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FOREWORD

Nirma University Law Journal provides a new and exciting way of exploring the changing dynamics of law. The journal is designed to cover a broad spectrum of topical issues, which are set within the framework of a changing global scenario; highlighting the catalytic nature of legal frameworks for society. The result is a coherent exposition which offers the reader a clear overview of the broader thematic influences on the law generally whilst also focusing more specifically on current manifestations of legal questions.

Thought leaders of today emphasize the need to embody all disciplines in one spectrum to analyze problems with creative zeal. Education in the real sense is the spirit of enquiry resulting in new knowledge and path breaking insights on mundane ideas and ways of living. The Nirma University Law Journal aims to encourage writings that are inter-disciplinary in nature expounding contemporary issues across discipline like Sociology, Political Science, Public policy and Economics in the context of Law. It showcases contemporary issues and challenges specific to law; with an inter-disciplinary approach towards knowledge. It is the endeavor of the Institute to become the beacon of legal education by encouraging synthesis of knowledge and best practices cutting across academia and research fraternity.

We thank all the contributors for their ingenuity in expressing new ideas and hope that the journey of legal research is fruitful for the fraternity and students at large.

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Chief Executive, Nirma University Law Journal
Director, Institute of Law, Nirma University

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AIR CARRIER LIABILITY FOR PASSENGER DEATH OR INJURY UNDER CARRIAGE BY AIR ACT 1972

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Abstract

Carriers' liability for passenger death or injury during the transportation by air has become a major area of controversy in India especially post Mangalore air crash. The Carriage by Air Act 1972 dealing with carriers' liability in India incorporates Warsaw Convention, Hague Protocol and Montreal Convention, the three international instruments ratified by India. The differences in scheme of liability adopted in these instruments have brought forward significant questions in terms of jurisdiction and computation of compensation. In addition, the application of international carriers' liability regime to domestic carriers with modifications has triggered the questions about justifiability of discrimination. In light of these factors, it is pertinent to address the issues concerning liability for passenger death or injury during the air transportation not only from an academic perspective but also from practical point of views.

The present paper first introduces the structure of liability under the Carriage by Air Act. It moves on to discuss the carriers' liability and defences against liability for passenger death and injury under three

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schedules of the Act. Next part of the paper delves into the problems of the regime in terms of jurisdiction, computation of compensation and discrimination in international and domestic carriers' liability. The last part concludes with suggestions of the author to overcome the problems.

***Keywords**: Carrier, Air, Liability, Law, Convention.*

INTRODUCTION

With the developments in civil aviation in the first half of twentieth century, one of the concerns to emerge early in the field was liability for damage caused to the parties during the air transportation. Since the civil aviation was in its rudimentary stage of development, mishaps were common resulting in death of or injury to passengers and damage to baggage and goods.[1] International deliberations in 1920s resulted in the Warsaw Convention 1929[2], which was to deal with the liability of carrier for damage caused during air transportation with an objective of having certain degree of uniformity in the laws applicable to different States.[3] Though the Convention speaks about the liability of carrier, it is more carrier oriented rather than victim oriented. This is reflected in wide range of defences and limits of liability available to carrier under the Convention. The obvious reason for this is that civil aviation and aviation technology were still in the initial stage of development, and imposition of heavy burden on air carriers would have disincentivised investments and developments in the sector.

However with the developments in aviation sector and consequential increase in revenue generated by the air carriers, it was found that the continuation of carrier oriented regime would be unfair from the public perspective. This awareness has resulted in amendments to the Warsaw

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[1] Paul Dempsey & Laurence Gesell, Air Transportation: Foundations For The 21st Century 74 (1997).

[2] Convention for the Unification of Certain Rules Relating to International Carriage by Air, 49 Stat. 3000; 137 LNTS 11.

[3] Nicholas M. Matte, Treatise On Air - Aeronautical Law 379 (1981).

Convention in the form of Hague Protocol 1955[4], Guadalajara Convention 1961[5], Guatemala City Protocol 1971[6] and four Montreal Protocols of 1975[7]. These subsequent instruments reduced the defences available to the carrier, and increased the sphere of application and limits of liability to further the interests of victims. Unfortunately, the amendments of Warsaw Convention were not uniformly accepted by all the State parties to the Convention. Consequently, there has been a complete diversification of air carrier liability regime in different parts of the world. In order to harmonize and modernize the air carrier liability regime in the international level, the Montreal Convention 1999[8] has been entered.[9] However, this did not solve the problem, since all the parties to Warsaw system did not become parties to the Montreal Convention. Thus Montreal Convention ended up in adding one more parallel regime to further diversify the international carrier liability law.[10] