QUALITY IS ALL THAT MATTERS

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WE BEGAN THE GROUND WORK FOR THE FORMULATION OF THIS JOURNAL ABOUT A YEAR AGO, SINCE THEN OUR COLLECTIVE HARD WORK AND DEDICATION MADE THIS POSSIBLE ATLAS. WE WOULD LIKE TO THANK OUR EDITORS WHO ARE THE BACK BONE OF THE JOURNAL.

Editorial Board:-

IS JAIL A REALITY AND BAIL AN EXCEPTION? : BAIL AND POOR

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ABSTRACT:

The main objective of this paper is to understand the question whether the bail provisions in India is anti poor. In the paper the author has explained the legal provisions as well as the factual condition of bail in India. The aim of the paper is also to point out that although we have strong legal precedents on bail provisions but still the poor suffers. The paper inspects the reason behind class discrimination in the grant of the bail. The main focal point of the paper is the issue; whether the provisions of law regarding bail are anti poor or there is problem in executions which has made the bail system in India discriminatory. 'The author has substantiated the reality of bail with the latest figure released by Nation Crime Record Bureau and other reports. The paper is concluded by suggesting the reforms needed to be brought in Indian bail system.

INTRODUCTION

"It is a crying shame upon our adjudicatory system which keeps men in jail for years on end without a trial"

When we see a bird flying in the azure sky, the first thing comes in our mind is "*If I were a bird*". A flying bird is the symbol of liberalization and the inherent nature of human being is to remain free. That is why whenever we think about 'jail' we feel uncomfortable and would never like to imagine ourselves inside it even in our dreams! It is scary isn't it? It might be scary to think about a jail but the truth is that the imprisonment is the most popular form of punishment awarded to serious offences where fines and community services are not sufficient. Incarceration is justified as retribution and enforced as a deterrent. The author agrees with the justification that punishment contributes to the retribution and enforced as a deterrent but the punishment must be within the framework of law, you cannot treat an accused and a convict equally. What can be worst than spending many years behind the bars that to without vindication of guilt? According to the latest figures released by the National Crime Records Bureau (NCRB) for 2014, almost 68 per cent of all inmates in the 1,387 jails in the country are undertrials. Over 40 per cent of all undertrials remain in jail for more than six months before being released on bail.

The law under section 167 of The Code of Criminal Procedure, 1973 states that when charge sheet has not been filed the maximum period of 15 days a person can be detained in police custody. In the judicial custody an undertrial can be detained for ninety days, where the investigation relates to an offence punishable with death, imprisonment

for life or imprisonment not less than 10 years .When the investigation is for any other offence the

maximum period of detention cannot be more than sixty days. On the expiry of above period if the investigation is not concluded, the bail becomes the right of the accused devoid of the nature of crime alleged of committed by him. In practicality, people are lodged in jail for years without bail.

The Supreme Court has recognised this for years and has been devising ways and formulae to secure the release of under-trial prisoners on bail. Our government has also understood the gravity to the situation and relaxed the provision of bail, the amendment made to Cr.p.c. in 2005 is example for the same. Arguing that the non-implementation of the existing legal provisions is a major reason for the large undertrial population lodged in prisons, this paper explores the legal dispensation of bail under the Cr.p.c. analyses the current data regarding undertrials and also explains that the poor is the biggest victim of the system.

The paper has been divided into four segments. In the first segment the author has explained the legal provisions related to bail in India. In the second part author has shown the factual condition of bail in India. She has substantiated the same with the latest figure released by Nation Crime Record Bureau and other reports. In third part the author has elaborated the ground reality which shows the harsh reality of bail

provisions for the poor and unprivileged section of the society. In the Fourth and the last part the author has concluded the paper by suggesting some of the reforms needed to be brought in Indian bail system.

BAIL IN INDIA: THE RIGHT AND THE DISCRITION

The term 'bail' is defined in Black Law Dictionary as *"procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court*." While Stroud's Judicial Dictionary of Words and Phrases defines bail as, "*the temporary release of a person pending a further decision of court."* Thus, we can say bail, in legal terminology, means procurement of release from prison of a person awaiting trial or an appeal, by the deposit of security to ensure his submission at the required time to legal authority.

According to code of criminal procedure, a bail can be either right of a person or the discretion of court. There are two types of offences, i.e. bailable and non bailable. Under CrPC and bail provisions in respect of them are governed by sections 436 and 437 of the Criminal Procedure Code, 1973 respectively. Bail is a right in respect of bailable offences while it is discretion of the Court in respect of non bailable offences. The aspect of bail in bailable offences came under scanner of the Hon'ble Supreme Court in case of *Rasiklal v/s Kishore, s/o Khanchand Wadhwani,* where the Hon'ble Supreme Court in clear words held that

incase of bailable offences, right to claim bail is an absolute and indefeasible right and if the accused is prepared, court/ police officer is bound to release him on bail and only choice available is in demanding security in surety and if the accused is willing to abide by reasonable conditions which may be imposed on him.

The demand of security is criticized as capable of causing discrimination against poor and underprivileged groups. The argument is given that a rich can easily pay the security amount and walk free while a poor guy is also expected to serve a surety even though they have been charged with a bailable offence where the accused is entitled to secure bail as a matter of right. As a result, a poor man languishes behind bars, subject to the atrocities of the jail authorities rubbing shoulders with hardened criminals and effectively being treated as a convict. True! Money must not be sole criteria for the denial of the bail when the bail is the right because a person had to remain in jail for his inability to furnish bail, till the case is disposed off and we cannot predict how many years it takes to dispose a case. This provision was highly anti poor on the face of until 2005 amendment. Section 436 (1) is, therefore amended in 2005 to make a mandatory provision that if the arrested person accused of a bailable offence and he is an indigent and cannot furnish surety, the Court shall release him on execution of a bond without sureties. Also section 440 of the Act clearly states that *the amount of every bond executed under this*

chapter shall be fixed with due regards to the circumstances of the case and shall not be the excessive.

Through plethora of judgment various courts have held that conditions relating to sureties should not be excessive as it would virtually amount to denial of bail itself. In the case of *Moti Ram & Ors vs. State of M.P* the Apex Court clearly held that:

"Social Justice is the signature tune of our Constitution and the little man in peril of losing his liberty is the consumer of social justice. And the grant of bail can be stultified or impossibly inconvenient and expensive if the Court is powerless to dispense with surety or to receive an Indian bailor across the district borders as well or the sum is so excessive that to procure a wealthy surety may be both exasperating and expensive. The problem is plainly one of human rights, especially freedom vis-a-vis, the lowly and necessitates the Supreme Court to interdict judicial arbitrariness deprivatory of liberty and ensure "fair procedure" which has a creative connotation after Maneka Gandhi [1978] 2 SCR 621."

Honorable Supreme Courts has given several judgements in which the consideration to economical condition of accused has been made mandatory. For example in the case of *Keshab Narayan Banerjee v State of Bihar* the condition imposed by the High Court for enlarging appellant on bail, namely, that he should furnish security for rupees one

lakh in cash or in fixed deposit of any nationalized bank in Bihar with two sureties residing in the state of Bihar each for like amount was held to be excessively onerous condition amounts to denial of bail.

What is the legal position when a person is accused of committing non bailable offence? Does Court has uncontrolled wide discretion while granting or refusing bail under section 437?

When accused of committing non-bailable offences, a person can only be released on bail by the court if it is satisfied that the person shall attend the court to stand trial; will not tamper with evidence or influence witnesses or obstruct police investigation in any manner; will not commit any other offence or hinder the interest of justice.

Thus, the bail provisions sounds to be fair and not 'anti-poor'. Then why various data released by various research agencies cry to tell us that approx seventy percent of total prisoners are undertrial and many of them have been detained more that the permissible time limit? In the next section of the paper we are going to discuss the various issues related to undertrials.

BAIL IN INDIA: ***THE ILLUSION AND THE DISTANT DREAM***!

Undertrial accused forms significant part of our prison population. According to 78th Law Commission Report, the 'undertrial' is the person in judicial custody on remand during investigation means these are the people who have not been granted bail.

According to the figure released by the Nation Crime Records Bureau in 2014 , 68% of total prison inmates are undertrials while convicts constitute 31% and 1% is the remaining category.

The worst part is more than twenty percent of these under trials are in the prison for a period of more than a year without bail. Following is the pictorial representation for the same.

The state trends are also interesting. Percentage of under trials in 15 states is more than the national average. This percentage is more than 70% in 12 states. Topping the percentage of under trials is Meghalaya with 91.2% followed by Arunachal Pradesh (88%), Manipur (87.2%), Bihar (85.6%) and Jammu & Kashmir (83.3%). Four of the top 10 states are from the North East.

According to prison Statics India 2014 the majority that is 82% of total undertrials are alleged of the commission of IPC offences while remaining 18% are booked under special legislations. Those who are booked under IPC, majority of them have been booked for serious charges like murder (27.3%), theft (11.2%), attempt to murder (10.3%), Rape (9.7%). An argument can be given that most of them are charged for non bailable offence and thus they cannot claim bail as right. Although they are charged of non bailable offence but they must be

given fair opportunity of bail. In most of the cases they are unable to get that. In coming sections we will discuss why. The concept of bail emerges from the conflict between the police power to restrict the liberty of man who is alleged to have committed the crime a crime and the presumption of innocence in the favor of alleged criminal. The perfect balance between these two things results in satisfaction of justice.

Under trial prisoners especially those belong to weaker section of the society are devoid of the benefits they are entitled to receive. Our law is the well equipped with the provision like section 436 A of the Indian Criminal Procedure Code which states that those who have completed more than half of the maximum punishment can be set free on bail by jail authorities. This is backed by judicial pronouncement. Honorable Supreme Court in the case of *Bhim Singh Vs Union of India & Others* relating to under trial prisoners, has directed for effective implementation of Section 436A of the Code of Criminal Procedure by directing the jurisdictional Magistrate/Chief Judicial Magistrate/Sessions Judge to hold one sitting in a week in each jail/prison for two months commencing from 1st October, 2014 for the purposes of effective implementation of section 436A of the Code of Criminal Procedure. In its sittings in jail, the above judicial officers shall identify the under-trial prisoners who have completed half period of the maximum period or maximum period of imprisonment provided for the said offence under the law and after complying with the procedure prescribed under Section

436A pass an appropriate order in jail itself for release of such under-trial prisoners who fulfill the requirement of section 436 A of Cr P.C.

If the order of *Bhim Singh* and other provisions regarding bail that we have discussed in the previous section would have been followed, the majority of these under trial prisoners would have been benefited but neither the prison administration not the state government implement these legal provisions.

The majority of undertrial prisoners belong to the weaker section of the society and they are unaware of the amendments made to the laws related to bails and judicial interpretations. The prison statistics 2014 has given the figure that 71.4% of total undertrials are either illiterate or semi literate. Schedule caste, Schedule Tribe and Backward class constitute 62.7% of the total under trials. The lack of education and poor background make the more vulnerable to the system because they are unaware of laws, unable to pay for bail and contact good lawyers.

In previous section we have discussed that our legal system is well equipped with legal provisions and precedents but in this section we have seen that the purpose of bail has at large extent has defeated in India and unprivileged groups are the biggest victims. This is evident from the number undertrial prisoners in Indian jails. A large number of the poor, the Dalits and people from the minority communities are languishing in jail as undertrials.

Why they are not able to get bail despite we have legal mechanism? How can we assure fair and leveled playing field for everyone in the grant of bail? These issues we are going to address in the next section.

WHY POOR HAVE TO FACE DISCRIMINATION IN THE BAIL PROVISION?

Despite we have strong legislation and legal precedent on Bail provision, all resent figures states the story of plight. There is system for justice but the huge sections of society do not have the access. Let us have a look on the ground realities of India system which ultimately result in huge discrimination against poor and people without means and made the bail system 'anti-poor'.

The problem lies in practice of criminal law in our country. Indiscriminate arrests by police, ignorance of legal rights, delay in trial, reluctance of the courts to grant bail, inability to provide surety, are some reasons that have led to jail the rule and bail the exception.

Suppose a person is accused of committing a crime and is apprehended. He is either released on bail or is detained in the police lock up pending his production before the Court. Use of discretion by the police to grant or refuse bail arises at this stage. In the case of bailable offence the bail is the matter of right. It must be granted by police officer but the practice is marked with certain dishonest and inefficient features as the discretion if often influenced by influential recommendations or through some

settlement of pecuniary gains. Many poor people are detained in prisons for alleged involvement in bailable offences primarily because they are unable to furnish surety. This is a serious concern because in such cases bail is a matter of right and people end up spending long periods in jail merely because they are poor.

The arrested person is detained in the lockup for unduly long period of time for standing his trial. Many times there is no registration of formal case and in that situation the arrest is not entered into formal records although some paper work is shown to be done. The arrested person is not produced before the magistrate on the expiry of twenty four hours. The weaker sections of society are the biggest victim. They formed the large number of these arrested persons and they are semi literates or illiterates with limited means of Income and influence and are thus, unable to avail the opportunity to communicate with a lawyer, friend or relative to arrange for legal aid or for standing sureties.

Amount of security for the bail bond and requirement of professional surety are another challenged before the poor and unprivileged. No doubt our Honorable Supreme has Court has given it guidance on the quantification of bail bond and has given emphasis that the economical condition of accused must be taken in to consideration. At the same time there is no statutory limits exists on the amount of bail bond or the number of sureties that may be required. The entire matter is left to the discretion of Court without any statutory guidelines and this in practice

has resulted in detrimental impact to the poor. Sometimes lower court imposes huge amount as surety ignoring the precedents set by Higher Courts. The Court's power to impose huge sum as bail bond on the grant of the bail has frustrated the very purpose of bail. The extent and limit of the court's power and discretion have to be mapped out keeping in view the need of security to assure the presence of accused so that he does not run away from the net of justice as well as the economical and social condition of accused.

As we have discussed that most of these undertrials are poor and illiterate person and sometimes they have to remain in jail for long period of time in the want of legal aid. We have sound law for free legal aid. Article 39A mandates the state to provide free legal aid to those who cannot afford. In the case of *Hussainara khatoon vs. State of Bihar*, it was held that if any accused is not able to afford legal services then he has a right to free legal aid at the cost of the state. Free legal aid also comes under the arena of right to life under article 21 of the constitution. We have Nation Legal Service Authority Act, 1987 which extensively talks about legal aid.

Despite all these legal aid system in India has not been able to accomplish the objective set. The most important obstacle to the legal aid movement is lack of awareness among the people regarding their legal rights. Again, it is an open secret that good lawyers are usually not on the panel of legal aid, and many of them do not take their cases

seriously. The law does not mandate the State Legal Services Authority, jail superintendent or the trial court to inform the accused about this law. There is immense requirement to focus on legal awareness programs to get the significant and permanent solution for non implementation of law and making law poor friendly. When citizens, particularly marginalized or underprivileged groups, know what the law has to offer them, they can recognize and challenge injustices much more forcefully. In the case of illegal detentions, a legally literate can fight for their right to bail and other safety valves which our legislation and judiciary has granted.

Also huge pendency of cases in the Court is another big issue which has impact at the grant of bail. We remember the awkward moment when the Chief Justice of India had broken down in front of the Prime Minister of India. Justice Thakur was most vexed about India's overworked judiciary and bemoaned that the common man's faith in the justice system is at an all-time low.

Our justice system is beset with massive problems of delay, cost, and ineffectiveness. India has just 13 judges for every ten lakh people as against 35-40 in other developing nations and 50 in a developed country. There are more than 2.18 crore cases pending in district courts across the country. This has led to ineffectiveness in the working of the judiciary and more often courts fail to implement the crucial provisions like that of bail. Thus, inmates who have been accused of committing a petty

criminal offense have languished in custody for years. They have no other option but to face prolonged investigations, delayed trials and tortures.

The object and purpose of bail is always an intelligible concept in criminal law jurisprudence. There must be a perfect balance between the interests of individual and that of state. It is the biggest pain when the liberty of a person is curtailed because of being unprivileged. Sadly in our system despite of huge developments in bail jurisprudence, the provision of bail is anti poor.

"He does not stay in jail because he is guilty,

He does not stay in jail because any sentence has been passed,

He does not stay in jail because he is any more likely to flee before trial,

He stays in jail for one reason only – because he is poor...".

CONCLUSION: THE WAY FORWARD

We have seen in the paper that unprivileged classes have to face discrimination. We have laws on bail but it is poorly drafted giving various agencies to mould it according to them. Our judiciary has interpreted it widely in the interest of the people but it could not have an upper hand against the malfunctioning of administrative machinery.

There is huge disparity in law enforcement mechanism and it has widely affected the working of the bail system in our country.

There is need of huge reform in bail system to make it work efficiently and to provide leveled playing field for all. The ambiguity in the legislative provision regarding surety and bail bond amounts is required to be removed. The guidance of Apex Court in various cases providing the safety valves to the poor and unprivileged in the bail system should be given legislative backing by making desirable amendments in the Code. There is requirement of strict scrutiny of Police power because it is essential for the maintenance of fairness in the bail provisions. Speedy trial is another important area for reform. Together with all these reforms the mass scale work is required to done in legal aid and legal awareness. Legal aid is the necessary constituent of a fair procedure implicit in Article 21.

In sum, no doubt the 'bail provision' is one of the grey areas of criminal justice system and it is highly detrimental to poor and unprivileged classes. At the same time we cannot deny the extraordinary interpretation done by our judiciary to establish equality and fairness.

THE CONUNDRUM OF LIVE-IN RELATIONSHIP

By Nikhil Gupta & Aditya Gogna, students of O.P Jindal Global Law School.

(Abstract: The paper deals with the idea of live-in relationship in marriage centric Indian society which is reluctant to go against customary norms and conventions governing them from ages. The approach of Indian judiciary in recognizing such relationship in the absence of any legislation takes the paper forward. This is followed by the current legal status of such relationship. The paper highlights the status of child born out of such relationship whose rights have been accorded by the courts though such child suffers from the social stigma. Focus has been made on how rights granted to the partner and child in such relationship also faces discrimination when the Constitution of our country prohibits discrimination. The unequal treatment of male and female who are into such relationship also aggravates the problem of gender inequality persisting in our patriarchal society. The paper then deals with the issues which are of high concern in context of live-in-relationship. The authors conclude the paper by making few suggestions which might be helpful in achieving the objective sought.)

Keywords: live-in-relationship, marriage, cohabit, rights, legitimate.

INTRODUCTION

St. Thomas Aquinas in his 'Summa Theologica' states, *"A human law, in so far as it deviates from reason, is called an unjust law, and has the*

nature, not of law but of violence". The words of wisdom reiterated by the great philosopher Thomas Aquinas, insinuate a complex narrative which negates any arbitrary notion of norms which do not provide a comprehensive justification for their existence. A live-in relationship is a relationship in which an unmarried couple cohabit together for a long term which resembles marriage. There are two types of live-in relationship, by choice or by circumstance. Relationship by choice are those where the partners agree to cohabit together voluntarily whereas relationship by circumstances are those where the couple reside together under the assumption that they are married to each other or cannot afford to be married. It is also presumed that the rationale behind a live-in relationship is that a man and a woman would want to test their compatibility before committing to each other. The concept has not been recognized under the Hindu Marriage Act 1955 and the Code of Criminal Procedure 1973. The perplexities persisting in our society with regards to western ideologies and the overarching desire to conform to ancient customs validates Aquinas 'unjust law' theory with regards to the concept of 'live-in' relationship. In India, there exits only one kind of a relationship between an unrelated man and a woman. The social union is called 'Marriage'. The concept of marriage is based on an anthropological truth that men and women are complementary to each other, the biological fact that reproduction depends on man and woman, and the social reality that children need a mother and father. Therefore,

marriage is considered as sacrosanct in the socio-legal realm. Through the advent of time, the status with regards to the concept of live-in relationship has changed drastically. The authors, in the paper, deciphers the concept of live in relationship by critiquing and analyzing it from the perspective of its creation, acceptance, and implementation. The paper delves into judicial activism in relation to live-in-relationship and the regressive outlook adopted by the society.

LIVE-IN RELATIONSHIP

The custom of men and women residing together without being in a relationship is not oblivious to the Indian society. Men in live-in relationship with women outside their marriage were not considered immoral in the past. Surprisingly, concubines (avarudh stries) were kept for the entertainment and relaxation of the men community. The narrative changed with the advent of the feudal society where a relationship between a man and a woman was tabooed. Post-independence, laws pertaining to bigamy were introduced and women became more aware of their rights. The concept of live-in-relationship is not alien to the Indian society. Earlier they were known as ‘maitri karar’ in which opposite sexes would enter into a written agreement to be friends, live together and look after each other. This was the legitimate friendship or companionship contract, defining the terms and conditions of relationship, entered into between heterogeneous sexes which had

social and legal recognition. Later, this practice was converted into service agreement wherein a man would employ woman as a helper or a maid servant. Mostly practiced in Gujarat, this practice was demolished by the Government as the practice circumvented the provisions of the Hindu Marriage Act, 1955 (hereinafter referred to as the "HMA") which clearly prohibits another marriage during the lifetime of one's spouse. Further, the Government of Maharashtra issued the notification imposing a seal of censure on such practice by examining the ill-treatment faced by the offspring born out of such relationship. In other words, the said practice promoted bigamy which is considered illegal. The practice was held to be void-ab-initio by the court in the case of *Minaxi Zaverbhai Jethva vs State Of Gujarat.* Gradually, the society saw the mushrooming of live-in-relationship. The existence of such a relationship bears testimony to the openness in the outlook of the society, even though not by majority. The traditional Indian society disapproved of the concept due to several reasons. Firstly, marriage was considered to be a sacred institution. Secondly, the financial dependency of a woman on a man created a subservient status for the woman.

CURRENT LEGAL STATUS

At present, there is no specific legislation pertaining to live-in relationship in India. Absence of any legal regime has alleviated the problem in context of rights and obligations of those entering into such

relationship. The Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the "PWDVA") is labelled to be the first legal legislation recognizing non-marital relationship between heterogeneous sexes. The said Act has defined 'aggrieved person' as *"any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;"* Further, the Act defined the term 'domestic relationship' as *"a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."*

By using the term 'a relationship in the nature of marriage', the Act is expected to cover live-in relationship and accord rights to the aggrieved person. It is to be noted that the use of such expression in the Act by legislature does not in any way promote bigamy. The objective of the Act is to provide safeguards and relief to the woman who has been subjected to domestic violence. The Act merely acknowledges the existence of relationship which are in the nature of marriage and to protect women community from domestic violence. In no way, the Act confers any legal status or recognition to live-in relationship. The HMA and Code of Criminal Procedure (hereinafter referred to as the "Code") does not recognize such relationship.

JUDICIAL PRONOUNCEMENTS

The concept of live-in relationship got legal recognition because of Indian judiciary. In the absence of any legal regime, coupled with the fact that law of any country should be flexible, dynamic and accommodative enough to be changed according to the need of the time, the Indian judiciary showcased judicial activism in context of live-in relationship. Law and society are the ones which are considered to be the regulator of an individual. The idea of live-in relationship may not be acceptable to the society but by recognizing the same and legitimizing it, the Supreme Court has developed the law of the land. Various cases faced by the courts over the number of years have evolved this concept and is furnished below:

In the case of *Gokal Chand* v. *Parvin Kumari*, the court of highest appeal stated that continuous co-habitation of man and woman as husband and wife and such a treatment for number of years may raise presumption of marriage. The same, however, is rebuttable. The court, in this case, held that the judiciary cannot afford to ignore the rebuttals if the same has the potency to weaken the presumption of marriage. In the same line, dismissing the special leave petition, the Hon'ble Supreme Court, in the case of *Badri Prasad* v. *Dy. Director of Consolidation and Ors.*, stated that a strong presumption in favor of wedlock arises where the partners have lived together as husband and wife for a long time. The

court further stated that the said presumption can be challenged. However, heavy burden lies on the shoulders of the one who rebuts the presumption or questions the legality of such a relationship. The said principles also finds expression in the case of *Tulsa & Ors.* v. *Durghatiya & Ors*.

The Allahabad High Court, in the case of *Payal Katara* v. *Superintendent*, Nari Niketan Agra, held that if a man and a woman wish to live together without entering into matrimonial bond then they can do so. Pointing out that there exist the difference between the law and morality, the court was of the opinion that such a relationship may suffer from the infirmities of immorality but the same is legal.

In the case of *D. Velusamy* v. *D. Patchaiammal*, the Hon'ble Apex Court considers a common law marriage to be same as live-in-relationship in order to bring it under the banner of a 'relationship in the nature of marriage'. The rights and protection granted under live-in-relationship given to the aggrieved person can only be availed once the court is satisfied that the couple is living in a valid live-in-relationship which resembles marriage. The perquisites for a valid live-in-relationship are furnished below:

- The couple must come forward to the society as the one akin to spouses.
- The couple must have attained the legal age of marriage.

- The couple must be qualified to enter into a legal marriage, including being unmarried.
- They must have co-habited and held themselves to be akin to spouses to the outside world for a significant period of time.

This takes us to the view that the courts are being protective and try to give recognition to such a relationship keeping themselves confined to legal boundaries. The very fact that the judiciary has not given recognition to all types of live-in-relationship bears testimony that the concept of live-in-relationship would encompass a large number of relationship than the ones which are a 'relationship in the nature of marriage'. In addition to the above conditions, to prove a 'relationship in the nature of marriage', the parties must have lived together in a shared household as defined in Section 2(s) of the Domestic Violence Act, 2005. Further, the court states that fulfillment of all the aforementioned conditions needs to be proved by giving evidence. Emphasizing on the expression used 'relationship in the nature of marriage', the court categorically states that merely spending weekend together or one night stand will not constitute domestic relationship.

The court, in the above case, states that if a man keep a 'keep 'whom he provides financial assistance and uses her mainly for the sexual purpose and/or as a servant would fall outside the scope of relationship in the nature of marriage. The court went on to agree with the fact that the

opinion adopted by the court will exclude many from coming under the domestic violence act, 2005 but then the court states that it is not for the courts to legislate or amend the law. This is based on the settled principle of law that one shouldn't encroach upon the field assigned exclusively to others i.e. legislature in the present case. The expression used in the section is 'relationship in the nature of marriage' and not 'live-in-relationship' per say. The court is barred from changing the language of the statute merely for the grab of interpretation.

The case of *Aruna Parmod Shah* v. *Union of India* dealt with some important issues. The petitioner, in the said case, raises a strong objection of placing those in relationship in the nature of marriage at par with the married person as defined under the head 'domestic relationship' contained in section 2(f) of the Domestic Violence Act, 2005. Rejecting the objection, the court opined that there are no logical and sound reasons which calls for unequal treatment to be given to both such relationships. The court articulated that like treatment to both does not diminish the sanctity of marriage in any way. Further, an assumption can fairly and validly be drawn that a 'live-in-relationship' is invariably initiated and perpetuated by male. The court, however, expressly stated that they are not ruling out an exception but such cases would be rare to find where the male is a victim. However, this calls for the Parliament to protect male victims. The court highlighted on the fact that it cannot ignore the social reality i.e. stigma which only women has to face and

not man, though the act is done unanimously by both. One of the other contention of the petitioner was that the Domestic Violence Act, 2005 jeopardize the rights which legally wedded women are entitled to while accommodating the rights to the women in a relationship in the nature of marriage. The court said that diminish in the complete maintenance of legally wedded wife and legitimate children shall not render the Act unconstitutional. Further, the court stated that there can be a case where the bread-earner or the man, as the case may be, may suffer from ill-health or insolvency which too may reduce the maintenance of legally wedded wife and legitimate children. The court stated that these are marriage vicissitudes against which no legal insurance or insulation is possible.

In the case of *Lata Singh v. State of U.P. & Anr.*, the court stated that relationship between two consenting adults of heterogenic sexes does not amount to any offence, exception being adultery as defined under section 497 of the Indian Penal Code. Further, in the case of *S. Khushboo* v. *Kanniammal & Anr.*, the Apex Court stated that though the mainstream notion of our society is that sexual contact should be only between marital partners and not otherwise but there is no legislation which would label sexual contact between two adults giving consent to such a contact as an offence.

The Indian judiciary has laid down guidelines which should be taken into consideration while dealing with the question of determination of

any relationship as live-in-relationship. Though the list is merely illustrative and not exhaustive, it is of immense help in recognizing live-in-relationships which can be brought under the scope of a 'relationship in the nature of marriage'. The said guidelines, which finds expression in the case of *Indra Sarma*, are discussed below:

- Duration of Relationship

  The first point which this judgment takes into consideration is the duration of the said relationship. The court read the expression 'at any point of time', used in Section 2(f) of the Domestic Violence Act, as the reasonable time needed to maintain and continue a relationship which is case specific. It can, therefore, be said that court has made a purposive interpretation of the said expression in order to achieve the objective sought.

- Shared household

  The expression has been defined Under Section 2(s) of the DV Act and, hence, need no further elaboration.

- Pooling of Resources and Financial Arrangements

  Unanimously supporting each other, or any of them, financially, or by acquiring immovable properties in the joint name, or making long term investments in business or shares, jointly or severally, or sharing of bank accounts may endorse the view that the couple is living in a live-in-relationship.

- Domestic Arrangements

  One other factor which may guide whether the relationship is in the nature of marriage or not is by seeing the domestic arrangement between the couple. If the domestic responsibility is shared between the couple especially woman being entrusted with the task to maintain the house and look after it – cleaning, cooking, maintenance of household etc. , would bring such relationship under the preview of live-in-relationship.

- Sexual Relationship

  Marriage includes sexual relationship between couple as the same is not only done for pleasure but also for companionship, procreation, emotional support and intimate relationship. Relationship in the nature of marriage, if includes sexual relationship, would therefore, be a strong indication that the couple needs to presumed married.

- Children

  Children of a couple living together is strongly renders the view that the couple is staying in a relationship in the nature of marriage. Sharing the responsibility for bringing up and supporting them is also a strong indication.

- Socialization in Public

If the couple socializes with friends, relatives and others in a way that they are husband and wife then there shall be a strong indication that the couple is living in a relationship in the nature of marriage.

- Intention and conduct of the parties

  Common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship.

In the said case law, the court listed down five categories of live-in relationship which is mentioned below:

- Domestic relationship between an adult male and an adult female, both unmarried.
- Domestic relationship between a married man and an adult unmarried woman, entered knowingly.
- Domestic relationship between an adult unmarried man and a married woman, entered knowingly. This would amount to the offence of adultery under the Indian Penal Code.
- Domestic relationship between an unmarried adult female and a married male, entered unknowingly
- Domestic relationship between same sex partners. This is illegal in India.

The concept of live-in-relationship, as stated earlier, is not alien to India. The Apex Court, in all above cases, reiterated the basic principle laid down by its predecessor i.e. the Privy Council which held in the case of A Dinohamy and W L Blahamy in 1927 that *"Where a man and a woman 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."* Two years later, the council revisited the legal issue in the *Mohabhat Ali* v. *Mohammad Ibrahim Khan* case. It made a significant addition to the conditions laid down in the 1927 ruling. It said: *"The law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for a number of years."*

ISSUE OF MAINTENANCE

The judiciary has made the literal interpretation of the terms used in Section 125 of the Code. In the case of *Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav***,** the Apex Court stated that where man enters into a live-in relationship by circumstance with other woman despite being married, then that 'other woman' is not entitled to maintenance rights granted under Section 125 of the Code. Ignorance of man's marriage is no excuse. The Allahabad High Court, in the case of *Malti* v. *State of U.P***,** held that a woman living in a relationship with a man cannot be equated as his "wife".

In *Savitaben Somabhai Bhatiya* v. *State of Gujarat*, the Supreme Court clearly stated that the attitude of the parties entering into such relationship is immaterial. The court opined that what matters is the intention of the legislature. The court further stated that ignorance of one's marriage will also be fruitless as the principle of estoppel cannot be used as a valid defense to defeat the provisions of Section 125 of the Code.

The case of *Narinder Pal Kaur Chawla* v. *Manjeet Singh Chawla* stated that the second wife can claim maintenance under Hindu Adoptions and Maintenance Act, 1956. In this case, the appellant was not informed about the first marriage of the respondent. Moreover, the relationship of appellant continued for 14 years with the respondent. The court while granting maintenance stated that if the same is not granted then that would mean that premium is given to the respondent to defraud the appellant.

The court stated that bigamous marriage may not permit grant of maintenance under section 125 of the Code as it would be illegal but the right to alimony cannot be denied merely because such relationship is immoral. The said contention finds expression in the case of the Supreme Court in *Rameshchandra Rampratapji Daga* v. *Rameshwari Rameshchandra Daga*.

The Malimath Committee Report on "Reforms in the Criminal Justice System" made a suggestion which stated that the word "wife" in Section 125 of the Code be amended to include a woman who is "living in" with a man for a "reasonable period". Strangely, in 1985, the Hon'ble Supreme Court in *Sumitra Devi* v. *Bhikan Choudhary* had held that if a man and woman cohabits for a long time and they are treated as husband and wife by the society then presumption of marriage will arise for awarding maintenance. However, the judiciary has not extended its scope to include purported live-in partners.

In the case of *M. Palani* v. *Meenakshi,* one of the contention of the petitioner was that mere proximity at some time for mutual pleasure could not be labelled to be as a "domestic relationship". The Madras High Court examined the definition of "domestic relationship" as given in Section 2(f) of the PWDVA which do not state any time period to establish domestic relationship between a man and a woman. The Court held that "at least at the time of having sex by them, they shared household and lived together". Applying the provisions of the Act in such a case, the court upheld maintenance claim. This may be said that this might be used by women as a weapon against the men community but at the same time the issues pertaining to other wife has been addressed by it..

The Hindu Succession Act, 1956 does not give any inheritance rights to the partner's property. The said Act does not specify succession rights to

even a mistress living with a male Hindu. However, the Supreme Court in *Vidhyadhari* v. *Sukhrana Bai* created a hope for persons living in such relationship together resembling husband and wife by stating that those into such relationship from a substantial long period of time can receive property inheritance from a live-in partner.

RIGHTS OF CHILD BORN OUT OF LIVE-IN-RELATIONSHIP

Since the concept of live-in-relationship is not administered by any legal regime, issues cropped up with respect to child born out of such relationship. Not only had it raised the concern in context of legitimacy of such child but also dilutes the comprehensive and over-all development and upbringing of the child when one of the partner walks out of such a relationship. This, in turn, affects the child mentally and emotionally. Further, the issues related to maintenance of such child and his/her rights in the property was the area of major concern. The problem of custody of such child also aggravated the problem.

The steps taken by Indian judiciary in relation to the aforementioned issues are welcoming change when compared to the regressive outlook adopted by the society. However, even though the judiciary, through various case laws, have determined the right of a child born out of live-in-relationship, such child suffer from the odd-reactions of society. This raises an important question that would challenge the conscience of the society i.e. why such child should be blamed and have to suffer the social stigma for no fault of his/hers?

The response of the courts in affirmative while addressing the above issues by using the purpose interpretation of law is discussed below using various case laws which became the law of the land.

The issue of legitimacy is important as this would decide the further rights of the child born out such relationship. It is to be noted that section 5(1) of the Hindu Marriage Act, 1955 (hereinafter referred to as the HMA) lays conditions for a Hindu marriage. It elucidates that marriage can be solemnized between any two Hindus if none of them have spouse living at the time of the marriage. Further, section 11 of HMA states that violation of Section 5(1) would render the marriage null and void. It is to be noted that post amendment brought in by Amendment Act of 1976, section 16 of HMA states that children born out of null and void marriages as enunciated in section 11 will also be regarded as legitimate child. Thus, the intention of the legislature to bring in social reform by conferring the status of legitimacy to child who would otherwise have been labelled illegitimate is clearly reflected in the section.

In the case of *S.P.S Balasubramanyam* v. *Suruttayan @ Andali Padayachi & Ors.*, the court, besides stating that presumption of husband and wife will arise if the couple is found to co-habit under the same roof for many years, held that child out of such relationship is not illegitimate.

In *Smt. P. E. K. Kalliani Amma & Ors.* v. *K. Devi & Ors*., the Hon'ble Supreme Court stated that section 16 of HMA is not constitutionally void. The court further opined that in view of the legal fiction contained in section 16 of HMA, the illegitimate child needs to be treated as legitimate child for all practical purposes, including succession to his/her parents' properties. It is to be noted here that such child has limited rights i.e. rights limited only to his/her parents' properties. Based on this rule, such child cannot succeed to the properties of any other relation.

The case of *Rameshwari Devi* v. *State of Bihar & Ors.* raised an issue as to whether after the demise of a government employee, his child born out of live-in-relationship can claim share in pension/gratuity and other death-cum-retiral benefits along with the children of deceased who were born out of wedlock. Answering the issue in affirmative, the court held that under section 16 of HMA, children born out of void marriage, who should be treated illegitimate, will be considered legitimate.

The court of highest appeal, in the case of *Jinia Keotin & Ors.* v. *Kumar Sitaram Manjhi & Ors.*, stated that while engrafting section 16 of HMA, the illegitimate children have become entitled to get share only in the self-acquired properties of their parents. The court further went on to state that Section 16 of HMA has been drafted with the intention to do justice in context of a child who is born out of live-in-relationship. The court stated that the legitimate status of children is dependent upon the marriage of their parents being valid or void. Thus, it depends on the

acts of parents on which the innocent child has no say or control. However, for no fault of child, he/she has to suffer the permanent set back in life and in society by being treated as illegitimate. Enactment of Section 16 of HMA treating such children to be legitimate is a laudable step taken by the legislature to overcome the great social evil prevalent in our society.

In the case of *Bharatha Matha & Anr*. v. *R. Vijaya Renganathan & Ors.*, the court stated that child born out of void or voidable marriage is not entitled to claim any inheritance rights in ancestral property. Such child enjoys that right only with respect to self-acquired properties, if any.

A contention can be made at this juncture that when the child who is born out of live-in-relationship has not committed any fault then why should he be treated differently than those who are born out of wedlock. Doesn't it seem that even the parliament and legislature are reluctant to broaden their mental horizon and meet the need of the society? To this one could argue, that accommodating the rights of child born out of void/voidable marriage would affect the rights of children born out of wedlock. This argument would stand baseless as the share or the rights of legitimate children born out of wedlock can get affected by other things also like for instance one making a will or a gift or to meet family obligation or uncertainties such as insolvency, bankruptcy etc. to name a few. Children out of live-in-relationship should also be given the full rights as enjoyed by legitimate child born out of wedlock. Even the

judiciary found its hands tied as they cannot legislate a law or amend the law.

The court in *Jinia Keotin* case stated that section 16(3) of HMA needs to be read carefully. It starts with a non-obstante clause specifically stating that nothing contained in other sub sections of the said section would confer any right on to the legitimate child who would otherwise have been illegitimate, with respect to property of any other person except the properties of parents. Express mandate in section 16(3) of HMA prohibits resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting section 16 of the Act. Attempt to do so would be against the Act and would also amount to judiciary encroaching the field of legislature against something which is expressly mentioned in the Act.

With regards to maintenance of child born out of such relationship, sSection 21 of the Hindu Adoptions and Maintenance Act, 1956, a legitimate son, son of predeceased son or the son of predeceased son of pre-deceased son, so long he is minor and a legitimate unmarried daughter or unmarried daughter of son or the unmarried daughter of a pre-deceased son of pre-deceased son, so long as she remains unmarried shall be maintained as dependents by his/her father or the estate of his/her deceased father. However, child born out of live-in relationship is not covered under the Act and as a consequence such child is denied maintenance rights

In order to meet the ends of justice, the Indian judiciary in the case of *Dimple Gupta* v. *Rajiv Gupta* held that even an illegitimate child born out of an illicit relationship can claim maintenance under Section 125 of the Code. The Code provides for maintenance rights to child, irrespective of his/her legitimacy status. In the case of *Captain Ramesh Chander Kaushal* v. *Mrs.Veena Kaushal*, recognizing the said piece of legislation as social legislation to protect child, the court held that *"the right to maintenance is condition to the fatherhood of the child being established."*

The denial of such right under the legislation to child born out of such relationship can also be challenged under Article 32 of the Constitution of India as this would amount to violation of fundamental right i.e. Article 21 of the Constitution of India which provides the right to life and personal liberty and the such denial can deprive such individuals of their right to lead their lives with dignity and this upheld by the *Kerala High Court in PV Susheela* v. *Komalavally*.

REASONS OF GIVING PREFERENCE TO LOVE-IN RELATIONSHIP

The preference to the idea of live-in relationship is given because of several factors. One of the major factor is the existence of the concept of divorce in the institution of marriage. The patriarchal society makes the divorced women suffer social stigma. This is, however, not there in live-

in relationship. Further, the institution of marriage is founded on the grounds of commitment and many obligations flow from it onto the couple entering into a matrimonial bond. To avoid any such commitments and obligations, people prefer live-in relationship more than marriage. The personal laws doesn't allow for inter-caste marriage. Moreover, people who marry inter-caste are not fully accepted by the society. As such, to avoid these, the idea of live-in relationship gains preference over marriage. Since this relationship doesn't impose any legal obligations on couple, the couple finds comfortable to enter into such relationship hassle-free. In the concept of arrange marriage, the couple don't know each other in a truest sense of the term before entering into a matrimonial relationship. They know each other only superficially as mostly the marriage gets fixed by the adults taking consent of the to-be married partners. As such, to know the compatibility between each other, couples are seen giving more preference to the concept of live-in relationship over marriage. There is an economical reason too behind this. In order to reduce the burden of household expenses, expenses to stay etc., people prefer partners to share the cost with.

ISSUES PERTAINING TO LIVE-IN RELATIONSHIPS

Our country is an amalgamation of culture, religion and traditions which are respected, adored and preached. The basic structure of India is stuck in an unusual dichotomy, the principles which are enshrined in the deepest contours of our society vs the overarching urge to reform our thinking in a manner which aligns with a more liberal and modern perspective. This differentiation in ideologies have created myriads of conflicts, one of which is the threat live in relationship has to marriage and traditions. An increasing number of couples choose a live-in relationship, over marriage. In such situations, various economic, social and legal issues have arisen and continue to do so. Some of them are as follows:-

- The issue with the order laid down by the court is that a live-in relationship can be misconstrued for high tech adultery. The parameters for establishing this narrative are simple, it lies in the regressive outlook of the society and popular perspective.
- Another problem which arose was regarding women and their safety. The degree of commitment in a live in relationship is comparatively low to marriage, therefore a possibility of vulnerable future for the woman arises.
- A child is a docile and unaware entity. The concept of love-in relationship is tabooed, therefore a child of such a relationship will

be a social stigma, especially when the father refuses to marry the mother.

- Rights, obligations and responsibilities of both the parties are not clearly defined.
- There is minimum clarity as to the duration a couple must cohabit together in order to be considered as husband and wife.
- These relationships are considered as an unreliable platform to build a relationship with such heinous ramifications.

The Supreme Court held in the judgment that a man and a woman cohabiting under the same roof for a substantial amount of time shall be deemed to be presumed married under Section 114 of the Indian Evidence Act. The rationale conclusion of the Supreme Court statement is that a long term cohabitation will be presumed to be a marriage. Therefore, a fundamental paradox persists between the judgment and the concept of live in relationship which is that the motive of going through such an exercise is to avoid the presence of marital rights.

CONCLUSION

The social fabric of our society calls for a change in its outlook with respect to live-in relationship. Article 21 of the Constitution of India guarantees right to life. This right encompasses the right to live the way one wants. This endorses the view that if two adults wants to live together then they can do the same. Living together and spend time of

one's life with another is a personal choice and right. As such, one should be given full liberty to do so. However, seeing the current societal norms, the loophole in such relationship i.e. its foundation, absence of any commitment, vulnerable position of women etc. There is a dire need to bring in a legislation governing such relationship.

The interpretation of judiciary of such relationship in line of PWDVA fails to bring in all kind of relationship under the banner of 'relationship in the nature of marriage' as used in the said Act. Further, grant of mere acknowledgement of such relationship in PWDVA, is only subject to protection from domestic violence. It does not grant any maintenance rights as such.

Section 125 of the Code, being a beneficial piece of legislation, should also grant maintenance rights to the woman who is into a live-in relationship. Women in this relationship, being akin to marriage, should also be protected and maintained in case if they are unable to do so. The negative response of the law-makers in relation to this issue, even raised by Malimath Committee and Law Commission of India, needs reconsideration. The said section should be amended so as to include women in live-in relationship also under the ambit of wife.

The research also brings us to the conclusion that non-grant of maintenance gives opportunity to males to taking advantage of such a

loophole in the legal regime. It permits them to do wrong without being penalized for the same.

More awareness regarding such relationship should be spread so that people understand the true purpose behind the existence of such relationship. The ones entering into such relationship needs to cooperate with each other and shouldn't enter into such relationship with any ulterior motive. 'Walk-in and walk-out' shouldn't be the case wherein one even violates basic human rights of others.

TERMINATING PREDICAMENTS BETWEEN SEDITION AND FREE SPEECH

By Shiva Parashar & Sumit Mirotha, students of Rajiv Gandhi National University of Law, Patiala.

THE NEED TO DRAW A LINE BETWEEN - A FREEDOM AND AN OFFENCE

Of late, a debate has stirred up upon the restriction on the freedom of speech due to the contentious law of sedition. Sedition is a heritage of our colonial past.The sole motivation behind the incorporation of this provision was to subjugate the masses. Now, the times have changed; India is a democracy now, and the people enjoy a right to speak their minds and criticize the State. Does that mean they could speak anything?

Section 124A of the Indian Penal Code, 1860, provides with a restriction to their speech. Are the restrictions enumerated in this provision, reasonable? Can a law curtail the freedom of expression? Amidst a lot of divergent opinions, the provision is presently relied to be reasonable,althoughit is vague and applied inconsistently by various courts. The Center of Debate, is the point where the freedom of speech ends and the offence of sedition begin. Indian courts have tried to demarcate the line but the same has become unreliable as the government has used sedition as a weapon to mum the voices raised against them.More so, the police have failed to understand the ambiguous and lengthy guidelines drafted by the Hon'blecourts. In this situation the citizens of this nation are left in a state of destitutionwhere they are uncertain if uttering a few words could land them up in a prison. Many rely on the assertion that repealing the law of sedition would solve the delinquency. On the other hand, one cannot ignore the principle of *salus reipublicae suprema lex,*which means that security of state cannot be compromised at any cause. This paper explores the points of distinction between the freedom of expression and a seditious speech. It further analyses the shortcomings in the present law and the obstructions in its execution and suggests that the law of sedition be retained in the statute book along with certain specified amendments.

"To be anti-Indian is not a criminal offence, and it is definitely not sedition"

-Fali Sam Nariman

Words have power, they can influence masses. Words can bind people together as one and they also possess the ability to spread hostility and antagonism. They can hurt and can also incite someone to hurt another. An adverse statement which expresses the speaker's hatred or bigotry against any individual, a community, the government or an organization is hate speech.In India, hate speech could be anti-national (sedition); communal, racial, lingual, ethnical and descent related; outraging religious feelings; etc. Further, it could be humiliating, threatening and aimed to incite violence against a particular religion, race, gender, ethnicity, nationality, sexual orientation, disability, political views, and social class and so on.

Lately, a lot of hue and cry has been raised in regard to,Hate Speeches against the State and its Functionaries, which is also known as Sedition. As a consequence of the same, two sets of factions have emerged, on one hand, are those who advocate the claim for a fundamental right of speech and expression, with minimum levels of constraints and the other, are the ones who supports the restrictions for the interest of the general public, as it is paramount for the peaceful Society.

The issue pertaining to hate speech is posingacomplex and mischievous problem for the exercise of freedom of speech and expression which is

guaranteed by the Indian Constitution.It is a freedom to the extent of, neither inciting nor, encouraging violence or violation of the law.

The Fundamental Right To Speak

Freedom of speech and expression is an integral part of a democracy and lays down the foundation of all democratic organizations. Every citizen must be allowed to participate in the democratic process and, to enable him to rationally exercise his right of expression, unrestricted discussion of public matters is undeniably crucial.

A subversive speech stands on the boundary between the freedom of speech and expression and the reasonable restrictions. Here,Voltaire'sobservation, which clearly supports the idea of free speech for both, the person propagating the hate speech and, the persons targeted by the same, becomes significant. In very simple words he keeps: *"While I disagree with what you have to say, I will defend to the death your right to say it."* The rationale behind this right is that unrestricted speech is a natural right of every person, and the same should not be tarnished if somebody finds it objectionable.

Freedom of speech and expression has an aspect of duty as well. A man hampered with an idea, not only has a right to express it but he also owes a duty to express it. He owes it to his conscience and common good of the public for it is a necessary condition of public discussion. In this way, the public benefits in extracting the truth from the falsehood.

Constitutional Restrictions on theFundamental Right to Speak

Freedom of Speech and Expression is not an absolute or unconditional fundamental right. It is subjected to reasonable restrictionswhich areenumerated in Article 19(2).These restrictions are in respect of maintenance of sovereignty and integrity of the state, along with the public order, morality and decency.

An unrestricted right will serve as swordin the hands of those who wish disorder and anarchy, propagandize protests or views. Free speech can only be taken away if community interest and public order is endangered. This anticipated danger shall not be remote or far-fetched; instead it must have a proximate and direct nexus to the expression.

There cannot be a universally standardized or general test for the determination of reasonability.In *The Superintendent, Central Prison,Fatehgarh v. Ram Manohar Lohia,,* theapex court made an effort to describe the reasonability of a restriction, by stating that in order to be reasonable, a restriction must have a reasonable relation to the object which the legislation seeks to achieve, and must not go in excess of that object.

Freedom of Speech & the Dilemma of Sedition

The framers of the Constitution came across, the dilemma as to whether the word ‘sedition’ should be used in Article 19(2) or not and if it was used then it what sense it was to be used. Many believed that the

offence of sedition was essentially an offence against public disorder. Law like sedition had been used to subdue Indians. The framers made a prudent decision to use more generic terms which covered sedition and every other offence against the state.

The word ‘sedition’ is derived from the Latin word ‘seditio’ which means, ‘a going aside’. It is an act or expression which brings the sovereign authority into contempt or hatred or which disturbs the tranquility of the state. It is essentially the defamation of the state. It is a more serious offence than an ordinary breach of peace. Section 124A, which embodies the offence of sedition appears in Chapter VI of the Indian Penal Code under the heading “Of offences against the state”. This section embodies only one aspect of sedition i.e., seditious libel.

The Law regarding sedition in India is colonial in origin and nature, which had been used to subdue Indians. Section 124A was adopted into the statute book on August 2, 1870 and a new element of suppression was added to the Anglo-Saxon jurisprudence. This stringent law was incorporated only with the purpose to suppress the voice of Indian freedom fighters and strengthen the command of the British upon the Indians. Mahatma Gandhi, during his trial in the case of sedition, declared Section 124A to be the prince among the political sections of the Indian Penal Code deliberately positioned to suppress liberty of the Indian masses.

A Legacy of Unsteady Status of Sedition

The question regarding the constitutionality of Section 124A troubled the judges of the highest court for years. There are divergent views within the judiciary in regard to this provision. Many High Courts had declared this provision unconstitutional. It was finally answered in *Kedar Nath Singh v. State of Bihar* that a constitution bench of the Hon'ble Supreme Court ruled this provision to be constitutional and detailed a comprehensive study on this provision.

Distinction between Free Speech & Subversive Speech

A speech which brings into hatred or excites disaffection against the sovereign government with an intention to do so is sedition. While, on the other hand, the commission of an act with an intention to show that the government is deluded or erroneous in its actions or to point out mistakes or flaws in the government or in the law is not sedition. In other words, the speech must have a direct and consequential effect on the public order to be termed it to be seditious. The authorities need to apply this hate speech provision objectively. Sedition cannot be used in case of speeches expressing disagreement or opinions against the government unless it excites terror and violent attacks. It means that every citizen has the right to express their opinions (even if it is 'anti-national') without any fear unless it excites violence.

The subjects have a right to criticize the measures of government. A citizen has every right to say or write whatever he likes about the government, by way of criticism so long as he does not incite people to resort to violence. It is a defense of sedition, as long as the speaker bounds himself in certain limits. Indian courts have tried to outline these limits within which a speaker must bind his tongue. But sometimes the situation is not as plain and manageable. Can a definite line of distinction be made that can demarcate between a sincere criticism and a seditious hate speech? If at all a line is demarcated, who will examine the government, who use sedition as a weapon to mum the voices raised against them? The flexibility of this law becomes an advantage for the governments. More so, how can police be made to understand the ambiguous and lengthy guidelines drafted by the Hon'ble courts? Arrests of innocent citizens on the charge of sedition have grown considerably during the past decade. Intolerance has become quite a concern in India in recent times. But here it is the government's intolerance towards critical speeches that has tarnished the basic freedom of expression.

Misuse of Law by the Lawmakers

Lately, many governments both at the Centre and in states charge sedition as soon as they hear a speech critical of the government. The guidelines issued by the Maharashtra government to the police in the aftermath of the cartoonist Aseem Trivedi case are of a similar nature. It

is a setback to the ideals of democracy. The guidelines state that sedition charges would apply to whoever is critical of the central and state governments, elected representatives belonging to the government, Zila Parishad chairmen, Mayor of a city, and other elected representatives of the government. This circular brings the freedom of expression to a standstill. It has departed from the fundamental right of the freedom of speech and expression. Governments have become so self-protective of their status that they are making a colorable exercise of power which further provides with fuel to hate speeches. Rajinder Sachar, remarked over these actions of the government that we are going through an undeclared emergency. The restriction on speech is nothing less than a state of emergency.

The Supreme Court ruled in the *Kedar Nath case* that comments however strongly worded, expressing disapprobation of action of the government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal. The Maharashtra government circular is in utter disregardandcontempt of the Supreme Court ruling.The government cannot expect its citizens to regulate their speech, if itadopts such harsh measures on the subjects.

Vague and UnclearTactics of Police and The Lower Judiciary

In *Bilal Ahmed Kaloo v. State Of Andhra Pradesh*, the Hon'ble Supreme Court made an observation regarding the "casual attitude" of the lower judiciary and the police, while convicting an accused of a serious offence as that of Sedition, without any material evidence:

"Before parting with this judgment, we wish to observe that the manner in which convictions have been recorded for offences under Section 153A, 124A and 505(2), has exhibited a very casual approach of the trial court. Let alone the absence of any evidence which may attract the provisions of the sections, as already observed, even the charges framed against the appellant for these offences did not contain the essential ingredients of the offences under the three sections. Mechanical order convicting a citizen for offences of such serious nature like sedition and to promote enmity and hatred etc. does harm to the cause. It is expected that graver the offence, greater should be the care taken so that the liberty of a citizen is not lightly interfered with."

Looking back at the incidents which happened in the past decade where majority of people were booked under the charge of sedition, and were released due to failure of the police to submit the charge sheet or where majority of them were convicted in the Lower Courts but later they were not found guilty by the High Court or Supreme Court, this shows that how much litigation is involved but the important point to infer is that there has been a grossly misuse of section 124A. While conviction is rare, the long and tortuous legal process is seen as a deterrent to others.

Quite recently, in the Kanaihya Kumar incident, the debate over the freedom of speech and the colonial law of Sedition caught up fire in the mind of the citizens of India. A general opinion is that the recent governments have become intolerant towards disagreements. Bhindranwale, an extremist who was considered a terrorist by many was a controversial figure, followers of Bhindranwale have upsurged, they declare him to be a martyr and claim Khalistan, a separate nation for Sikhs, but this is not considered seditious by anyone. If we consider the JNU incident on the same parameters, JNU students did nothing wrong if they organized a meeting to honor Afzal Guru. The ambiguity in the implementation of a law like sedition creates uncertainty in the minds of the public.

In *Balwant Singh case*,Hon'ble Apex Court, generously analyzed of the text of Section 124A, and acquitted two persons accused of the charges of sedition. These men raised the slogans of "Khalistan zindabad", "Raj karega Khalsa" and "Hinduan nun Punjab chon kadh ke chhadange, hun mauka aya hai raj kayam karan da", a day after the assassination of Indira Gandhi. The Hon'ble Court observed that raising the slogans a few times, which did not evoke any response and did not create any law and order problem, did not attract Section 124A. Henceforth, a mere display of sympathy toward any person or a cause and an actual commission of the offence of sedition are very distinct in itself. Police should mind the difference between advocacy and incitement. The

difference between them is same as that of preparation and attempt and in this case incitement is punishable and not the advocacy.This ruling of the apex court clarifies that advocacy and sympathizing with a cause will not be a crime, till the time it turns into incitement of violence.

Furthermore, the police do not understand the implications of words like disaffection and disloyalty. They only file the FIRs and do not indulge into the understanding of the words mentioned in the text itself. Thus a lot of FIRs are filed against individuals but only a few are found guilty with the charge of sedition. Many a times, innocent citizens suffer arrest without reasonable application of mind. Prakash Ram, a resident of Haldwani, Uttarakhand was accused of being a Maoist. Police arrested him on charges of sedition. After eight long years of struggle in the courts, his name was finally cleared by the Sessions Court. He stated that *"I spent two of the best years of my life behind bars (he was granted bail in 2006) and six more years in my battle for Justice," "I may be free now but this arrest has spoilt my reputation and will make it difficult for me to get work".* There many like Prakash Ram who is hassled by this relic of our colonial past.

Further it must behighlighted that sometimes the arrest of individuals, rather than the slogans shouted, could lead to tension and a law and order problem.This over-sensitiveness attitude could be counter-productive and invite more trouble. Indeed, the explanations to Section 124A make it clear that criticism or disapproval of actions of the

government do not amount to sedition. In a country like India, it is inevitable to have disaffection towards government's actions and not every form of disaffection could be treated as sedition.

Should Sedition be REPEALED or RETAINED?

Former Prime Minister Pt. Jawaharlal Nehru had once said, *"now so far as I am concerned [Section 124-A] is highly objectionable and obnoxious and it should have no place both for practical and historical reasons, if you like, in any body of laws that we might pass. The sooner we get rid of it the better."*Further, many of the liberalists believe that the provision in regard to sedition as stated in the Indian Penal Codeis too colonial and in utter contradiction to the constitutional provision of freedom of speech and expression.

A prohibition on speech, whether hateful or not, undermines democracy. Voice of every individual has its own significance even if he is a minority. In the absence of such a right, it is democracy that suffers along with those who are in power. There is a necessity to reassess the sedition law and review it according to the present-day conditions. If we look at this situation from the other side, then the people also possess a right to know to what others have to say. It is another facet of the freedom of speech. The notion of "marketplace of ideas" has to be recognized both by the judiciary and the legislature. Society is best served when ideas, even hateful ideas, are disproven through public

debate.This little curtailment sometimes becomes a tool to abuse the law.In 1962, the Supreme Court ruled that speech or action constitute sedition only if it incite or tend to incite disorder or violence. Yet various state governments continue to charge people with sedition even when the standard is not met.This provision of law is vague and prone to abuse by the authorities.

India gained freedom from the British after a long battleand we acquired certain habits and ideas from them. The law pertaining to sedition is one of them. Sriram Panchu (Senior Advocate) once said that, *"Countries like the US and the UK (which ironically introduced the law in India) have repealed the law. It is only counties like Saudi Arabia, Malaysia and Sudan that still hold on to sedition. Which of these two categories of countries do we want to follow?"*Even the British, who introduced this law in India, have scrapped it. He further commented sedition as an attack on the liberal polity of the nation. This outdated law has no place in a democratic setup like India. Moreover, it has been used more often by the independent India's governments than the British government during its presence.

On the other hand many, Countries like Scotland, Australia, Italy, France, Canada and the United States have laws similar to the offence of sedition as laid down in India. Recently, Malaysia strengthened its sedition and anti-terrorism laws and extending the term of sentence for the offence as well.

A state has to be equipped with the authority to punish those who by their conduct, endanger the safety and stability of the state, or spread such feelings of disloyalty and disturb the public order.Maoist insurgents and similar other groups have posed to be a great threat to the sovereignty of this nation. These groups believe in overthrowing the state governments through violent measures.These groups influence a lot of men.In presence of these adversaries of the nation, it would be foolish to abolish a law like sedition. Furthermore, under the principle of *salus reipublicae suprema lex,* which means that safety of the state is the supreme law, laws like sedition must be given a place in the statute books. It is the safety of the state which must be protected at all costs. For a government to work for its subjects, it has to be sovereign in its command and authority. There are both sides of the coin. Although, sedition marks an end to free speech but its presence in a country like India cannot be slashed. In spite of this, an effective regulation is required in the enforcement of this law.

Scholarly Recommendations

As a result, this law must not be repealed, but must be retained to help the sovereign authorities to curb the incidents of violence against the state and to preserve the integrity of thisnation, and maintain the public peace and morality.

