regulations and gives power to executive to further allow regulation on various issues which is clearly excessive delegation of power, the bill states that for abortion, the consent of appropriate authority is required which may delay the process and amounts to red tapeism, the bill also only allows “close relative” to act as surrogate but does not gives any definition of “close relative”.

Apart from these are so many procedural concerns the bill faces but our objective is to focus mainly on concerns which are related to human rights and affects human rights of people involved in those arrangements. One of the issues is Criteria of “only” “Indian” “couples”-

³²The Surrogacy (Regulation) Bill, 2016 available at <http://www.prsindia.org/billtrack/the-surrogacy-regulation-bill-2016-4470>.

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The bill bars any foreign national from conducting surrogacy in India. Apart from foreigners there is a condition put upon Indian citizens if they want to avail surrogacy service. There are three steps to it

- I. The couple should be Indian
- ii. The couple should be married
- iii. They should be necessarily “male” and “female”

5.1 CONDITION OF INTENDING COUPLE TO BE INDIAN

Right to become parent of a child is a fundamental right available to all the people. This right is enshrined in various international instruments including UDHR³³ on the same lines. Art. 21 of the Indian Constitution states that everyone has the right to life and liberty which includes the right to reproduce. Further, Art. 14 ensures equality of law and equal protection of laws. So, the condition of intending couple to be Indian in Surrogacy is how far relevant. This harsh step is taken by legislators by keeping several cases in mind where our Indian surrogate mother is exploited by the hands of foreign nationals who come to India to avail cheap surrogacy services. The exploitation is not only limited to women but sometimes the couple also abandons the child born out of surrogacy, if the child is not born normal. Another problem with respect to such an arrangement is regarding nationality³⁴.

In the recent case of *J S Wad*³⁵ the petitioner argued that S. 5 of Foreign Trade (Development and Regulation) Act 1992 which reads trade in embryo, is unconstitutional on the touchstone of Art. 21. Subsequently, on the order of the court, the government issued a notification banning foreigners to enter into such an arrangement. Our Constitution, particularly, Art. 21 has a wide scope and guarantees the right to life to everyone irrespective of nationality. Right to Reproductive choice comes under the right to privacy which in turn comes under the Right to life and Liberty. This right is backed by UDHR Art 16 (1) and ICCPR and ECHR³⁶.

So, banning transnational surrogacy is something which is not as per the constitution and it also violates provisions of respect of India towards International Instruments under Article

³³ Art. 16 of UDHR.

³⁴ Jan Balaz case the main issue was the nationality and citizenship of the child.

³⁵ *Jayashree Wad v. Union of India & Others W.P. (C) No. 95/2015*.

³⁶ Art. 17 and 8 of ICCPR and UDHR respectively.

51c³⁷ of Constitution. Thus, there needs to maintain balance between both the faces of arguments and hence author submits that keeping states obligation and Art 21 in mind foreign nationals should not be banned to enter into surrogacy as intended parents rather stringent law should be made to regulate their conduct.

5.2 PRECONDITION OF INTENDING COUPLE TO BE “MARRIED” AND RIGHT OF INDIVIDUAL PERSON

The clause in the bill which says that only couples who are married can enter into such an arrangement attracts controversy. The main issue with the said provision is it ignores right to form a family of individuals and couples who are not married but are in arrangement of live in relationship.

Art. 21 guarantees right of reproduction to every individual irrespective of marital status and sex. Apart from it there are number of international instruments which gives right to have a family, reproduce³⁸. If single individual whether man/women is barred from making such a choice under a law, that law is arbitrary and absurd and fails test of reasonable classification under article 14³⁹. To prove that classification which the law is creating is reasonable there are two conditions which needs to be satisfied. First, the classification should be based on intelligible differentia and Secondly, it law should have nexus with the object of the legislation. In my opinion, the impugned rule if passed and made legislation, it fails to draw a nexus with the object of the legislation. Object of the said bill is to regulate surrogacy and deal with problem of exploitation of surrogate women and child born⁴⁰ and banning individual would not serve any purpose.

Another argument which is given with regard to ban of individuals is people are of the opinion that only married couple counts as a “family”. The outdated notion of “family” which includes mother, father and children needs to get changed. In modern times there are men and women who can take care of the child without needing spouse. Our legislature has well understood this and has drafted some of the legislation where a single parent can adopt. One of the example of such a law is Juvenile Justice Act of 2015 where single parent is very well eligible to adopt a child and start a “family”⁴¹. On the one side government is endorsing

³⁷ Art. 51 (c) of Indian Constitution.

³⁸ Art. 8 of Universal Declaration of Human Rights, 1948.

³⁹ *EP Royappav. State of Tamil Nadu*, 1974 SCR (2) 348.

⁴⁰ Surrogacy (Regulation) Bill 2016.

⁴¹ The new guideline governing adoption of children 2015.

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single individual parenting and on the other side its banning them from using surrogacy as a method to procreate.

Article 15(1) of ICESCR allows individual to take benefit from scientific progress to have a family to which UDHR supports by Art 16(1)⁴². If both of them read together they convey that every individual has right to use technology for purpose of reproduction or procreation or to have a family. India banning surrogacy for individuals is not only acting in derogation with the constitution but also in derogation of international agreements which the state is party to and obliged to respect under Article 51(c).

5.3 RIGHTS OF COUPLE NOT MARRIED OR IN “LIVE IN RELATIONSHIP” ARRANGEMENT

In pre independence cases such as *Dinohamy v. WL Blahamy*⁴³ the privy council laid down a broad rule postulating that, “where a man and a women are proved to have lived together as a man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage” The same principle was reiterated in the case of *Mohabhat Ali v. Mohammad Ibrahim Khan*⁴⁴ Post independence the first case that can be reviewed is *Badri Prasad v. Dy Director of Consolidation*⁴⁵ where in the Supreme Court recognized live in relationships as valid marriage, putting a stop to questions raised by authorities on the 50 years of life in relationship of a couple⁴⁶. India is a country, which is slowly opening its doors for western ideas and lifestyles and one of the most crucial episodes amongst it, is the concept of live in relationships⁴⁷.

Further there are two basic classification of such an arrangement. The arrangement is classified into “relationship in nature of marriage” and “relationship not in nature of marriage” The relationship which falls “in the nature of marriage” enjoys all the rights which a married couple enjoys and is akin to marriage. In another celebrated judgments of Supreme Court said that in the relationship which is in nature of marriage there are some of the normative conditions to be satisfied such as couple should admit themselves as spouse in

⁴² Art. 16(1) of Universal Declaration of Human Rights, 1948.

⁴³ *Dinohamy v. WL Blahamy* (1928) 1 MLJ 388 (PC).

⁴⁴ *Mohabhat Ali v. Mohammad Ibrahim Khan* AIR 1929 PC 135.

⁴⁵ *Badri Prasad v. Dy. Director Of Consolidation* AIR 1978 SC 1557.

⁴⁶ Patil, Dr. Yuvraj Dilip, Socio-Legal Perspective of Live-in-Relationship in India (September 12, 2011). Available at SSRN: <http://ssrn.com/abstract=1926477> or <http://dx.doi.org/10.2139/ssrn.1926477> last assessed on 23 November 2018 at 11:15 p.m.

⁴⁷ *Ibid.*

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public, they should be of legal age, they should be qualified otherwise to get married and lastly they would have voluntarily cohabited for a reasonable period of time⁴⁸.

Hence when the judiciary recognizes that there is no difference between couple married and a couple living in “relationship in nature of marriage” then it is high time for legislature to understand the same and draft policy accordingly.

5.4 CONDITION OF A “MALE” AND “FEMALE” IN A COUPLE AND RIGHTS OF HOMOSEXUAL(S)

Classification of world health Diseases of World Health Organization and various other institutions⁴⁹ have declared homosexuality is not a mental disorder but a variant of sexuality. Homosexuals also enjoy right to parent and family⁵⁰ rather the one of the limited option for homosexuals is to undergo surrogacy to have a baby.

Indian Supreme Court is crusader for homosexuality and LGBTQ community since long. Two of the recent judgments which gave recognized rights to transgender couples and decriminalizes sexual activity between such couples is being lauded throughout the country. In *NALSA v. Union of India*⁵¹, the Supreme Court said that discrimination based on gender identity or sexual orientation violates constitutional guarantee of equality, privacy and dignity. Later *Navtej Singh Johar v. Union of India*⁵² decriminalized consensual sex between all individuals including homosexuals. Apart from this court has also interpreted dignity under Art. 21 as non- discrimination of oneself on the basis of sexual orientation. In the wake of such developments it is irrational for any regulation to discriminate homosexual/homosexual couples to avail surrogacy services on the basis of their sexual orientation.

6. RECOMMENDATIONS AND CONCLUSION

Since long India is called as “Surrogacy capital” of world because availability of cheap surrogates. The tag in itself should not be taken as achievement but concern because this arrangement if not regulated properly leads to exploitation of persons employed. Hence, this brings us to several human rights concerns which surrogacy faces. Human Right is

⁴⁸*D. Velusamy v. D. Patchaiammal*, (2010) 10 SCC 469.

⁴⁹Diagnostic and Statistical Manual (DSM IV) of the American Psychiatric Association.

⁵⁰It extends to all the individual in international instruments as well as Indian constitution.

⁵¹*NALSA v. Union of India*, (2014) 5 SCC 438.

⁵²*Navtej Singh Johar v. Union of India*, WP(Crl.)No. 76/2016.

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lindispensible part of this arrangement and hence in this article author brought up some concerns which encompass human rights and surrogacy.

At present there is no provision in any of the internationally recognized instruments which talk about surrogacy but indeed there are some basic rights guaranteed by various international instruments as well as under Indian Constitution to ensure that the basic human rights are protected which can be extended to surrogacy very well. Rights such as right against exploitation, right to have a family, right to privacy, right to reproductive autonomy and right to live with dignity. Surrogacy majorly impacts these human rights. To make sure it does not impact negatively, the government in year 2016 came up with the draft of Surrogacy (Regulation) Bill, 2016. The object and purpose of bill is noble and lauded but the bill suffers from various fundamental flaws which if made a legislation may infringe rights of various sections of the individuals.

To name a few we can point out discrimination of homosexual couple from legally married straight couple, bar upon individual to enter into such an arrangement and so on and so forth. It is high time for us to recognize that the rationale upon which these laws are made is obsolete and rudiment. These provisions also are violative of human rights of individuals.

It is good to note that once the bill is passed there will be at least some laws regulate surrogacy in India. The situation will be little clearer. The existence of law is not only condition for better regulation rather implementation of policies should also be taken care of. There are some of the regulations enumerated in the bill such which are directly violation of human rights of individuals. Provision for precondition of intending couple to be “married” necessarily between “man and woman” and “India” are in many way derogatory to human rights enshrined in various international instruments and also under the Constitution of India and do not even serve the purpose and object of the legislation and should be deleted from final draft. The other concern is absence of definition of “close relative” and the word in itself is discriminatory

With the incorporation of these recommendations, India will surely be flag bearer of international human rights standards in regulation of surrogacy.

Dr. Monika Ahuja*

A duty is an obligation. A man is said to have a duty in any matter, when, he is under an obligation to do or not to do something. It is something, we owe to others as social beings. Right of living involves duty to fellow men to allow them the same condition of life. What is a right in regard to one's self is a duty regard to others. They are two aspects of the same thing. If one looks at them from one's own point, they are rights. If one looks at them from the standpoint of others, they are duties¹.

'Duties' and 'Rights' are the two sides of the same coin. Today in a democratic society, a right is not regarded as an act of grace, mercy or charity from government, but as a legitimate wish of the individual for his own good and for the good of others. Rights are now regarded by the citizens as their claims for which they always fight.²

1. DUTIES AND THEIR INDIGENOUS SOURCES

When one traces the history of human civilisation, one finds that it was the absence of the concept of duty which was largely responsible for the disappearance of the golden age of mankind. There was a period when absolute freedom was enjoyed by the people in the primordial society. The golden age, referred by Western political thinkers like Rousseau and others, was an age of absolute freedom when there were only rights and no sense of duties. In India, the classical literature like Mahabharata³ also depicts the existence of such a golden age of harmony and happiness, when the people enjoyed total freedom in the absence of any State to enforce law.

This golden age did not last long. It eventually disappeared largely because of exterminating wars engendered by greed, jealousy, hatred, etc. among the human beings. The Mahabharata describes how the earthly paradise soon turned into an unusual hell and there was an era of "matsya nyaya" when the strong overpowered the weak in the same manner as a bigger fish eats away a smaller one in water. Such degradation of the golden age leading to anarchy has also been corroborated in Dighnikaya.⁴

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¹Dr. B.L. Fadia & Kuldeep Fadia, *Indian Government and Politics* 156, Sahitya Bhawan, Agra, UP, 12th Edn., 2016.

²*Ibid.*

³The Mahabharata XII, pp 58&12.

⁴Dighnikaya, Vol.III, pp. 84-86.

1.1. DUTY IN DHARMASHASTRA

The Indian Dharmashastra laid stress on duties rather than on rights. It mentions *Kartavya* under the heading 'Dharma'. Dharmashastra means by Dharma not a religion but a mode of life or a code of conduct which regulates a man's work and activities, both as a member of the society and as an individual, and which intends to bring about the continuous development of a man with a view to enabling him to reach what is deemed to be the goal of human existence.⁵ Medhatithi categorically states this in the following words: "the characteristic feature of the word dharma is duty (kartavya)".⁶

1.1.1 SADHARANA DHARMA VIS-À-VIS VARNASHRAMA DHARMA

In Dharmashastra, 'dharma' has been classified into Sadharna dharma and varnashrama dharma. The Sadharana dharma is different from the varnashrama dharma. The former is universal in its application, to be followed by persons of all castes (varna) or rank and stages (ashramas) aspiring to a moral regeneration. In other words, these duties were common to all alike. The latter, i.e. varnashrama dharma, lays more emphasis on acts, rites and ceremonies that each person is expected to perform with reference to his status in the society. The first group involves non-injury, truthfulness, non-stealing, purity of body-mind, charity, etc, which have to be observed by all classes of people alike. The second group involves particular duties determined by the caste, such as, a Brahmin should teach and study the Vedas, the Ksatriyas should fight for the country, etc. The concept of 'Fundamental Duty' is quite akin to our ancient concept of sadharna dharma, as it refers to duties common to all. There are substantial similarities between the fundamental duties prescribed in Art.51A of the Indian Constitution, and the duties prescribed in some of the other Constitutions in the world.

Art.9(1) of the Nepalese Constitution states: "Devotion to the nation and loyalty to the State are the fundamental duties of every citizen".

Art.63 of the Constitution of Yugoslavia says: "Everyone shall abide by the Constitution and law".

Provisions shall be made in law determining the conditions under which failure to discharge duties determined by the Constitution shall be punishable.

According to **Art.4** of German Democratic Republic, ".....every citizen is duty bound to act in accordance with the Constitution and to defend it from its enemies".

Similarly, **Art.130** of the erstwhile USSR stated, "It is the duty of every citizen of the USSR

⁵P.V. Kane, *History of Dharmashastra (Ancient and Medieval Religious and Civil Law)*, Govt. Oriental Service, Class B.No.6, Vol.II, Part.1, p.2.

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to abide, by the Constitution of the Union of Soviet Socialist Republics, to observe the law, to maintain labour discipline, honestly to perform public duties and to respect the rules of socialist intercourse.

All these articles are quite similar to the duty prescribed in **Art.51(a)** of our Indian Constitution, namely "to abide by the Constitution and respect its ideals and institutions, the National Flag and National Anthem".

Art.34 of the Constitution of Czechoslovakia provides: "Citizens shall be in duty bound to uphold Constitution and other laws and in all their acts to pay heed to the interests of the Socialist State and the society of the working people". This is quite akin to the fundamental duty "to uphold and protect the sovereignty, unity and integrity of India", prescribed in **Art.51A(c)** of the Indian Constitution.

Similarly, like **Art.51A(d)** prescribing the duty "to defend the country and render national service when called upon to do," the Constitutions of other nations also make similar provisions. For example, **Art.35** of erstwhile Czechoslovakian Constitution stipulates: "Citizens shall be in duty bound to protect and strengthen socialist social order and the source of the welfare of the working people, the wealth and the strength of the country".

Further, **Art.37(1)** of this Constitution says: "the defence of the country and its socialist social order shall be supreme duty and a matter of honour of every citizen.

Art.60 of the Constitution of Yugoslavia makes a provision that "the defence of the country is the right and the supreme duty and honour of every citizen".

Art.5 of German Democratic Republic says: "The service for the defence of the Fatherland and the achievement of the toilers is an honourable duty of the citizens of G.D.R". **Art.133** of the erstwhile USSR stated that "to defend the country is the sacred duty of every citizen of the USSR. Treason to the Motherland, violation of the oath of allegiance, desertion to the enemy, impairing the military power of the State, espionage - is punishable with all the severity of the law as the most heinous of crimes".

Art.51A(e) of the Indian Constitution enjoins upon every citizen "to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women". One comes across similar provisions in other Constitutions. For example, **Art.38** of Czechoslovakia Constitution states: "An essential part of the duty of every citizen shall be respect for rights of his fellow citizens and the careful observance of the rules of Socialist Conduct".

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Respecting the rights of fellow citizens will indirectly promote the spirit of common brotherhood.

Similarly, **Art.19** of the Yugoslavian Constitution proclaims: "the relations among people shall be based on mutual co-operation and on respect for man and for his freedoms and rights: "It shall be the duty of every person to come to the assistance and help of any person in danger".

The duty in **Art.51A(i)** of the Indian Constitution, namely, "to safeguard public property and to abjure violence", was also stated though in different words in **Art.131** of the erstwhile Constitution of the USSR. As stipulated in it, "it is the duty of every citizen of the USSR to safeguard and fortify public Socialist property as the sacred and inviolable foundation of Soviet system, as the source of the prosperity and culture of all the working people".

2. THE CONSTITUTION OF CHINA

The 1982 Constitution of the People's Republic of China constitutionalised the basic principle of rights by providing in Article 33 that every "citizen enjoys the rights and at the same time must perform the duties...." The earlier Constitutions simply carried a list of duties incorporated in the Chapter on the Fundamental Rights and Duties of Citizens but neither of them categorically spelt out that rights and duties are inseparable and that a citizen enjoys the rights and at the same time performs the duties⁷.

Apart from the Articles relating to fundamental rights where duties are specifically stated along with a particular right—Article 42 (the right as well as the duty to work), Article 46 (duty as well as the right to receive education), Article 49 (the duty to practise family planning), and Article 51 (in the exercise of rights a citizen may not infringe upon the interests of the State, of society and of the collective, or upon the lawful freedoms and rights of other citizens)—the Constitution prescribes the following duties for citizens;

Unity of the Country

The foremost duty of every Chinese citizen is to safeguard the unity of the country and the unity of all its nationalities. The People's Republic of China is a multi-national State comprising fifty-six nationalities with their own distinct customs, beliefs, languages and mode of life. The people of all nationalities in China says the Preamble to the Constitution, have jointly created "a splendid culture and have a glorious revolutionary tradition." Both the victory of China's new-democratic revolution and the success of its socialist cause have been achieved by the Chinesepeople of all nationalities. In the struggle to safeguard the unity of the nationalities and as such of the country, "it is necessary," the Preamble adds, "to combat big-nation chauvinism, mainly Hanchauvinism, and also necessary to combat local

⁷Anup Chand Kapur & K.K. Mishra, *Select Constitutions*, S.Chand & Co. Pvt. Ltd., Reprint 2014, p. 614.

-national chauvinism." Discrimination against and oppression of any nationality and acts that undermine the unity of the nationalities or instigate their secession are prohibited. The State, accordingly, suppresses treasonable and other counter-revolutionary activities, penalises actions that endanger public security and disrupt the socialist system⁸.

2.1 TO ABIDE BY THE CONSTITUTION

Article 53 enjoins on all citizens to abide by the Constitution and the law, keep State secrets, protect public property and observe labour discipline and public order and respect social ethics. China is a socialist State under the people's democratic dictatorship and it is the basic system of the country as manifested in the Constitution. Sabotage of the socialist system by any organisation or individual is prohibited⁹. All State organs, the armed forces, all political parties and public organisations and all enterprises undertakings must abide by the Constitution. No organisation or individual is above the Constitution and the law¹⁰. The Constitution is the fundamental law of the State and it commands supreme legal authority. The citizens have, therefore, as the Preamble says, "the duty to uphold the dignity of the Constitution and ensure its implementation."

2.2 TO SAFEGUARD THE HONOUR OF CHINA

It is the duty of citizens of China to safeguard the security, honour and interests of the motherland. They must not commit acts detrimental to the security, honour and interests of the Motherland. The Preamble exhorts the Chinese people to fight against all forces and elements, both at home and abroad, that are hostile to China's socialist system and try to undermine it.

2.3 DEFENCE OF THE MOTHERLAND

It is the sacred duty of every citizen of the People's Republic of China to defend the Motherland and resist aggression. It is the honourable duty of all citizens to perform military service and join the militia in accordance with the law. All able-bodied persons who are young and within the range of specified age limit, as prescribed by law, have the constitutional duty to perform military service both during peace and war time in order to keep the country prepared to meet aggression of any kind¹¹.

2.4 TO PAY TAXES

It is the duty of citizens of the People's Republic of China to pay taxes in accordance with the

⁸Article 28 of Constitution of India.

⁹Article 1 of Constitution of India.

¹⁰Article 5 of Constitution of India.

¹¹*Supra* note 7 atp. 615.

law. Tax is a compulsory contribution by citizens to meet the expenditure of the State and there is no quid pro quo in it. It is the duty of every citizen to pay taxes, national and local, punctually and regularly to enable the government to perform its functions adequately, efficiently and effectively.

3. THE CONSTITUTION OF JAPAN

The Constitution of Japan places emphasis on the duties of the individual, though they are not many. Chitoshi Yanaga says that the "traditional attitude" has for centuries been to emphasize duties practically to the exclusion of rights, this was especially the case under feudalism. For the purpose of encouraging democratic development it was imperative that individual rights be stressed to effectively counteract the altogether too powerful influence of the authoritarian tradition and its legacies in Japanese society. The result has been the inclusion of only a few basic obligations of citizenship.....¹² The duties and responsibilities of the citizen include: refraining from the abuse of any freedom or right, the responsibility for preserving and maintaining by constant endeavour the freedom and rights guaranteed by the Constitution¹³, the obligation to work which is also a right¹⁴, liability to taxation¹⁵, and the obligation of all people to have all boys and girls under their protection-receive ordinary education as provided by law¹⁶.

Japan is the sole political example where a constitution imposed on the defeated nation by a Victorious Country has successfully worked for almost six decades. It has embraced the spirit of western liberalism and tried to reshape its conceptual assumptions in accordance with its own national ethos. A conservative political party has remained in power in Japan for long without interruption. Nationalism is still a strong political tendency¹⁷.

4. RECOMMENDATIONS OF SWARAN SINGH COMMITTEE

The Constitution of India did not incorporate any Chapter of fundamental duties. The Fundamental Rights which were given to the citizens were incorporated in Part III of the Constitution. It was during the period of internal emergency declared in 1975 that need and necessity of fundamental duties was felt and accordingly a committee under Sardar Swaran Singh was appointed to make recommendations about Fundamental Duties. The Committee emphasised the inclusion of a chapter on fundamental duties in the Constitution so that the

¹² *Japanese People and Politics*, 353.

¹³ Article 12 of Constitution of India.

¹⁴ Article 27 of Constitution of India.

¹⁵ Article 30 of Constitution of India.

¹⁶ Article 26 of Constitution of India.

¹⁷ *Supra* note 7 atp. 543.

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people of India became quite conscious that in addition to rights they also had certain duties to perform as well. The committee proposed that "the Parliament may by law provide for the imposition of such penalty or punishment as may be considered appropriate for any non-compliance with or refusal to observe any of the duties."¹⁸

After detailed discussion, the Swaran Singh Committee recommended inclusion of the following eight Fundamental Duties for incorporation into the Constitution:-

- 1) To uphold the sovereignty of India and function in the way to strengthen the unity and integrity of India.
- 2) To respect and abide by the Indian Constitution and the laws of the nation.
- 3) To respect every democratic institutions enshrined in the Constitution and to avoid doing anything that may impair their dignity and authority.
- 4) To abjure communalism in any form or manner.
- 5) To defend India and to render national service, whenever required to do so.
- 6) To assist and co-operate in implementing the Directive Principles of State Policy and promoting the common good of the nation in order to subserve the interests of economic and social justice.
- 7) To pay taxes as is required by laws of the land.
- 8) To safeguard and protect public properties and not doing anything that may either cause destruction or, damage to such properties, besides abjuring violence.

The duties proposed by the Committee were to be obligatory in nature.

Forty-Second Amendment Act and Fundamental Duties

As a result of the 42nd Amendment carried out in 1976, the Indian Constitution has incorporated a set of fundamental duties of citizens in a separate part added to Chapter IV (Article 51-A). The Fundamental Duties, now are 11 in number. Under this Article, it shall be the duty of every citizen of India¹⁹.

- (a) to abide by the Constitution and respect the National Flag and the National Anthem;
- (b) to cherish and follow the noble ideas which inspired our national struggle for freedom;
- (c) to protect the sovereignty, unity and integrity of India;
- (d) to defend the country and render national service when called upon to do so;
- (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities to

¹⁸Hans Raj, *Indian Political System*, pp.107-108.

¹⁹Article 51A of Constitution of India.

renounce practices derogatory to the dignity of women;

- (f) to value and preserve the rich heritage of our composite culture;
- (g) to protect and improve the natural environment including forest, lakes, rivers and wild life and to have a compassion for living creatures;
- (h) to develop the scientific temper, humanism and the spirit of inquiry and reform;
- (i) to safeguard public property and to abjure violence;
- (j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;
- (k) to provide opportunities for education by the parent, the guardian to his child, ward between the age of 6 to 14 years, as the case may be.

5. ENFORCEMENT OF FUNDAMENTAL DUTIES

Article 51A, merely declares the *fundamental duties* of the citizens of India. It does not say of the enforcement of these duties. In *Surya Narain v. Union of India*,²⁰ the Rajasthan High Court held that *the duties* under *Article 51A*, were the duties of the individual citizens. They cast no public duties and, therefore, a *mandamus* could not be sought against an individual who did not observe his duties under *Article 51A*. The Calcutta High Court in *W.B. Head Masters' Association v. Union of India*,²¹ held that the performance of *the duty* was quite personal to every citizen of India.

Since the duties are imposed on the citizens and not upon the State, it has been held that legislation is necessary for their implementation. For example, *the Prevention of Insult to National Honours Act, 1971*, punishes a citizen of India for committing insult of national honours. In the case of *Bijoe Emmanuel v. State of Kerala*,²² the Supreme Court held that proper respect was shown by the students to the National Anthem by standing up in silence when the National Anthem was being sung. Not joining in the singing, the Court held, did not amount to committing disrespect to the National Anthem²³.

In *M.C. Mehta v. Union of India*²⁴, the petitioner by way of a "public interest litigation", filed a writ petition for the prevention of nuisance caused by the pollution of the river Ganga. Having regard to the grave consequence of the pollution of water and air and the need for protecting and improving the natural environment, the Supreme Court gave appropriate directions. *The duties may also be enforced by the Courts while balancing and harmonising*

²⁰ AIR 1982 Raj. 1.

²¹ AIR 1983 Cal 448.

²² AIR 1987 SC 478.

²³ *N.R. Narayana Murthy v. Kannada Rakshana Vakeelaro Vedike*, AIR 2007 Kar 174.

²⁴ AIR 1988 SC 1115 (Pollution of Ganga Case).

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them with the fundamental rights²⁵. Reference was made to the duty contained in *Article 51A(d)* in *Devendra Nath Gupta v. State of Madhya Pradesh*²⁶. In this case, the teachers were required to perform duty with regard to the educational survey, family planning, preparation of voters list, ration cards, etc.

The Gujarat High Court in *M/s Abhilash Textile v. Rajkot Municipal Corporation*²⁷, replied upon *Article 51A(g)* duty and held that notices asking the petitioners to stop discharging the effluents from the factory on public road or drainage, harming natural environment, on the pain of closing the factory, were valid.

In *Indirect Tax Practitioners Association v. R.K. Jain*²⁸, the respondent published editorial, highlighting, irregularities in appointments, postings and transfer of members of the CESTAT Tribunal, which were not shown to be incorrect. In contempt proceedings instituted against him the Apex Court said that the respondent could be appropriately described as whistle blower for the system, who was merely discharging his constitutional fundamental duty as a citizen enshrined in *Article 51A(h)* which enjoined the citizens "to develop the scientific temper, humanism and the spirit of enquiry and reform.

Holding that "*sting operation* is no crime", the Delhi High Court²⁹, on 24-9-2011 observed that it was a *built-in-fundamental duty* that every citizen must strive for a corruption-free society and must expose *the corruption* whenever it come to his or her knowledge and try to remove corruption at all levels more so at higher levels of management of the State.

The Court, giving a boost to *investigative journalism*, acquitted Anirudh Bahal and Subhasini Raj, the two investigative journalists, of the charge of abetting the crime. They were charged for the expose "*Operation Duryodhan*" shown on the *Aaj-tak* news channel, unearthing *the cash-for-quarry* scam involving 10 MPs from Lok Sabha and one from Rajya Sabha, who were subsequently expelled from the Houses. Stating that corruption in the country had "deep roots", the Court held that acting *as agent* to expose graft at higher levels did not amount to abetting the crime.

In *Government of India v. George Philip*³⁰, the Supreme Court has observed that it shall be the duty of every citizen to strive towards excellence. This cannot be achieved, unless the employees maintain discipline and devotion to duty. Courts should not pass such orders

²⁵ *Mohan Kumar v. Union of India*, AIR 1992 SC 1.

²⁶ AIR 1983 MP 172.

²⁷ AIR 1988 Guj 57.

²⁸ AIR 2011 SC 2234.

²⁹ *The Hindu*, 25-9-2010.

³⁰ AIR 2007 SC 705.

which, instead of achieving the underlying spirit and objects of Part IV-A, has the tendency to negate or destroy the same. The Supreme Court of India has in several cases relied on Fundamental Duties contained in Article 51A to determine the duty of the state, and when necessary, give directions or frame guidelines to achieve the purpose. This has been done in several cases relating to preservation and conservation of environment, ecology and prevention of degeneration of forests, wildlife, flora and fauna, etc. For the implementation of at least some of the fundamental duties of citizens as the Verma Committee stated, legal provisions exist: The Emblem and Names (Prevention of Improper Use) Act, 1950, The Prevention of Insults to National Honour Act, 1971, etc.

6. CRITICAL APPRAISAL OF FUNDAMENTAL DUTIES

Part IV-A of the Constitution which deals with fundamental duties has certain inherent weaknesses. The duties enumerated are so vague that it is usually difficult to have their universally acceptable definitions and thus these can be interpreted in the way one would like to interpret these. One of the duties of the citizens is to follow the noble ideals which inspired our freedom struggle. Everyone knows that during India's freedom struggle different means and methods were adopted and every section of the society which participated in this struggle had his own ideals, though ultimate goal was that the nation should get freedom. Thus, the 'noble ideal' is both very vague and undefinable. Then we come to another duty which says that every citizen of India will value and preserve the rich heritage of our composite culture. A question that can be asked is as to which is India's composite culture. Though India takes pride in her ancient Indian culture and civilization, yet nowhere and so far none has prepared a brief as to what is India's composite culture, of which she feels proud of. Then all what has been said in Article 51A is very vague namely 'to develop scientific temper, humanism and spirit of inquiry.' It is very difficult to define scientific temper, humanism, or spirit of inquiry.

Of course, there is no provision in the Constitution for direct enforcement of any of these duties nor for any sanction to prevent their violation. But it may be expected that in determining the constitutionality of any law, if a court finds that it seeks to give effect to any of these duties, it may consider such law to be 'reasonable' in relation to Article 14 or 19 and thus save such law from unconstitutionality. It would also serve as a warning to reckless citizens against anti-social activities such as burning the Constitution, destroying public property and the like³¹.

The National Commission to Review the working of the Constitution recommends that the first and foremost step required by the Union and State Governments is to sensitise the people and to create a general awareness of the provisions of fundamental duties amongst

³¹D.D. Basu, *Introduction to the Constitution of India*, Lexis Nexis, Nagpur, p.131.

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the citizens on the lines recommended by Justice Verma Committee on the subject. The Commission also recommends that the following should be incorporated as fundamental duties in article 51A of the Constitution :

- (I) To foster a spirit of family values and responsible parenthood in the matter of education, physical and moral well being of children.
- (ii) Duty of industrial organisations to provide education to children of their employee.

The incorporation of fundamental duties in the Constitution was an attempt to balance the individual's civic 'freedoms' with his civic obligations and thus, to fill a serious gap in the Constitution.

7. CONCLUSION

There cannot be civilized or just society without legal order, and there cannot be legal order without legal duties. Total absence of external restraint is unimaginable in a civilized society. If a man is allowed to enjoy limitless rights, he is bound to come in conflict with others. Absolute liberty is neither desirable nor practicable. The fundamental duties contain noble principles. It is obligatory on the part of every citizen who seeks the enforcement of his Fundamental Rights not to violate the Fundamental Rights of any other person. The chapter on Fundamental Duties has been introduced not to another right but to establish democratic balance. Our Constitution was notable for highlighting Directive Principles alongwith Fundamental Rights. neither can we have flower and fruit without performance and duties.

The above pronouncements exhibit the concern of the Judiciary with respect to the enforcement of the *fundamental duties* enshrined in *Article 51A*. These duties may be enforced by legislation enacted by the appropriate Legislature. The Courts may give directions to the Government to take steps for their enforcement.

**RELEVANCE AND IMPACT OF HUMAN RIGHT
EDUCATION IN A GLOBALISED WORLD**

***Dr. Ruchi Sapahia**

1. INTRODUCTION

The development of human rights remains ineluctably tethered to statecraft. Forms of power and domination provide the chronicles of contingencies of the politics of governmental and intergovernmental desires. At the same moment, resistance and insurgencies also reconstitute the political, increasingly in terms of human rights- oriented imageries of societal and global development.

The politics of human rights treats human rights languages and logics as an ensemble of means for the legitimating for governance and domination and only universalizes the powers of the dominant in ways that constantly elsewhere reproduce human rightlessness and suffering².

Many people take for granted that there is human rights protection within society but which is not the real state of affairs. Human rights are still contested and our ideas about rights have changed over time.

Ideas of equality have changed and transformed the protection given to sexual rights, ethnic minorities, women, children and disabled people etc³.

Philosophers like St. Thomas Aquinas argued that man is made in God's image and certain inalienable rights flow from this. The enlightened thinkers like John Locke began to move away from God as the giver of rights to arguing that reason means that man has intrinsic 'goods'. He argued that the State could only rule with the consent of its people and that the people had certain rights that the state had a duty to refrain from abusing⁴.

Immanuel Kant argued that humans have an inherent dignity that can't be violated. It commands that a human being be not treated as a means to an end, but should always regard his or her dignity as an end in itself.

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²S.Subramanian, *Human Rights: International Challenges*, National Curriculum Framework For School Education-A Discussion Document, 1999, pp.93-95.

³UNESCO, *The Right to Education: Towards Education for All Throughout Life*, Paris: UNESCO, 2000.

⁴Alston and Steiner, *International Human Rights In Context: Law, Politics, Morals*, Oxford University Press, 2000.

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Modern philosophers such as Alan Gerwith and John Rawls argue that as rational human agents we should respect each other's rights and human beings should act reciprocally with fairness⁵.

1.1 CATEGORIES OF RIGHTS

Rights have been classified historically as different types of rights⁶:

1.1.1. FIRST GENERATION RIGHTS: CIVIL AND POLITICAL RIGHTS

These includes right to life, freedom from torture and arbitrary detention, right to privacy, freedom of expression which are considered as fundamental rights in a liberal and democratic society. First generation rights are negative rights as the state is refrained from taking such actions which could violate these rights. These are justiciable rights⁷.

1.1.2. SECOND GENERATION RIGHTS: SOCIAL, ECONOMIC AND CULTURAL RIGHTS

These include the right to food, water, housing, education and employment rights. These rights are positive rights which place an obligation on the state to act in such order as to ensure that these rights are provided to the people. These rights are non- justiciable rights⁸.

1.1.3. THIRD GENERATION RIGHTS

These rights covers a variety of issues such as the right to economic development, group rights, right to peace and rights related to environment. Its scope is still developing.

The general idea of human rights is to give practical effect to an intuition or a feeling which, it is believed, all reasonable human beings share and which marks out our common humanity. This intuition or feeling is that in whatever we do, we need to accord proper respect to the dignity of all individual human beings⁹.

The advancement of human rights to the forefront of global politics has been as remarkable as it has been improbable. The universal declaration of human rights has engendered a vast and growing body of international law that is challenging the ideal of sovereignty and

⁵Jeremy Bentham, *An Introduction To The Principles of Morals and Legislation*, Oxford University Press, 1996.

⁶Weston, Burns, 'Human Rights', *New Encyclopedia Britannica*, reproduced in Alston and Steiner, *International Human Rights in Context: Law, Politics, Morals*, Oxford University Press, 2000.

⁷C Wickliffe, Human Rights Education in the Pacific, 3 *Journal of South Pacific Law* (1999).

⁸K.P.C.Saxena, *Human Rights--Perspective and Challenges*, Lancer Books, New Delhi, 1994.

⁹J.R.Bauer & Daniel A. Bell, *East Asian Challenges for Human Rights*, Cambridge University Press, 1999.

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transforming relations among states. This transformation included the creation and development of a diverse array of international institutions concerned with human rights monitoring, compliance and increasingly enforcement. Human rights have inspired domestic and transnational social movements that have toppled repressive regimes and won protection for oppressed and marginalized people. While the idea of human rights has provoked sometimes sharp controversy, it has nonetheless become the dominant normative or moral discourse of global politics and a major standard of international legitimacy¹⁰.

The Vienna Conference called for a decade of human rights education. The Commission on Human Rights endorsed this call and, by General Assembly Resolution 49/184 (1994), the United Nations Decade for Human Rights Education was declared with effect from 1st January 1995. The decade was based upon the provisions of the international human rights instruments. It is defined as 'training, dissemination and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes'. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups and shall further the activities of the united nations for the maintenance of peace¹¹.

In many respects, the key to securing the universality of human rights lies in the right to education. Education plays an important role in disseminating information to people on their rights as well as promoting the Shangri-La of human rights- a world in which the right to be different is a sine qua non, a world in which all people practice tolerance and live together in peace with one another as good neighbours¹².

The right to education straddles the division of human rights between civil and political rights and economic, social, and cultural rights, embodying elements of each. The success of any right to education is dependent on the availability of that education and the conditions of access thereto which should be available to both girls and boys, young and old without any discrimination of any kind. Various factors influence the accessibility of right to education like geography, cost, language and the availability of teaching and learning resources. A good education reflects an appropriate balance between promoting the physical, mental, spiritual and emotional aspects¹³.

¹⁰*Human Rights and Humanitarian Law*, South Asia Human Rights Documentation Centre, Oxford University Press, 2008.

¹¹United Nations International Children Emergency Fund, *The State of the Children*, UNICEF, New Delhi, 1999.

¹²D. Hodgson, *The Human Right to Education*, Aldershot, Ashgate, 1998.

¹³G.L.Aurora, *Child Centred Education-for Learning Without Burden*, Krishna Publishing Co, Gurgaon, 1995.

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Human rights education can be used as a tool to eradicating poverty, for fighting war and conflict, for combating discrimination. Without knowledge, individuals and groups would not be able to demand their inalienable rights or seek redress for the violations or infringement thereof. A cross- disciplinary approach is necessary to ensure that everyone enjoys the benefits of the international norms of rights and freedoms.

In part II of the Vienna Declaration and Programme of Action 1993, the World Conference on Human Rights calls on States and institutions to include human rights, humanitarian law, democracy and rule of law as subjects in all educational curricula. Just as individuals need to know their rights in order that they can exercise them, the legislature and the judiciary need similar knowledge in order that national laws can conform to international obligations and the judiciary can ensure that basic rights and freedoms are enforced¹⁴.

Hence, it is not sufficient to just inform the beneficiaries of their rights and freedoms but the dissemination of relevant information and human rights education as part thereof is quite necessary for bringing about the necessary knowledge of judges, other officialdom and all persons and groups coming under their jurisdiction. Human rights education should be implemented at all levels¹⁵.

States may affect human rights education by enacting legislation, by policy implementation or, indeed, by example. State owned or controlled media may be used to disseminate information on human rights. However, the duty does not rest with the state alone. Academicians, teachers and researchers have moral obligations to the same effect¹⁶.

The emphasis on Human Rights Education began in 1995 with the beginning of the UN Decade for Human Rights Education which served as an initial attempt to teach human rights in formal school settings. The first formal request for the need to educate students about human rights came about in *UNESCO's 1974 article Recommendation concerning Education for International Understanding, Cooperation and Peace, and Education Relating to Human Rights and Fundamental Freedoms*. The participants of the International Congress on the Teaching of Human Rights eventually met in 1978 to form a specific definition of what would be required application of the education in formal curricula¹⁷.

¹⁴National Council for Teacher Education, *Human Rights and Indian Values*. Vols. I and II, Self Learning Module, NCTE, New Delhi, 1999.

¹⁵Rhona K.M.Smith, *International Human Rights*, Oxford University Press, 2016.

¹⁶Educational Innovation and Information, *A Curriculum Framework for Peace Education*, Geneva: IBE, 1999.

¹⁷Dev & Arjun, *Human Rights--A Source Book*, New Delhi: NCERT, 1996.

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Human Rights Education became an official central concern internationally after the World Conference on Human Rights in 1993. This conference brought the issue of educating formally to the top of many countries' priority lists and was brought to the attention of the United Nations. It was two years later that the United Nations approved the Decade for Human Rights Education, which reformed the aims of application once again. Since the development of the UN Decade, the incorporation of human rights education into formal school curricula has been developed and diversified with the assistance of non governmental organizations, intergovernmental organizations, and individuals dedicated to spreading the topic through formal education.

Today the most influential document used to determine what qualifies as human rights and how to implement these ideas and rights into everyday life is the Universal Declaration. The declaration was adopted by the General Assembly in 1948 and has declared December 10 as human right day. The 30 article compilation is seen as a common standard of achievement for all peoples and all nations. Learning about human rights is the first step toward respecting, promoting and defending those rights¹⁸.

Universal Declaration of Human Rights is a common standard of achievement for all peoples and all nations. Each and every individual and every organ of society are expected to keep this Declaration constantly in mind and strive by teaching and education to promote respect for these rights and freedoms¹⁹.

Education of human rights should be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It should promote understanding, tolerance and friendship among all nations, racial or religious groups, and help in the maintenance of peace.

The World Conference on Human Rights reaffirmed that States are duty-bound, as stipulated in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights and in other international human rights instruments, to ensure that education is aimed at strengthening the respect of human rights and fundamental freedoms²⁰.

¹⁸Jeremy Bentham, *The Rationale of Punishment*, London, 1830.

¹⁹F.Waldron & B. Ruane, *Human Rights Education: Reflection On Theory and Practice*, Liffey Press, Dublin, 2010.

²⁰Brad Roth, Retrieving Marx for the Human Rights Project, *Leiden Journal of International Law*, 2004, p. 17.

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States should strive to eradicate illiteracy and should direct education toward the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. The World Conference on Human Rights calls on all States and institutions to include human rights, humanitarian law, democracy and rule of law as subjects in curricula of all learning institutions in formal and non-formal settings. Human rights education should include peace, democracy, development and social justice, as set forth in international and regional human rights instruments, in order to achieve common understanding and awareness with a view to strengthening universal commitment to human rights.

Amnesty International defines Human Rights Education as a “deliberate, participatory practice aimed at empowering individuals, groups and communities through fostering knowledge, skills and attitudes consistent with internationally recognized human rights principles.

Human Rights organizations aim to protect human rights on different levels some being more specific to geographical areas, others are based on governmental influences, others are nonprofit and education based, while others specifically aim to protect a certain group of individuals²¹.

2. UNESCO'S ATTEMPT TO PROMOTE HUMAN RIGHTS EDUCATION THROUGH:

1. Development of national and local capacities for human rights education, through its co-operation in development projects and programmes at national and sub-regional levels.
2. Elaboration of learning materials, publications, their translation and adaptation in national and local languages.
3. Advocacy and Networking Activities.

There should be a common understanding of the basic principles and methodologies of human rights education which can provide a concrete framework for action and strengthen partnerships and cooperation from the international level down to the grass roots amongst the countries of the world. Human rights education is all learning that develops the knowledge, skills, and values of human rights²².

The United Nations Decade for Human Rights Education (1995-2004) has defined Human Rights Education as training, dissemination, and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the molding of attitudes which are directed to:

²¹Brad Roth, Retrieving Marx for the Human Rights Project, *Leiden Journal of International Law* (2004), p. 31.

²²National Council of Educational Research and Training, *National Curriculum for Elementary and Secondary Education: A Framework*, New Delhi: NCERT, 1988.

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- (a) The strengthening of respect for human rights and fundamental freedoms;
- (b) The full development of the human personality and the sense of its dignity;
- (c) The promotion of understanding, respect, gender equality, and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups;
- (d) The enabling of all persons to participate effectively in a free society;
- (e) The furtherance of the activities of the United Nations for the Maintenance of Peace

3. IMPORTANCE OF HUMAN RIGHTS EDUCATION IN THE ERA OF GLOBALISATION²³

- 1. As a strategy for development.
- 2. As an empowering tool to downtrodden class.
- 3. As a way of change for women, children and disabled whose rights are violated.
- 4. As a legal prospective and for law enforcement.
- 5. As a legal education for social transformations and human sensibility.
- 6. for assessing needs and formulating strategies to further human rights education at all levels, in vocational training and formal as well as non-formal learning.
- 7. For strengthening the role and capacity of the mass media in furtherance of development of masses.
- 8. For strengthening of respect and for fully developing the human personality and its dignity.

²³Nickel James, *Making Sense of Human Rights: Philosophical Reflections On The Universal Declaration of Human Rights*, University of California Press, Berkley, 2016.

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9. For promoting understanding, tolerance, gender equality, and friendship among all nations, indigenous peoples, and racial, national, ethnic, religious, and linguistic groups.
10. For enabling all persons to participate effectively in a free society.
11. For furthering the activities of the United Nations to maintain peace and equality.

4. HUMAN RIGHTS EDUCATION MODELS

There is a need to establish human rights education models which can work in different levels and stages for generating and creating awareness amongst the masses. It can be worked out in following manner.

4.1. VALUES AND AWARENESS

The Values and Awareness Model focuses on transmitting “basic knowledge of human rights issues and to foster its integration into public values” based on its philosophical-historical approach. This model is what people commonly think of when human rights are concerned with the target audience being the general public with topics including global human rights and more cultural based matters.²⁴

4.2. ACCOUNTABILITY

The Accountability Model is associated with the legal and political approach to human rights in which the learners which the model targets are already involved via professional roles. The model is incorporated by means of training and networking, covering topics such as court cases, codes of ethics, and how to deal with the media.

4.3. TRANSFORMATIONAL

This model of education focuses on the psychological and sociological aspects of human rights. The topics towards which this model is effective are those including vulnerable populations and people with personal experiences affected by the topic, such as women and minorities trauma. The model is geared towards recognizing the abuse of human rights but is also committed to preventing these abuses.

Students of law and international relations or political science may study human rights in a university setting, but most people receive no education, formally or informally, about human rights. Even human rights activists usually acquire their knowledge and skills by

²⁴A. Abdi & L. Schultz, *Educating For Human Rights and Global Citizenship*, Albany: State University of New York Press, 2008.

self-teaching and direct experience.

People who do not know their rights are more vulnerable to having them abused and often lack the language and conceptual framework to effectively advocate for them. Growing consensus around the world recognizes education for and about human rights as essential in today's time. It can contribute to the building of free, just, and peaceful societies. Human rights education is also increasingly recognized as an effective strategy to prevent human rights abuses.

Integral to learning about one's human rights is learning about the responsibilities that accompany all rights. Just as human rights belong to both individuals and society as a whole, the responsibility to respect, defend, and promote human rights is both individual and collective. The Preamble of the UDHR, for example, calls not only on governments to promote human rights, but also on every individual and every organ of society. Human rights education provides the knowledge and awareness needed to meet this responsibility²⁵.

The responsibilities of all citizens in a democratic society are inseparable from the responsibility to promote human rights. To flourish, both democracy and human rights require people's active participation. Human rights education includes learning the skills of advocacy – to speak and act every day in the name of human rights.

Human rights education also provides a basis for conflict resolution and the promotion of social order. Rights themselves often clash, such as when one person's commitment to public safety conflicts with another's freedom of expression. As a value system based on respect and the equality and dignity of all people, human rights can create a framework for analyzing and resolving such differences. Human rights education also teaches the skills of negotiation, mediation, and consensus building²⁶.

5. THE OBJECTIVES AND GOALS OF HUMAN RIGHTS EDUCATION IN MODERN TIMES

Its objective is to help people understand human rights, value human rights, and take responsibility for respecting, defending, and promoting human rights. An important outcome of human rights education is empowerment, a process through which people and communities increase their control of their own lives and the decisions that affect them. The ultimate goal of human rights education is people working together to bring about human rights, justice, and dignity for all.

²⁵David P. Forsythe, *Human Rights In International Relations*, Cambridge University Press, 2018.

Ministry of Human Resource Development, *Fundamental Duties of Citizen*, Government of India, New Delhi:

²⁶NCERT, 1999.

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Education about human rights provides people with information about human rights. It includes learning about following²⁷:

1. The inherent dignity of all people and their right to be treated with respect.
2. Human rights principles, such as the universality, indivisibility, and interdependence of human rights.
3. How human rights promote participation in decision making and the peaceful resolution of conflicts.
4. The history and continuing development of human rights.
5. International law, like the Universal Declaration of Human Rights or the Convention on the Rights of the Child and other related treaties, conventions and programmes.
6. Regional, national, state, and local law that reinforces international human rights law.
7. Using human rights law to protect human rights and to call violators to account for their actions.
8. Human rights violations such as torture, genocide, or violence against women and the social, economic, political, ethnic, and gender forces which cause them.
9. The persons and agencies that is responsible for promoting, protecting, and respecting human rights.

Education for human rights helps people feel the importance of human rights, internalize human rights values, and integrate them into the way they live. These human rights values and attitudes include following aspects²⁸:

1. Strengthening respect for human rights and fundamental freedoms.
2. Nurturing respect for others, self-esteem and hope.
3. Understanding the nature of human dignity and respecting the dignity of others.

²⁷ P.Gerber, *From Convention To Classroom: The Long Road To Human Rights Education*, Berlin: Verlag, 2008.

²⁸ National Council of Educational Research and Training, *National Curriculum Framework for School Education*, New Delhi: NCERT, 2000.

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4. Empathizing with those whose rights are violated and feeling a sense of solidarity with them.
5. Recognizing that the enjoyment of human rights by all citizens is a precondition to a just and humane society.
6. Perceiving the human rights dimension of civil, social, political, economic, and cultural issues and conflicts both in the US and other countries.
7. Valuing non-violence and believing that cooperation is better than conflict.
8. It gives people a sense of responsibility for respecting and defending human rights and empowers them through skills to take appropriate action.
9. Recognizing that human rights may be promoted and defended on an individual, collective, and institutional level.
10. Developing critical understanding of life situations.
11. Analyzing situations in moral terms.
12. Realizing that unjust situations can be improved.
13. Recognizing a personal and social stake in the defense of human rights.
14. Analyzing factors that cause human rights violations.
15. Knowing about and being able to use global, regional, national, and local human rights instruments and mechanisms for the protection of human rights.
16. Strategizing appropriate responses to injustice.
17. Acting to promote and defend human rights.
18. Enhance the knowledge and understanding of human rights.
19. Foster attitudes of tolerance, respect, solidarity, and responsibility.
20. Develop awareness of how human rights can be translated into social and political reality.
21. Develop skills for protecting human rights.

6. WHO NEEDS HUMAN RIGHTS EDUCATION?

Human rights should be part of everyone's education. However, certain groups have a particular need for human rights education: some because they are especially vulnerable to

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rights abuses, others because they hold official positions and upholding human rights is their responsibility, still others because of their ability to influence and educate. Among these groups are the following:²⁹

Among these groups are the following:

1. Administrators of Justice:
 - i) Law enforcement personnel, including police and security forces
 - ii) Prison officials
 - iii) Lawyers, judges, and prosecutors
2. Other Government and Legislative Officials:
 - i) Members of the legislature
 - ii) Public officials, elected and appointed
 - iii) Members of the military
 - iv) Educators
 - v) Social workers
 - vi) Health professionals
 - vii) Journalists and media representatives
3. Organizations, Associations, and Groups
 - i) Women's organizations
 - ii) Community activists and civic leaders
 - iii) Minority groups
 - iv) Members of the business community
 - v) Trade unionists
 - vi) Indigenous peoples
 - vii) Religious leaders and others with a special interest in social justice issues
 - viii) Children and youth
 - ix) Students at all levels of education
 - x) Refugees and displaced persons
 - xi) People of all sexual orientations
 - xii) Poor people, whether in cities or rural areas
 - xiii) People with disabilities
 - xiv) Migrant workers

²⁹H.L.A.Hart, *The Concept Of Law*, Oxford University Press, 2005.

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- v) Prohibition of traffic in human beings and forced labor (Article 23).
- vi) Prohibition of labor in case of children below 14 years (Article 24).
- vii) Freedom of religion (Article 25).
- viii) No provision for religious instruction in any educational institution wholly maintained out of State funds (Article 28).
- ix) Conservation of language, scripts, and culture (Article 29 [1]).
- x) Right of minorities to administer educational institutions (Article 30).
- xi) State guarantee of social order (Article 38 [1]).
- xii) Adequate means of livelihood, equal pay for equal work for both men and women, non-abuse of health of the worker, opportunity for children to develop in a healthy manner and in conditions of freedom and dignity (Article 39)³².
- xiii) Right to work, education, and public assistance in specific cases (Article 41).
- xiv) Provision for free and compulsory education of children up to 14 years of age (Article 45).
- xv) Ensuring education and economic development of scheduled castes, scheduled tribes, and other weaker sections of society (Article 46)³³.

8. METHODOLOGY, APPROACHES AND STRATEGIES

The design of the curriculum needs to be built on the philosophical, psychological, and sociological bases of curriculum planning and development. The school curriculum should work toward the holistic development of the individual. Human rights education can be incorporated into the school curriculum in several ways³⁴:

³²Justice M. Rama, *Ancient Indian Law: Eternal Values in Manu Smriti*, Universal Law Publishing Co. Private Limited, 2002.

³³Delors Jacques, *Learning the Treasure Within*, Paris: UNESCO, 1996.

³⁴Jois, M. Rama, *Human Rights and Indian Values*, New Delhi: NCTE, 1997.

trauma. The model is geared towards recognizing the abuse of human rights but is alsoIt is universally accepted that education is the best source of social mobility, equality, and empowerment, both at the individual and collective levels. It is a precondition for any healthy and flourishing democratic society. It is thus important that education include the study of peace, human rights, and democracy as essential elements to society's development.

Everyone has the right to education. Education should be free at least at the elementary and fundamental stages. Human rights education must be treated as essential to the development of a global human rights culture. Human rights education, training and public information is essential for the promotion and achievement of stable and harmonious relations among communities and for fostering mutual understanding, tolerance and peace³⁰.

States should strive to eradicate illiteracy and should direct education towards the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.

7. INSERTION OF CORE VALUES OF HUMAN RIGHTS IN THE CONSTITUTION OF INDIA

The Constitution of India shapes the country's concept of human rights. The Preamble, Fundamental Rights, Fundamental Duties, and Directive Principles of the State policy are concrete steps toward the realization of human rights. Whereas basic objectives have been defined in the Preamble, the protection of human freedom and liberties are emphasized in Fundamental Rights and Directive Principles of State Policy. Since rights and duties are inseparable, Fundamental Duties are also imperative. These provisions epitomize the collective will and aspiration of all Indians. The following provisions in Constitution safeguard human rights³¹:

- i) Equality before the law (Article 14).
- ii) Non-discrimination on ground of religion, race, caste, sex, and place of birth (Article 15).
- iii) Equality of opportunity (Article 16).
- iv) Freedom of speech, expression, assembly, association, movement, residence, acquisition, and disposition of property, practice of any profession, carrying out any occupation, trade, or business (Article 19).

³⁰*Encyclopaedia of Human Rights*, London: Taylor and Francis Inc., 1992.

³¹Bernadette Rainey, *Human Rights Law*, Oxford University Press, 2015.

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- i) The formal curriculum Schools may choose to examine their present curriculums and identify areas where themes and elements of human rights education already exist. Human rights education is considered the most important part of the core curriculum of good general education.
- ii) The informal curriculum Human rights education can also be promoted through the extracurricular and co-curricular activities of the school³⁵.
- iii) The hidden curriculum Human rights education should also address the farreaching hidden curriculum of the school to create a school atmosphere that truly reflects respect for human rights. Values, attitudes, knowledge, and patterns of behavior should be integrated into the students' personal experiences in order to help them view reality critically³⁶.

Human rights education goes beyond subject teaching to organization of other activities and should be considered as an integral part of the whole education process. Activities that promote cooperation and group living can include human rights content. Teachers can involve elementary-school children in creative tasks such as paper cutting, drawing, collage, and work related to science, environmental studies, and social studies. Exhibitions, displays, and debates on human rights issues should be considered as core elements of human rights education. The activities themselves lead to an understanding of human rights as the children learn to cooperate and respect each other³⁷.

Theater and literacy activities should be part of human rights education. Role play is an important strategy for inculcating values in children. Even the study of major literary and artistic works may promote human rights education, international understanding, and peace³⁸.

International-relations clubs, art, music or drama circles, and UNESCO and United Nations clubs promote international understanding. Activities such as putting up wall newspapers and posters on current events, holding debates, writing essays and poems, celebrating special days such as Human Rights Day and World Health Day, and activities relating to population, apartheid, literacy, etc. inculcate human rights values and generate awareness of human rights³⁹.

³⁵Delors Jacques, *Learning the Treasure Within*, Paris: UNESCO, 1996.

³⁶S.K.Purohit, *Ancient Indian Legal Philosophy: Its Relevance to Contemporary Jurisprudential Thought*, Deep and Deep Publications, New Delhi, 1994.

³⁷G.Alfredsson, 'The Right to Human Rights Education' in A Eide, K Krause, and A Rosas, *Economic, Social and Cultural Rights*, Dordrecht: Martinus Nijhoff, 2001.

³⁸Amartya Sen, 'Human Rights and Asian Values, *The New Republic*, 14-21 July, 1997, at <http://www.mtholyoke.edu/acad/intrel/sen.htm>.

³⁹UNITED Nations, *Plan of Action for the United Nations Decade for Human Rights Education 1995-2004: Human Rights Education- Lessons for Life*, UN Doc A/51/506/Add.1, Appendix, 12 December 1996, para 2.

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Human rights education projects can be taken up in any discipline--history, geography, civics, literature, and science, etc. Since co-curricular activities complement human rights teaching in the curriculum, appropriate materials such as references and activity books are needed⁴⁰.

9. CONCLUSION

The process of internationalization and globalization of the concept of human rights has generated the movement 'All Human Rights for All'. In a complex country such as India, violations of human rights at all levels necessitate human rights education at all levels i.e in schools, colleges and universities. There is a need for human rights education to find its rightful place in the school curriculum, teacher training courses--pre- and in-service, textbooks, supplementary reading materials, educational policies, and school administration. Human rights education must exert its influence from early childhood education onward and through a broad range of disciplines to build a human rights culture. Hence, greater commitment from all sectors and preparation of a sound, realistic plan of action can help us achieve human rights education for all and transform the human rights movement into a mass movement to achieve a better social order and peaceful coexistence. Indeed, this is one of the greatest challenges in the 21st century.

The promotion of ethnic, racial and religious tolerance within states and between states would go a long way towards reducing tensions and dissipating violence. It would also develop truly pluralistic societies. Human rights education is key to achieve this goal. Without appropriate education, ignorance can breed contempt and can lead to abuse of rights by other individuals and states as well. Realization of these rights will enable the protection and advancement of human rights to progress to a higher level. Given the increasing globalization of society, this is imperative⁴¹.

⁴⁰Upendra Baxi, *The Future of Human Rights*, Oxford University Press, 2014.

⁴¹Arjun Dev, *Commonwealth Values in Education: Young People's Understanding of Human Rights--A County Report*, Commonwealth Secretariat, 1996.

Form IV

(See Rule 8 of the Registration of News Papers (Central) Rules, 1956 under the Press and Registration of Books Act, 1867)

**STATEMENT ABOUT OWNERSHIP AND OTHERS PARTICULARS IN
RESPECT OF THE JOURNAL**

Place of Publication	Rajiv Gandhi National University of Law, Punjab
Language	English
Periodicity	Bi-Annual
Publisher Name	Professor (Dr.) Naresh Kumar Vats Registrar, RGNUL, Punjab
Nationality	Indian
Address	Rajiv Gandhi National University of Law, Punjab, Sidhuwal, Bhadson Road, Patiala -147006
Editor's Name	Dr. Jaswinder Kaur, Assistant Professor
Nationality	Indian
Address	Rajiv Gandhi National University of Law, Punjab, Sidhuwal, Bhadson Road, Patiala-147006
Printer	Doaba Stationery & Printing Solutions Pvt Ltd, E-14, Industrial Area Focal Point, Derabassi. 140 507
Owner's Name	Rajiv Gandhi National University of Law, Punjab

I, Professor (Dr.) Naresh Vats hereby declare that the particulars given are true to the best of my Knowledge and belief.

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(Naresh Kumar Vats)
Registrar, RGNUL, Punjab.**

About CASIHR

The Centre for Advanced Studies in Human Rights (CASIHR) is a centre for excellence established at one of the premier national law universities in India, Rajiv Gandhi National University of Law, Punjab to undertake and promote advanced study and research in emerging trends in Human Rights. CASIHR aims at conducting multi-disciplinary research in various human rights issues and create working documents serving as advices to policy makers, regularly organizing conferences, seminars and debates on the relevant topics. CASIHR also publishes a monthly newsletter titled the Human Rights Communique, aimed at highlighting human rights issues in India and around the globe.