Firstly, that there are many victims of police ruthlessness, as discussed earlier. Therefore, police must be trained enough to ensure that incongruous cases of sedition must not be lodged. Furthermore, as a procedural aspect, a compulsory legal opinion from the law officer or district attorney must be taken before invoking sedition. But many believe that time should not be wasted in taking a legal opinion and a senior police officer shall decide on this matter.

*Secondly,*Section 124A, which works as a restriction on Article 19(1) (a) of the Indian Constitution should be made more conform to Article 19(2). The mens rea has not been included in the provision. Words like "intention" and "knowledge" must be added to charge seditious intentions expressly under this provision.

Thirdly, that the definition should be extended to include disaffection towards the Constitution of India, Parliament and State Legislatures and the Administration of justice, as it is fundamental duty of every citizen to abide by the Constitution and respect its ideals and institutions.Therefore, it will enforce the duty upon the citizens, not to incite disaffection towards the Constitution and its institutions.

Fourthly, that under the present provision of sedition, even an unsuccessful attempt toward sedition would be labeled as sedition. An unsuccessful attempt will not undermine the sovereignty and integrity of

the state or any of its institutions. Thus this section must be amended to remove unsuccessful attempts out of its definition.

Fifthly, thatthe 42nd Law Commission in its report recommended that, the punishment for the offence of sedition to be fixed at a maximum of seven years. While the other serious offences in the category "Of Offences Against the State" have a lesser term of imprisonment, a person convicted of sedition could be sentenced either for a maximum period of three years or for life. It is quite evident that the present sentence fixed for the offence is obscureand it needs to be altered.

Sixthly, that in 2015, Shashi Tharoor moved a private member bill in the parliament, which states that, a person could only be charged under sedition only if his words, signs or visual representations results in the commission of an actual offence, punishable under the IPC. His proposition narrows down the ambit of sedition and might put an end to thedevious and unscrupulous suppression of masses due to the law of sedition.

Conclusion

Free speech is quintessential for maintaining democracy because it facilitates the exchange of diverse opinion and ideas. Freedom of speech lay at the foundation of all democratic organizations. The Preamble of the Constitution of India speaks of liberty of thought and the freedom of expression, belief, faith and worship. It cannot be over emphasized that

when it comes to democracy, freedom of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme. Freedom of speech and expression, though not absolute, was necessary as we need to tolerate unpopular views. This right requires the free flow of opinions and ideas essential to sustain the collective life of the citizenry. While an informed citizenry is a pre- condition for meaningful governance, the culture of open dialogue is generally of great societal importance. The object of guaranteeing constitutional protection to freedom of speech and expression is to advance public debate and discourse. However, speech laden with harmful intent or knowledge of causing harm or made with reckless disregard is not entitled to the protection of Article 19(1) (a). Such speech has no social value except in cases where it is a truthful statement meant for the public good

The law enforcement agencies have always used sedition against artists, public men, intellectuals, and many others for criticizing the governments. Whereas the communal killers, mass murderers, and rapists who prey on the poor, roam free. The strict interpretation must be done away with by the authorities and they should rather build up a case of sedition on liberal grounds of interpretation of the provision.

Hence, it is arduous to determine where to draw the line but, it must be drawn as far as possible in the favor of free speech. The Indian Judiciary played a major role in interpreting the law more liberally and rationally

to craft a clear and luminous distinction between the discussion of ideas and an act of endorsement towards hatred towards the government.

In the 21st century, people are actively participating in the country's affairs. The Constitution of India gives the freedom of speech and expression and it is subject to reasonable restrictions enumerated in section 19(2). It should not be neglected that the Supreme court have issued guidelines on invoking the charges of sedition which specifically provides that the provisions of section 124A are only made out where there is a tendency to public disorder by use of violence or incitement to violence. But the invocation of hate speech and sedition in a series of cases has stirred up the debate. Arrests of people like Hardik Patel, Aseem Trivedi, and many others, could be seen as sign of the increasing intolerance of the Indian government of any political movement venting out people's grievances.

The offence of Sedition involves the question of the relationship between a government and the people. In the past, when the government was the absolute ruler and people were the subjects, any opposition, however peaceful, was considered a challenge to political authority and, as such, was punishable as sedition. After, the arrival of the democratic government, recognition of sedition became controversial; the line was required to be drawn between permissible speech and justifiable limits in the interest of safeguarding the political authority of a democratic state.

Justice Brandeis in a concurring judgment in *Whitney v. California*, ruled that fear of serious injuries cannot alone justify suppression of free speech and assembly. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to believe that the danger is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. He even stated that the path of safety lies in the opportunity to discuss freely the supposed grievances and their proposed remedies.

In *Sanskar Marathe case*, the court had taken the duty upon itself of drawing a clear line of demarcation between the ambit of a citizen's fundamental right guaranteed under Article 19(1) (a) of the constitution and the power of the legislature to impose reasonable restriction on that guaranteed right in the interest of, inter alia, security of the state and public disorder. If some advocacy or act results in violence, we can say that the line has been crossed from the exercise of free speech to sedition. The courts have given the illumination, a line of demarcation between free speech and subversive has been carved. Now it is the duty of the functionaries of the state to pursue on those lines so that the liberty of the citizens is not interfered with.

In a democratic society like India, tolerance for contradictory and dissenting expression of opinion need protection on the pretext of individual right of self-expression, but aggressive mode of expression likely to cause social disruption, spread hatred and violence in the

community, cannot be allowed to be propagated. For larger social good, a little curtailment on individual freedom is permissible and constitutional, though one must remember Rabindra Nath Tagore, when he, through his Poem "Where the mind is without fear", indicated that, Fear prohibits the flow of Knowledge in the mind of people.

Dilemma Of Choosing Medical Paternalism or Patient Autonomy for Better Patient Compliance

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Introduction:

Medical science is both an art as well as a science. It is an art because it deals with the most delicate things such as feelings, reassurance, subjugation for the mitigation of any suffering. It is the most potent , innovative and powerful science because it deals with human beings, their health and suffering. This extreme knowledge makes the person practising this science as the person with an overwhelming power as one can have over any other individual. However this influence over any other individual is the most benevolent of any action taken for the life and mitigation of misery in the form of suffering . Hence the physician

assumes the role of a paternalistic individual in guiding the patient to choose the correct path to good health. This is most important when the patient is sick and his facultative integrity has been compromised and his immediate relatives and attendants in overwhelming emotions are not in a fit state of mind to take correct decisions. This is when the physician takes the role of a guide to give him correct decision. However, in this age of liberalism especially when the integrity of the patient needs to be violated in the form of any interventional procedure, the knowledge parted to him and his relatives regarding disease and the course to be taken with all the possible alternatives through an informed consent sets to preserve the sovereign right of the patient over his body.

The current study sets to look at both these aspects and strike a middle path in the form of harmonising both the extremes.

Professional Sovereignty as the basis of Paternalism:

Arts and science streams were thought to liberate humanity from deficiencies and whims of natural forces, ignorance and irrational beliefs, absolutions and diseases of the body and the spirit. With settling of reasoning in human behaviour, the excessive weight of hunger and defeat has been somewhat dampened and decreased but this has also given rise to a new world order of power by virtue of their knowledge over other people and this authority through the channel of its overall superior knowledge over vast institutions has been able to manage and

rationalize the cognisant form of human labour. Modern medicine is one of those extraordinary works of reason; an elaborate system of specialized knowledge, ever evolving technical procedures and principles and standards, a code of regulation of behaviour. If we set aside these obliquities we can see that science in its modern avatar has succeeded in releasing the humanity from the constraints of the burden of diseases to a large extent. From cultural relativism and pragmatist view, a liberal suffering from bad fever or a fractured limb would never consult a traditional healer to a modern physician just to prove his obsequious views. Medicine is a world of unmistakable power where the learned few through their reasoning capabilities have a partially more significance than the others.

The history of medicine has been written as an epic of progress, but it is also a tale of social and economic conflict over the emergence of new hierarchies of power and authority, new markets and new conditions of belief and experience. Power, at the most rudimentary personal level, originates in dependence, and the power of the professions primarily originates in dependence upon their knowledge and competence. To most of us this power seems legitimate. When professionals claim to be authoritative about the nature of reality, whether it is molecular structure, the conscious thinking or the world we generally defer to their judgment. The medical profession has had an especially persuasive claim to authority, the reason being that the physicians offer a kind of

individualized objectivity, a personal relationship as well as authoritative counsel. The very circumstance of a diseased body lowers the intellectual integrity and promotes acceptance of their judgment. The power is altruistically enlisted solely in the interests of health - a value of usually unsubdued importance to its clients and society. On this basis physicians exercise authority over the patients, their co-workers in other health care delivery system and to a large extent on public at large in matters even outside their jurisdiction. In a strict clinically professional relationship this authority is often in quintessential aspect a basic requirement in the curative process, when a person is sick his judgemental capacity is obtunded , and he is not the best judge of his own needs, nor are those who are emotionally close to him. Apart from the specialised information which a physician possesses , they have a distinct edge in the judgemental superiority. Furthermore, effective therapeutic measures frequently require not only difficult tasks but certain repelling tasks, like violating the integrity of the body and also rechanneling the unconscious urges of some patients to be sick and to be cared for. Professionals are ideally suited for this role because they can refuse to indulge such tendencies in patients without threatening their relationship with them. Also professional authority facilitates cooperation in recovering besides compensating for the often impaired and inadequate judgment of the sick.

Choosing Paternalism:

Paternalism is the impedance with individuals' freedoms or independence "for their own particular great" or to "keep their damage" independent of the inclinations of the individual whose freedom is being shortened. An intense approach to comprehend the issues and discussions about paternalism in solution is to consider the instance of Dax Cowart, who was extremely harmed following a gas blast which severely charred areas more than 67 percent of his body. A 1974 film, shot 10 months after the mischance, demonstrates Cowart experiencing agonizing yet life-sparing medications. The unit specialists told White, a plastic and reconstructive specialist that Cowart was unreasonable and discouraged any form of treatment and should be pronounced non judgemental so that his mother could be named his legitimate watchman and thus could approve surgery to save his face.

Ultimately Cowart consented to the surgery since, he said, he trusted that it was the speediest course out of the doctor's facility, where he could restore control over his life. The trouble with paternalism for legitimately skilled people is that, to begin with, somebody's genuine conviction about what is useful for someone else might not be right. With the best goals individuals might be mixed up about what are damages or advantages for others. Second, constraining the freedom of equipped people offers lacking admiration for their self-governing activities or their capacity to settle on choices for themselves. Individuals discover it naturally profitable to arrange their own lives and

live as they wish . Third, there is utility or instrumental esteem in giving individuals a chance to live as they wish on the grounds that able individuals by and large are the best judges of what is best for them and in light of the fact that we gain from each other's victories and disappointments . In choosing for ourselves, in addition, we build up our potential as self-sufficient people, pick up regard from others, and don't feel impeded. Paternalism is for the most part considered an outlandish impedance with the freedoms of individuals who can act self-rulingly in the light of the fact that it undermines what they need for themselves and their freedom to experience their lives as they wish the length of they don't meddle with others. Current laws and arrangements by and large don't allow restorative paternalism for lawfully capable people.

Powerless Paternalism or Feeble Paternalism:

Powerless paternalism licenses impedance with the freedom of others to figure out if they are skilled or equipped for settling on a judicious decision. The vast majority would contend that it is reasonable to meddle with people going to damage themselves to figure out whether they have the ability to take care of their interests, comprehend the outcomes of what they are doing, or act deliberately. Feeble paternalism respects the self-governing choices of equipped people while additionally securing individuals who might act non autonomously or on lacking data.

During restorative humanities course we get to acquaint them with issues of competency, educated assent, and paternalism. Empathy appears to lead to one bearing and regard for freedom in another. There is no contention between the need to secure wiped out individuals and to respect their self-assurance when they approve suggested medicines or hospitalizations. The issues emerge when we can't at the same time do what we believe is best for individuals furthermore regard their refusal of treatment or hospitalization, and arrangements regularly rely on upon competency judgments.

Reasonable Paternalism :

Paternalism is reasonable in the event when one does not have the ability to take care for his or her interests. Some type of insurance is supported or even compulsory when individuals can't settle on choices for themselves, endure crippling diseases, demonstrate automatic self-ruinous conduct, or settle on decisions so improper to their own particular built up life objectives that we question their self-sufficiency. Impedance appears to be advocated within the sight of individuals' non autonomous, self-dangerous conduct or when they depend upon actions that are nonsensical, absurd, and strange. Consequently, paternalism (some lean toward the less sexist word "parentalism") is now and again an obligation in solution, and clinicians need to choose what they ought to act like great guardians and individuals who can't pay special mind to themselves.

For instance, brief automatic duty of a patient may eventually broaden that individual's freedom. Common responsibility laws for people considered hazardous to themselves are paternalistic as in they meddle with the freedom or self-governance of such people for their own particular great or to avoid hurt. The avocation for these laws is that individuals in some cases do not have the ability to act to their greatest advantage. At the point when individuals are sick, they are "not themselves" and are not picking self-governing.

Constraining the freedom of others can be supported on the off chance that they need ability to settle on the applicable choice (paternalism), in the event that they posture damage to others (the mischief standard), or if their conduct is bizarre to the point that we ought to intercede to permit time to figure out whether their activities are self-ruling and educated (feeble paternalism). It requires demonstrating that the likelihood and extent of the conceivable damage justifies the impedance and that the methods utilized are powerful and the slightest prohibitive means accessible.

Regarding a patient's skilled refusal of a difficult treatment does not constitute cooperation in a suicide, as a few specialists dreaded. One would trust that Cowart's specialists would have prescribed or even entreated him to consider life-sparing medications or meet people with handicaps who were living full and glad lives. Still, they crossed a

lawful and good line in treating this exceptionally skilled man without wanting to without even a court hearing.

Guided Paternalism, The basis of informed consent:

It appears glaringly evident that in a post-present day, constructivist world where significance and esteem frameworks are regularly subjective and relative, any absolutist view is probably going to be faulty. This is all the more so in the event that it identifies with morals, the establishments, elucidation and utilization of which have been and kept on being abundantly faced off regardless. In this way, intending to the suggestion, my endeavours were coordinated at distinguishing a position that would intercede extremity. I inspected the dispute that the specialist, since he is better educated, may assert more prominent keenness and forces of judgment, and its safeguards against the accuse of meddling of individual freedom and self-rule through different contentions, for example, the damage rule, the welfare, the guideline of legitimate moralism and the interest to instability. While there is some legitimacy to the contentions proposed, supreme paternalism would appear to be incongruent with deference for individual rights. How attractive, then, is the outlook change from paternalism to the autonomous decision demonstrate where the specialist presents nonpartisan measurements as meagre one-sided as could reasonably be

expected by his own particular perspectives and judgments and leaves the basic leadership completely to the patient or his/her relatives. This unmistakably had its impediments as well. Similarly as with quite a bit of human experience, the answer would appear to rest in intervening the cheerful mean. Perceiving a qualification between self-rule (self-assurance) and autonomy (add up to opportunity of decision with no obstruction) takes into consideration a model of qualified freedom or "upgraded independence" . This is predicated on specialist tolerant discourse, trade of thoughts/perspectives, transaction of contrasts, and sharing force and impact for the basic motivation behind serving the patient's best advantage. This model would appear to be a mindful and successful way to deal with administration of clinical predicaments, and one that in its pluralistic approach is predictable with essential good and insightful recommendations. It is in no way, shape or form faultless, yet in a flawed world, there can be no impeccable arrangement; steady transaction with the substances - however uncomfortable- - is an inevitable unavoidable truth. Activities are ideal in extent as they have a tendency to advance bliss: wrong as they tend to deliver the turnaround of satisfaction. (J S Mil, Utilitarianism) On that supposition, I present that guided paternalism is ostensibly what serves the patient best.

Autonomy:

Definition: Autonomy is the "individual decide of the self that is free from both controlling impedances by others and from individual impediments that forestall important decision." Autonomous people act deliberately, with comprehension, and without controlling impacts.

Clinical Applications: Respect for independence is one of the central rules of clinical morals. Self-rule in solution is not just permitting patients to settle on their own choices, but doctors have a commitment to make the conditions important for independent decision in others. For a doctor, regard for self-governance incorporates regarding an individual's entitlement to self-assurance and in addition making the conditions vital for self-governing decision.

People come to specialists for direction in settling on decisions since they don't have the essential foundation or data for settling on educated decisions. Doctors teach patients with the goal that they comprehend the circumstance sufficiently. They quiet feelings and address fears that meddle with a patient's capacity to decide. They direct patients when their decisions appear to be troublesome to wellbeing and prosperity. Regard for independence additionally incorporates classification, looking for assent for therapeutic treatment and techniques, revealing data about their medicinal condition to patients, and looking after protection. Cases of advancing independent conduct is presenting all treatment alternatives to a patient, clarifying dangers in wording that a

patient comprehends, guaranteeing that a patient comprehends the dangers and consents to all methodology before going into surgery.

Beneficence:

Beneficence is an activity that is accomplished for the advantage of others. Advantageous moves can be made to counteract or expel hurts or to just enhance the circumstance of others.

Clinical Applications: Physicians are relied upon to shun bringing on mischief, yet they additionally have a commitment to help their patients. Ethicists frequently recognize compulsory and perfect helpfulness. Perfect advantage includes extraordinary demonstrations of liberality or endeavours to profit others on every conceivable event. Doctors are not really anticipated that would experience this wide meaning of helpfulness. In any case, the objective of medication is to advance the welfare of patients, and doctors have aptitudes and information that empower them to help others. Because of the way of the relationship amongst doctors and patients, specialists do have a commitment to:

1) counteract and evacuate damages, and

2) weigh and adjust conceivable advantages against conceivable dangers of an activity. Helpfulness can likewise incorporate securing and

shielding the privileges of others, protecting people who are in threat, and helping people with inabilities.

Cases of useful activities: reviving a suffocating casualty, giving immunizations to the overall public, urging a patient to stop smoking and begin a practice program, conversing with the group about STD counteractive action.

Adjusting Autonomy and Beneficence, Harmony between two extremes:

Probably the most widely recognized and troublesome moral issues to explore emerge when the patient's self-governing choice clashes with the doctor's helpful obligation to pay special mind to the patient's best advantages. For instance, a patient who has had cardiac surgery might need to keep on smoking or a patient with pneumonia may reject anti-toxins. In these circumstances, independent decision of the patient clashes with the doctor's obligation of helpfulness and taking after each moral standard would prompt to various activities. For whatever length of time that the patient meets the criteria for settling on an independent decision (the patient comprehends the current choice and is not constructing the choice with respect to fanciful thoughts), then the doctor ought to regard the patient's choices even while attempting to persuade the patient generally.

Choice of Autonomy v Paternalism in contradictions:

In 1977, the Supreme Judicial Court of Massachusetts held in the Saikewicz case that the probate court is the best possible tribunal for settling on choices whether to give or withhold "life-delaying treatment" for in critical condition awkward patients. This decision incited discuss in the restorative and lawful groups. Dr. Arnold Relman, Editor of The New England Journal of Medicine, contends that Saikewicz infringes on existing sound therapeutic practice and requires basic leadership hardware that is unfeasible and heartless. Relman battles that treatment choice for in critical condition incompetents in Saikewicz-sort cases ought to be made by the doctor in conference with the patient's family. Law teacher Charles Baron, interestingly, guards Saikewicz's judicialization approach, contending that such choice must be made in a foe structure that approximates the perfection of the lead of law. Buchanan contends that Relman's feedback of Saikewicz lays on a deficient, medicinal paternalist perspective of the doctor understanding relationship, and that Baron's support of Saikewicz depends on an unmerited, lawful imperialist perspective of basic leadership for incompetents. In Buchanan's view, Relman's approach neglects to recognize fittingly between the making of medical judgments and the making of good judgments and wrongly accept that the patient's family ordinarily can't comprehend the components of the choice, while Baron's approach outlandishly expands the circle of the lawful procedure by

disregarding the exceptional good relationship that as a rule exists between the family and its uncouth part. Buchanan proposes an option based leadership approach that he accepts joins the benefits, while helping the imperfections, of both Baron's and Relman's methodologies. The option depends on three recommendations.The best possible assumption in Saikewicz-sort cases is that the group of an uncouth is to settle on choices concerning treatment. This assumption of the family's overwhelming part in basic leadership is defensible: assurance of the patient's rights requires that choices be made inside a structure that permits incredible exchange and accountability through fair survey and that accommodates lawful mediation when vital. The institutional system for executing the elements recorded in the former recommendation will depend intensely upon a morals board of trustees that is neither an all-restorative forecast advisory group nor a managerial office of the healing centre. Other than assessing and reacting to the Relman and Baron approaches, Buchanan looks at the commitment to the Saikewicz face off regarding made by law-and-drug teacher George Annas. Basically, Buchanan rejects Annas' contention that, taken together, the Saikewicz supposition and the Quinlan sentiment of the Supreme Court of New Jersey portray an appropriate division of restorative and legitimate basic leadership duty concerning in critical condition incompetents. Buchanan reasons that, in spite of Annas' view, those two cases are not reconcilable.

Conclusion:

In Montgomery v. Lanarkshire Health Board [2015] ,The Supreme Court, after an exhaustive review of post Sidaway cases, disagreed regarding the decision about information to be provided to a patient by his /her doctor to be left ultimately to the doctor's clinical judgment. In particular, the court noted that the English Courts (in cases such as Pearce and Chester v. Afshar) had eroded the supposed certainties of Sidaway and have tacitly ceased to follow Sidaway adoption of the Bolam test. The main judgment puts it as ...."Patients are now widely regarded as persons holding right rather than as the passive recipients of the care of medical profession." In Union Pacific Railway Co v. Bots ford, it was concurred "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." This can be a valid Constitutional Provision wherein the fundamental value of self determination has a higher pedestal than the right to health and long life. However the radical thought about the patient's exclusive right to take decision about his /her own treatment and /outcome or right to refuse treatment is only plausible when the patient's faculties are intact. In case of acute illness does this argument that respecting patient autonomy with physician's non-interference

holds good when the illness puts constraints on the patient's ability to make choices. In Constitutional provisions , however, in claiming autonomy certain obstacles have to be overcome and those are involvement of human of "adult years" and "sound mind". Terrence Ackerman in his report dated 1982 called" Why Doctors should intervene" gives light to various kinds of constraints which included physical constraints e.g., prison or bodily prevention, cognitive constraints, psychological constraints, social constraints etc.

From past to the present, the physician-patient relationship has been continuously evolving. This unique relationship for a long time has been immune to the criticism and the scrutiny of the outsiders. If we compare the Hippocratic Oath which emphasises ,"Knowledge as is mine " and "benefit of the sick" to that of Charak's discourse as "A Physician who fails to enter the body of the patient with the lamp of knowledge and understanding can never treat diseases" , we can concur that from the standpoint of ethics enshrined in Indian Medical texts, the patient autonomy is as respectful as the Medical paternalism. Manu, in his treatise Manav Dharma has clearly mentioned that a person treating an ailing person should ensure that his treatment causes no harm to a person reposing faith in him; that he is bound by divine intervention never to mention a third person about the disease---- the essence of patient confidentiality and an exquisite blend of patient autonomy with clinician's decision to intervene without any conflict zone.

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Rewriting Batman and Copyright Infringement

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ABSTRACT

"Only one thing is impossible for God: To find any sense in any copyright law on the planet"- Mark Twain

Copyright law has certain interesting aspects to it, which will be showcased in this paper. The paper's main theme is understanding whether fictional and graphical characters from novels, cartoon strips in newspapers, comics and other literary works are subject to copyright law or not. This theme would not only demonstrate how the fictional characters and cartoons ingrained in our childhood memory are a part of the IPR regime, and makes "dry" subject of law, more interesting and relatable.

This paper delves into the law on copyrightability of characters, while also giving insights on different case laws of America and India, and exploring if the US law can be the correct approach to Indian copyright laws. While doing so, I would, during the course of the essay also discuss the dearth of direct material in Indian law on this subject. It would also be necessary to understand the arguments in favor of having a copyright over fictional characters and cartoons, and also arguments opposing the sole use of such characters by authors and cartoonists, to

the detriment of other creative souls and finally touching upon middle ground between the diagonally opposite theories.

Keywords: Copyrightability, fictional and cartoon characters, Indian law

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OVERVIEW OF THE ISSUE

The idea of this paper was inspired from a news piece some years ago, which was titled *"Don't copy 'Gutthi' warns Comedy Nights with Kapil producers"*which was featuring how *Viacom 18* has established its sole right over a famous character in a popular stand-up comedy show, and has given a newspaper notice for the same, indicating that anyone who would want to use the character even remotely, has to take prior permission of *Viacom 18*. Not considering the option of being a television gimmick, but larger debate which has been sparked off is, is it possible to "own characters" by production houses, to the detriment of the artist, or to the detriment of other television shows which would want to tap into the talent of that same artist by offering him/her a

similar role. Another question which needs keen research is, what is the protection given to an author/cartoonist/artist for something which exists in recesses of his/her mind in the form of the character which he/she creates, and this is what is going to be discussed in the upcoming sections.

Firstly, it is essential to demarcate the characters itself. Characters which can get copyright protection can be

1) a visual character e.g.: a cartoon character, or character of show/ drama etc.

2) a fictional character showcased by an author in a novel or a magazine.

The differences among them, though otherwise not relevant in terms of entertainment seems significant from point of view of copyright. Fictional characters have their visualization in varied forms, since they do not have any visual reference anywhere in tangible form (with exception of it being reproduced in a movie or television show wherein it can get a visual representation). These characters come alive and are given shape only in the minds of the readers. So broadly categorized there are visually recognizable characters and there are characters which readers make for themselves with their own fertile imagination, the latter though would have no solid form of depiction. Writing, sketching, playwriting are all creative medium of imaginative souls, and its association with law might seem a bit absurd at the beginning. However,

copyright law has often witnessed the most bizarre form of human behavior, starting from dealing with stalwart actor like Amitabh Bachhan copyrighting his baritone voice to dispute over copyright issues on celebrity tattoos, a ready example of Mike Tyson's tattoo controversy. Copyright law adds audacity to the legal field.

Secondly, it would be important to know that copyright, especially over characters, is also interlinked to trademark law, and also would enter the topic of unfair competition in the creative industry. But for the purpose of this paper, the author has solely dealt with the theme of copyright.

Thirdly, the author would also like to point out relevance of this topic in today's time. Fictional characters of novels or movies are of too much interest to the readers and movie-buff, and many a times for them, the protagonist or even the antagonist's character might be more intriguing than the plot of the story itself. Readers will agree that these fictional characters and different shades and nuances given to the character make the story more worthwhile and also make the entire experience of readers and audience a satisfying mental and visual treat. The story wouldn't have been the same had it not been the character of Oliver Twist, or Harry Potter, set in their respective themes.

American Law on the copyrightability of fictional characters

American Law deals in depth with regard to the fictional characters of literary and cartoon works, not only expressly in their statue law, but

also the plethora of case laws prove that the basic jurisprudence on this subject has grown from American law. Under the American law, copyright is form of protection for authors of “original authorship”. However, one limiting factor which is relevant to the copyright over fictional characters is the tenet that copyright would not extend to any idea, process, system, method of operation, concept, principle or discovery regardless of the term in which it is described, explained, illustrated or embodied in such a work. This indicates how copyright can be specifically for a particular literary or graphic work, but the essence or the broad theme can never be copyrighted since that would be in public domain for exploitation of all and other authors who can use the same general idea and make another work. A very classic example can be of the much acclaimed book 'Twilight' written by Stephanie Meyer. The book can be copyrighted, however the theme behind the story i.e. werewolves and vampires cannot be copyrighted. These concepts should be available for the public and the artistic community for them to create newer stories and artistic works. It is a well-established principle of copyright law that in order to find copyright infringement one must “determine whether there has been copying of the expression of an idea than just the idea itself”. So the question arises that if ideas are not protected under the sphere of copyright law, then, would specific characters get protection from being abused or misused by other budding authors?

There are several tests by which Courts have tried to extend protection to many famous fictional personalities loved by all such as James Bond, Rocky Balboa from the Rocky Film series, Tarzan etc., however it should be kept in mind that these characters had specific screen persona to them, which made it easier for them to be copyrighted. However, when observed from a technical point, these fictional characters are abstractions and therefore have to be studied in detail for them to be copyrighted as compared to their visual counterparts which have a recognizable image and imprint on the minds of the viewers.

Therefore, the author would start by discussing the genesis of a well known test, which for the first time laid down a rule to demarcate which characters have the ability for them to be copyrighted by their authors. The first of it is ***"distinctively delineated test"*** developed by Justice Learned Hand in *Nichols v. Universal Pictures* which are the oft-quoted case when it comes to copyright over the fictional characters. The ratio of the case was the rule which was later proved to be of immense help for courts to understand the character's importance for a story line. The ratio was "**the less developed the character, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinct"**. I further elaborate this by asking the readers how can a character be developed? While defining what is meant by a character it has been stated as follows in a famous case, *"character is said to be an aggregation of particular traits his creator selected for*

him". There are some prominent characters the author has weaved to have their own independent characterization, completely distinct from the plot of the story itself. Therefore, the more unique and shaded a character is, or the more talented or differently described he or she is, the stronger the impression it would have on readers to have him fixed in their imagination, even if they would have forgotten the story itself. This makes it easier for courts to know whether such character is distinct and independent of the story plot. As described earlier, ideas or concepts cannot be copyrighted, however if a character travels beyond the idea i.e. James Bond is now associated beyond a British spy, assigning a unique identity of its own, and therefore copyrightable. However, for courts to know whether a particular character has an independent life of its own, it would have to delve it bit deeper, because an independent character is difficult to define or grasp clearly, since no two minds will conceive of it in precisely the same way.

This led to evolution of different parameters that involved in knowing how a character would come within the ambit of copyright, which cannot be said to be supplementary to the delineated test, but is different way of approaching the same issue. The second test is the *"story being told test",* which was formulated in a dispute over a character named SAM SPADE which appeared in *The Maltese Falcon* novel written by Dashiell Hammett, wherein the Columbia Broadcasting System was sued by Warner Bros. as having exclusive contract of copyright over the

use of this character in motion pictures, radio and television by virtue of grant given by the author to them. Herein the court was of the opinion that character should be the central figure, someone who was indeed an important character and ruling the issue at hand whether Sam Spade was covered under the copyright protection it said the following*, "It is conceivable that the characters really constitute the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright".* In the end, author got the right of using his character in other stories, despite of the fact that he had assigned the rights in broadcasting to the Warner Bros. thereby reiterating the custom of the American law that a statutory right does not divest the author from other non-statutory or common law rights, for him/her to stop others from using his works.

But both these tests have been criticized at several points, due to new tests being created by different courts, which have proved to be more sound on legal reasoning. The main criticism offered by academicians about the distinctively delineated test is that it is too troublesome for judges and lawyers to make out one mental impression of a particular character, not only making the argument devoid of legality but leading to misapplication of copyright law. The peculiar characteristics of characters in novels are changing throughout the story, with the gradual development of the plot.Characters may have different moods and incidents associated to them in the book, which are brainchild of the

author. One can always err if one compares the original published work, and the copied version, since literary works can never have a uniform standard of comparing themselves with other similarly placed works. As one author who criticizes this test correctly puts, this test makes *the judge sit in the place of the literary critic*. There are cases which demonstrate that this test is not a full-proof and complete test for determining copyrightability of the characters, since the end result of this test is protection of general abstraction on which the characters are based, or over-protection to the detriment of other artists. In the case of Cassidy which is a classic example of mindless use of this test, wherein the Hopalong Cassidy was portrayed in the novel as someone who was violent and tobacco chewing, a typical rough cowboy image, whereas the Cassidy which was then brought live on the movie screen was kind and sentimental, clearly a contrasting depiction of the novel's character. The Courts here, still went ahead to protect the literary character, calling it an infringement of copyright, and ignoring the vast variations used by two mediums of the same character, based on aforementioned tests. Some authors have gone to the extent saying that courts have laid down the words "distinctively delineated" and "fully developed" only to solidify their reasoning of granting protection to fictional characters.

The same loopholes hold true for the *"story being told test"* since that test tries to differentiate between the character who is central to the story, and a character who acts as a vehicle in just building the story.

This test expects judges to actually apply their individual understanding of the work, and decide accordingly which character was prominent in the literary work, based on his taste of literature and then afford copyright protection, which might not be accepted by readers, since one can never have a same view on the characters of a book. It actually means giving lot of "literary interpretational powers" to courts, which was never their ambit to do so. It also adds subjectivity in law, which can be harmful for legal certainty.

There are other tests such as *intrinsic test* and *extrinsic test* which have been laid down, for the purpose of copyright of fictional characters which have helped the courts to ascertain which character can be brought under the ambit of copyright protection, when other previously laid down tests are not able to provide answers. *Twentieth Century Fox Film Corporation v. Stonesifur* is the case which underlines what is the true nature of these tests. Extrinsic test is described as a scenario *where plot, characters, settings, dialogues and other details of the two works are compared.*It is a test which analyzes specific objective things in a story, making it appear like a better planned dissection, giving a judge various above mentioned elements to compare between two works.The intrinsic test is the one where *the two works involved are considered and tested, not hyper critically or with meticulous scrutiny, but by the observations and impressions of an average reasonable reader and spectator.*The same test is more eloquently carved out when it is said

that intrinsic test asks whether the *"the total concept and feel" of the two works are substantially similar.* Intrinsic test again, allows the judges to enter into the minds of book readers and comprehend whether the entire theme and idea is just a rip-off of an earlier publication. My independent opinion is, these tests if applied together can give a wholesome picture of both, original and allegedly infringing work. It answers the questions about whether there has been infringement to such an extent that one needs to make the character copyrighted, which also means taking him off the public domain for exploitation and giving the character's sole use to the author. The extrinsic and intrinsic test was developed as a two-tier test, to be applied simultaneously in a famous 9th Circuit Court decision of *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.,* and in 2013 has been cited in 309 federal court decisions, which gives an idea of the influence of the judgment. The judgment of *Krofft*, relied on an earlier case of *Arnstein v. Porter,* for the purpose of extrinsic/intrinsic application. But it is essential to note that *Porter* judgment was based on copying/unlawful appropriation dichotomy, whereby Court held, merely copying the idea isn't enough for copyright protection, unless the character hasn't been copied to the degree of the unlawful appropriation. Secondly, it is also stated by one author that *Krofft* is a misleading interpretation of the *Porter's* decision, and the terminology of 'intrinsic/extrinsic'is confusing and inapt. However, one US decision, goes on to say that for all practical purposes, the

differences between *Porter* and *Krofft* is meaningless, and in its application the differences which come across are minimal. However, the author respectfully disagrees with this academic criticisms levelled to show that these tests still hold true, and can be used.

Intrinsic/extrinsic test has undergone a gradual evolution, where courts have allowed some aspects in both these tests to be modified which has been described in detail in a book by Osterberg & Osterberg. Author proposes a middle ground, whereby an amalgamation of both these tests is used, without one being given weight over the other. Primary reason for this is, neither of the tests in themselves are sufficient enough to be applied on its own. Application of both of the tests, though burdensome for interpretation, need not require strict interpretation. A middle path can be adopted by way of ensuring that a character is sufficiently protected from the angle of a reader (intrinsic) and also on the grounds of an objective piecemeal analysis (extrinsic). Simultaneous application will ensure that ideas and concepts are not easily made subject of copyright leaving ample creative space, and will also ensure that on fulfilling both the conditions the aggrieved creators gets his character back. The degree of proof is made higher by application of both the tests, to encourage new literary works, however, at the same time, authors of fictional character are not over-burdened, since in case of clear copying of character, the tests might not be difficult to meet. Academic literature, further explains these “intrinsic/extrinsic” test by

stating, that, intrinsic test is focusing on the “total concept and feel” of the works in question, whereas, extrinsic test is more about expert testimony and dissecting each component of the two characters and then listing them to find a similarity of ideas.

By ensuring a middle ground, we include not only an ordinary reader’s perspective of "total feel and concept" but there is also an evidentiary value attached by producing expert testimonies, and analyses on an objective plank, whether the infringing character, is really substantially the same as the one which the copyrighted author has used. This ensures, a layman’s understanding is put into the decision, supplemented by objective and thorough dissection of the characters.

Here the author would like to bring in the concept of **“scenes `a faire”** which is closely linked with the above mentioned intrinsic and extrinsic tests. Courts and literature world have undoubtedly agreed to one fact which is the essence of this French word that many characters naturally flow from a given topic and thus do not qualify for a copyright protection, since “expressions indispensable and naturally associated with the treatment of a given idea are treated like ideas and are therefore not protected under copyright. Therefore, something a concept like “Satan” was not given copyright protection, as it was a depiction of eternal damnation which was a story about Judas and his alleged betrayal of Jesus, which made the courts conclude that indeed, certain concepts which are abstract, and necessary for particular genre, can

never be copyrighted, as it would hinder the creative expression and thus the process of other talented minds.

Therefore, a more balanced approach would be to look at intrinsic test and extrinsic test together, and analyze whether something like a "scenes a` faire" would apply to make sure that what the courts are doing does not categorize itself as copyright on an idea but on a character. There is sometimes a hairline difference between a character and an idea or general concept, such as an ape man like Tarzan, which is the same as "Mowgli" or a character of spy, who would invariably be described with certain common characteristics. It has been described quite artistically by one author who says that a generic Southern plantation belle character will not be protected under copyright but Scarlett O'Hara will not appear in any other work without the approval of copyright owner so long as "Gone with the Wind" is protected under a valid copyright.

There have been instances in the copyright law, where characters from commercials and television advertisements have been copyrighted too, an example is given below. This shows the enlarged concept of copyrightability with which American law is taking strides in protecting true economic motives of creative minds in the country. One such instance is character Bill, which was aired on television commercials and print advertisements as "a bald Caucasian male dressed in a costume resembling a stack of US dollars bills" being a metaphor for money that is not earning interest or any other form of investment return, was also

ruled to be under the protection of copyright since it was fully developed character looking at the totality of his costume, even though he only appeared in 3 commercials.

All this shows how copyright law is highly developed, but also proves to be a good source of litigations in America in the field of literature and creative industry, making the law on this subject, if not clear, but truly worth reading from academic point out of view, making it a nice subject for discussion, which touches beyond the realm of law at times. But as no law or test can be perfect, and with each case, the jurisprudence needs to take new dimensions, especially in a field like a copyright law, where different issues, which are often the "first timers"come up each time, Justice Learned Hand expressed it as follows, which sums up the position very correctly,

"Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc."

Indian Law on Copyrightability of Fictional Characters

Indian law on copyright is governed by Copyright Act 1957, and is a legislation which has proved to be extremely fruitful for the people. However, on this particular topic, there isn't much of case law developing. Indian authors have started showing their presence on the global forum, by many Indian cartoonists and literature lovers writing,

creating, sketching and showing their intellectual expressions in various mediums. Even then we fail to get any apex court judgment on this question, indicating a different scenario from that in America. In this section the author discusses various High Court rulings which have indirectly looked into copyrightability of fictional characters. However, unlike American case laws, Indian jurisprudence has been used interchangeably by courts, as most of the cases which will be discussed below have had infringement of play or movie as the direct issue, and not that of literary characters. But with the movie industry booming, courts have time and again laid down rules in the infringement cases of films or plays, and used it in cases of fictional characters also.

Starting by discussing one of the major landmark cases on infringement of copyright, which also has discussed a lot of earlier judgments, and has a strong precedential value on this subject is *R.G.Anand v. Deluxe Films*. The case was concerning infringement of a play which was successful, being converted into a film by the defendant production company. The court ruled certain important concepts, which still hold true, though they can be considered secondary for our discussion, since they deal with infringement of a theme of film, and not fictional characters. Yet it would be important to name a few rules which were formulated after digging into a multitude of case law from various jurisdictions. The first point which the court laid down was, in order to determine whether there has been copyright infringement, the surest way to do this is by seeing

whether the reader, spectator who has had the chance to look at both the works, the original and the alleged copy (herein the play and subsequent film) and after viewing both he/she gets an unmistakable impression that the subsequent work is copy, then, that would amount to infringement. However, the court also cautioned what would not amount to infringement, and that situation would be when there are other dissimilarities, along with similarities which will negate the intention to copy, it would appear that the similarities were only co-incidental and not amounting to infringement. Secondly when there is same theme being shown, but the presentation is different from the former, which would make the subsequent work get the shape of a whole new art work, it would not amount to infringement.

Another important case is *V.T Thomas v. Malaya Manorama Company* which has not exactly ruled whether any fictional character be it cartoon or literary figure can be copyrighted or not, but has dealt with a different aspect of this subject, by taking help from American case authorities. Section 17 of Copyright Act lays down the rule that owner of the work shall be the first owner of the copyright, however, proviso under clause (a) states that when any artistic work is made in the course of employment, in absence of the contract contrary, will vest in proprietor. However, this right only extends to publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the purpose of it being so published. Court herein held that

proviso (a) of section 17 is applicable. Herein the Kerala High Court, ruled two things, which by and large discuss the ownership of copyrights over cartoons, whether they remain with the publishing house even after cessation of employment of the cartoonist, or with the author of the graphics, that is the cartoonist himself or herself. The first major proposition which the High Court ruled was, taking substantial support from American jurisprudence, that once cartoonist is employed by a publishing house, they do not acquire any property rights in the work, even if they were published during the course of employment of the cartoonist, and therefore logically not even after the employment of the cartoonist when employment is over. Circumstances of the employer are such that it is mighty institution which is financially sound and there is no indication to show that not using the cartoon of the outgoing employee has dropped the circulation of the publication company. Second major proposition which needs to be highlighted is, the court took a stand for the freedom of creative expression of artists and cartoonists and observed *"It is better not to place such a premium on the intellectual activity of an artist. The creative faculties of an artist cannot be equated with vendible chattels reckonable only in terms of money".* In the same case, there has been one more viewpoint which needs to be mentioned; however, I must agree it is based only on an inference. According to this view, the court has somewhere impliedly drawn a distinction between drawing made by using the cartoon character and the

cartoon character separately. However, author does not really agrees to it, since the court has never brought about this distinction clearly, only focusing on who would own the character once the cartoonist leaves employment. The court did not grant copyright protection to the disputed cartoon figures "Boban and Molly" but it was the case which shed some light on the ownership aspects of the copyright over characters.

Also, one very well-known doctrine used in Indian Law, which has generally not been used by American law, and is based on common understanding, is the doctrine of *"test of fading memory"*which was used in *Raja Pocket Books v. Radha pocket Books*. In this case there was a dispute between two publishing houses over a comic character. Both the characters the original Nagraj and the alleged copy Nagesh were visually the same, and the court applied this doctrine which focuses on the point of view of a man of average intelligence having imperfect recollection, and if there is likelihood of confusion from this person's point of view, or if the target audience would have a feeling of alleged work being a copy of the original then, it could be said that there was clear cut copyright infringement. The court also held that both the characters have the same central idea, and therefore the characters were copyright infringement. It is pertinent to note here, that test of fading memory is more closely associated with the intrinsic test of US Courts. Intrinsic test just like a test of fading memory has a subjective element attached to it. However, extrinsic test of the *Krofft* has been seldom

resorted to by Indian courts. The balance of intrinsic/extrinsic will be addressed in the end by the author.

There are other case laws which also deal with copyright issues of fictional characters however, they would fall under the category of cases on character merchandising, which is a different topic in itself. But limiting the scope of the paper, it is essential only to discuss the judicial approach towards such issues by the courts.

Statutory provision

When we look at Copyright Act of 1957, it defines in section 2(c) what is an "artistic work" and under clause (iii) it includes any work of artistic craftsmanship. But with the dearth of any strong case law on interpretation, the issue whether fictional character is under the ambit of this clause, is difficult to state in regards the Act. But a plain reading of the definition, prima facie does allow fictional characters to be within "artistic works", be it a cartoon, or a character in a book. Section 2(y) defines "work" which under clause (i) includes a literary, dramatic, musical or artistic work. This definitely broadens the scope through which fictional characters are to be included under the Act's protection.

Does Indian law address the issue properly?

As discussed in the preceding section, there has been quite a vacuum when it comes to any direct commentary or precedent on this major academic theme. The idea of copyright is twofold, firstly to give the

author their due for putting in their so much hard work, and creativity behind any artistic expression, secondly at the time, to give access to other minds to make use of characters, maybe in the form of fan fiction novels, or borrowing from famous works which would further give us more soul food for book lovers.

One question, however which the author wishes to address is, 'can Indian jurisprudence be inspired from US case laws'? So far, Indian courts have relied on common law, but when it comes to US court decisions, they just have a persuasive value. The tests which are propounded by US courts though useful, might not function well with Indian laws. Supreme Court has cautioned us to look West invariably whenever there is a void in our law, in the following words, *"But India is India, and its individuality, in law and society, is attested by its National Charter, so that the statutory construction must be home-spun even if hospitable to alien thinking".* Agreeing to this, the legal regime and circumstances in US can be contrasted from what it is in India. The tests laid down by US courts can be a good starting point, but there are certain Indian fictional characters like Chacha Chaudhary, Chotta Bheem, Shaktimaan etc. which will have to be given protection in view of Indian Copyright Act. One must also note that Indian readers and literary lovers have a different impression of Indian fictional characters. It is said by some that US's character delineation test will be applicable to India, but there is no sufficient reason provided for the same. In this

nascent stage, we do have trademark cases over movie characters and names of movies, however, fictional characters haven't been touched upon, resulting in author not coming across any literature arguing the application of US copyright protection pattern to India.

Indian law has not yet opened up to such copyright issues, since many case laws which author reviewed during the research period, always had an element of marketing, broadcasting or merchandising, thereby the decisions did not touch upon copyright. These cases did not provide lengthy discussion directly on the ambit of copyright protection, especially when the literature and comic cartoon industry is growing rapidly, not only in the English language, but also in various other Indian regional languages. There needs to be some identifiable test or guidelines that need to be followed by the courts. There is a need to have certain clear stance, since such things are very important to the authors and cartoonists.

Having said that US law might not really help us with Indian characters, author would discuss now whether the middle ground of intrinsic/extrinsic test given in *Krofft* decision could be of any help to us. Indian courts have gravitated towards intrinsic test, which as earlier discussed is an analysis of "total concept and feel" of the two works. In various High Court decisions, not directly dealing with fictional characters, "law observer test" has been applied, which states that would the two works (plaintiff and defendant's works) appear to persons, who

are not experts in that field, to be a reproduction? *The test which the Courts have been applying in such cases is as to effect produced on the mind of the person who has seen the work of the plaintiff and also comes across the work of the defendant. The degree of resemblance between two works must be such that it suggests an impression, in the mind of the observer, that the work of the defendant is, in fact, the work of the plaintiff.* Clearly, this embodies the intrinsic test, however, we do not find mention of extrinsic test. Importance of extrinsic test cannot be undermined. It is important to note that the Delhi High Court, while deciding if serial "24" which was broadcasted at prime-time on Indian channel was similar to a film "Time Bomb" of the defendant, relied on *Krofft* decision. Reading of this case shows that the court has partly looked into extrinsic test also, whereby there is application of extrinsic test simultaneously with the intrinsic test. However, the decision was never based on the ratio of *Krofft* judgment, and many Indian judgments were relied upon to reach the decision. The Court finally held that serial 24 was completely different from the defendant's film in question. In view of the absence of any decision on extrinsic test, which allows expert testimony etc., author would propose that courts should be more open to applying the extrinsic test as well, since it adds objectivity to the copyright infringement. Furthermore, extrinsic test has one advantage over intrinsic test, which is, that it allows some predictability in law. A methodical dissection of two fictional characters, supplemented by

experts of those fields, can add to the creation of some judicially manageable standards. This does not solely depend upon, what a layman feels or thinks. Law requires some stability and clarity of propositions; which extrinsic test can put forward.

Therefore, the author states that extrinsic test should be equally looked into by the Indian courts together with the intrinsic test or 'lay observer test.'

Conclusion

The author has tried to summarize the law on copyrightability of fictional characters, under the American and Indian Law, and has also by use of various judgments given the way in which both the countries have created their own tests and parameters, in order to protect something which is imaginary, however given the status by law to be protectable entity and alive in the minds of spectators and readers worldwide. Moreover, the author concludes that US law, though comparatively advanced, might not fill the void of Indian Laws. The *"test of fading memory"* of Indian courts and the *"character delineation test" "intrinsic/extrinsic test"* of US, give us a general overview of different approaches existing in two systems. But neither can be a replacement of the other. The author, therefore proposes a middle ground of the extrinsic/intrinsic test, which ensures that Indian Courts have higher standard for deciding copyright infringement. Author also has stated the

Indian law, is more in favor of intrinsic test, but copyright protection for fictional characters, equally requires the application of extrinsic test.

Book Review

Title of the Book: Human Rights Education for the 21st Century: Issues and Challenges
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-By Minakshi Goswami, a student of National Law University, Assam(LL.M. with human rights specialization).

Human rights are the most basic, universal and inalienable rights that every person is entitled to by virtue of being human. Education on these human rights covers education, training and information imparted with the aim of building a universal culture of human rights. In the contemporary period, the concept of human rights is gaining popularity; similarly there is also a rise in abuse of the same. Hence, the concept of human rights education holds much significance. Along with imparting knowledge about human rights and the mechanisms for protection of these rights, human rights education develops the skills needed to promote, defend and apply human rights in our daily lives. This book,

titled ***'Human Rights Education for the 21st Century: Issues and Challenges'*** is a collection of ten selected research papers presented at a UGC sponsored National Seminar organized by Department of Education, Raha College.

The **first chapter** of this edited volume is a paper, titled **'Promotion of Human Rights Through Human Rights Education : Opinion of the B.Ed Students of Parijat Academy Teacher Education Institute, Dibrugarh'** is authored by **Dr. Asomi Chaliha,** Assistant Professor in Education, Dibrugarh University and **Rajen Mandal**, ex-student, Department of Education, Dibrugarh University. Realisation of the human rights would be very difficult unless people know and claim these rights. Human rights education helps in creating awareness about these rights. In this paper, the two authors have confined their study to 50 B.Ed. students (session 2015-2016) of Parijat Academy Teacher education institute, Dibrugarh. The method of data collection used is self structured questionnaire containing 20 questions. Response of students is shown in percentage form for each question asked. In this paper, a humble attempt has been made by the authors to identify the level of opinion of the respondent B. Ed students on the role of human rights education in the promotion of human rights.

Chapter 2- 'A Study on Human Rights Violation of Women and Scope of Human Rights Education for its Improvement (With Special Reference to ST Women of Barkhetri Block of Nalbari

District'is authored by **Bhaskarjyoti Das**, ex-student of Gauhati University. This paper is an extensive study with the data beautifully tabled and well explained. With a brief introduction on what constitutes human rights, the young author views that women, children and the backward sections of the society are more prone to human rights abuses. As the scope of the present paper is confined to women rights, the author tries to pen picture the actual position of women's rights in the country by citing the statistics of the Reports of National Crime Records Bureau. In this study the researcher has made a comparative study (between the two ST tribes, i.e. Boro and SaraniyaKachari) to find out the situation of ST women's human rights abuses in Barkheri Block of Nalbari District. The total sample used by the researcher is 80 (50 Boro and 30 SaraniyaKachari). The researcher has also made an attempt to highlight the level of human rights literacy amongst the sample population, their awareness on women's rights, types of violence that these women face, etc. This work is finely concluded with a set of suggestions and a part specifically explaining how human rights education will help in strengthening women.

Chapter 3 of this book is a paper titled, **'Economic Status of Tea Tribes Women of Khowang Development Block of Dibrugarh District'** co-authored by **Binoy Munda,** Research Assistant, Department of Education, Dibrugarh University;**Devajyoti Gogoi,** Assistant Professor in Education, Dibrugarh University and **Manashee Gogoi,**

Assistant Professor in Education, Dibrugarh University. In this paper, the researchers have confined their study to analysing the economic status of tea tribes women of Khowang Development block of Dibrugarh District. Tea gardens are the most vital part of the Assam economy and a huge majority of Assam's population works in tea production. Assam contributes about 51% of the total tea produced by India and about 17% of the workers of Assam are engaged in the tea industry. However, the poor working conditions and discriminations that these workers are experiencing are well known to all. In this paper, descriptive survey method is used to study the problem identified. In this work, a sample of 60 tea tribes women (out of which 30 are from tea garden area and other 30 tea tribes women are from village area) are purposively selected. In this study a structured interview schedule containing 21 close ended questions, was used as a tool for data collection. However, whenever the need was felt, the researchers have also relied upon a few open-ended questions. The findings of this work are systematically put forward. The concluding part of this paper classifies illiteracy and lack of awareness to be the major reasons why the women workers of tea gardens suffer in all aspects of their life. Hence, the last remark put forward in this paper is to create awareness among these underprivileged sections for their betterment and equal development with rest of the society.

Chapter four of this book, **'Human Rights Awareness of Teacher- Trainees of Asom Sikshak Prasikshan Mahabidyaya,**

Lankeshwar, Guwahati: A Study'is co-authored by **Birina Boro,** Research Scholar, Gauhati University; **Debajani Borah,** Research Scholar, Gauhati University and **Sayanika Deka,** Research Scholar, Gauhati University**.** The authors of this paper introduce the subject matter of study with a beautiful description on the significance of peace in a society. Peace in a society is greatly affected when rights of people are being abused. Therefore, it is very important to raise the level of awareness of the masses on the inherent rights that every person is entitled to by virtue of being human. This paper is an attempt at measuring the level of human rights awareness among the teacher trainees of Asom Sikshak Prasikshan Mahabidyaya, Lankeshwar. The tool used for collection of data in this research is a self structured human rights awareness questionnaire containing 20 basic questions. In this work, 60 teacher trainees were asked to fill the questionnaire with 'yes' or 'no' responses. The responses collected are finely tabled and well elaborated by the author. For the convenience of understanding, the researcher has also provided the percentage of people for both positive and negative responses.

Dhruba Kalita (Deprtment of Education, Goalpara College) authored paper, titled **'A Study on Education and Human Rights of Rural Women with Special Referenceto Goalpara District'** finds place as the **fifth chapter** in this book. The researcher of this paper is of the view that development and progress of a society is possible through

empowerment of the female section. However, the literacy rate of women belonging to the Goalpara district is not satisfactory and hence this paper attempts to measure the level of women's awareness on vital matters of rights of citizens. The researcher, in this paper has relied upon questionnaire and personal interviews to collect the required data from 100 adult women, chosen randomly. The author has tabled and analysed the data gathered and has also highlighted the major findings of the study.

Chapter six of this edited volume is titled **'Right to Education Act, 2009 as a Powerful Instrument to Remove Child-Labour from the Society with Special Reference to Dhubri District of Assam – A Study'.** Child labour has evolved as a contemporary social evil that has attracted the attention of government as well as the civil society organizations. A number of steps and initiatives have been taken in order to eradicate this evil from the affected societies. The passing of the Right to Education Act, 2009 definitely had a lot of positive impact on achieving a 'child labour free' India. The present paper authored by **Dwipmallika Das,** Part-time Lecturer in Education, North Gauhati College and **Smita Boro,** Pat-time Lecturer in Education, North Gauhati College is an attempt to weight the contributions of the Right to Education Act 2009 towards eradication of child labour. The area of this research work is confined to Dhubri District of Assam and the researcher has relied upon information schedules as a method of data collection.

The authors in this paper have selected the representative sample by using the method of Non-Probability Sampling. In order to trace the impact of Right to Education Act in eradicating the evils of child labour, the researcher has made a comparative study on the percentage of children attending school six years prior to passing of the act with six years after the Act was passed. This paper also makes a comparison on the percentage of child engaged as labours six years prior to the passing of the Act and six years after the Act was passed. This paper is an extensive study on the impact of Right to Education Act towards elimination of child labour. The research value of this paper is further enhanced by inclusion of ten well founded and well justified suggestions that will prove helpful in eliminating the practice of child labour.

The **seventh chapter** of this book is titled **'Status of Human Rights Education among Rural Women: A Study of ST and OBC Women in Two Villages under Raha Development Block, Nagaon, Assam'.** With a beautiful portrayal of the atrocities and discriminations that women have been experiencing since ages, the author in this paper rightly puts forward his argument as to why he confines the scope of this paper to women's human rights literacy. The author of this paper, **Gajondra Mohan Dev Sarma,** is an Associate Professor in Geography, Raha College. The researcher in this paper has relied upon a self structured question schedule to interview randomly chosen 30 ST families and 30 OBC families of 'Mikirati' and 'Lauphulabari' village

under Raha Development Block in Nagaon District, Assam. The researcher has made a successful attempt to put a clear picture of the economic and educational background, population, as well as the male-female ratio of these two villages before the prospective readers. Household and population pattern in both the villages, male-female ratio, age structures, educational level, economic activities of both genders, nature and type of abuses of rights of women are beautifully put forward with the help of self-explanatory diagrams, charts and tables. In order to identify the literacy level of the ST and OBC women on human rights, the researcher has used a self structured questionnaire containing six most basic questions. The conclusion drawn from this question schedule shows the poor awareness of the respondent women on human rights concept. After a detailed study on the level of human rights literacy amongst the women of 'Mikirati' and 'Lauphulabari' village, the author concludes his paper with three vital recommendations. Firstly, the author stresses on the need to organise public meetings, seminars and other such programmes on human rights education. Secondly, the researcher urges that government agencies, non-governmental organizations as well as academicians must come forward and contribute their share in spreading human rights literacy among rural women. Lastly, human rights are for everyone. Enjoyment of these basic rights is possible only when people are taught to fight for their own rights and to respect the rights of others. Hence, education, or more specifically

human rights education should be imparted to everyone irrespective of the learner's gender.

Chapter 8- Human Rights Awareness among Women: A Study on Employed and Unemployed Women of Guwahati Cityis authored by MinakshiGoswami, National Law University. The author views that imparting human rights education is not a mere intellectual exercise, but is a combination of education and training. Education helps in spreading human rights literacy and training makes the learners skilled enough to defend their own rights as well as the rights of others. The author in this paper also highlights the significance of human rights education for women and the international legal instruments that contain provisions relating to human rights education. This paper is an attempt to analyse the level of human rights literacy among employed and unemployed women of Guwahati City. A self structured questionnaire containing 11 questions has been used by the researcher to find out if at all there is any gap in the level of human rights literacy among employed and unemployed women. It is a simple, random sampling wherein the questionnaires were distributed among 50 employed and 50 unemployed women.

Chapter 9 is **Pinkumoni Kumari**, Part-time Lecturer in Education, North Gauhati College authored paper, titled **'Education on the Human Rights of Women as a Vehicle for Changing the Society with Special Reference to Kamrup (Rural) District a Study'.** Society is dynamic,

which changes with time and advancements of civilization. Human rights, that hold much significance in a contemporary society is also a product of evolution of mankind and their desire for peace and prosperity. Peaceful co-habitation is possible only when 'conflict of interest' is minimized and people are taught to respect each other's choices and decisions. Education is a vital means of bringing that change in the society. The author of the present paper, hence, studies how education can bring positive changes with regard to women's enjoyment of the basic human rights. In this paper, descriptive survey method is used. The researcher has relied upon simple random sampling to select 20 women each from six villages for the purpose of data collection. This is a well-researched paper with tables and diagrams justifying the arguments of the author.

The **Tenth Chapter** of this edited volume, **'Awareness About Human Rights Among Post Graduate Student'** is authored by **Dr. Rita Rani Talukdar,** Associate Professor in Psychology, Gauhati University and **Sukanya Bora,** Assistant Professor in Psychology, Nonoi College, Nagaon. The research work of this paper is confined to three broad objectives, viz (a) identifying the level of human rights awareness among 20 post graduate students aged 20-25 years of Gauhati University; (b) comparing the level of human rights literacy among male and female students; and (c) to promote human rights education among the sampled students at the time of data collection. In this study, the

researcher has employed the criterion based sampling (purposive sampling) in selecting the sample. The results of this study are properly tabled and explained in a simple way. This paper is not just based on empirical premises investigating the human rights literacy among post graduate students, but is also a well written paper that narrates the history of human rights education as well as the contribution of the United Nations in promoting human rights literacy.

All these ten research papers are based on primary sources of data collection and stand like a mirror reflecting the actual position of human rights education in the country. A list of references is also added after every paper. This helps readers or people interested for further research on any related topic, to rely on them and proceed with the work. Field studies, preparation of questionnaires, graphs, diagrams, and also references made to reliable sources from government departments like the Census reports, reports of the National Crime Records Bureau etc. increase the reliability of the findings of these papers. This book can be referred for study, research and policy implementation purposes. Further, the systematic and detailed studies made by the authors have successfully touched upon gravity of the issues of human rights abuses and the increasing demand of human rights literacy. This book can also be relied upon to carry on further investigations on these important areas of human rights education. All in all, this book is a good option for readers and researchers at a fair cost.

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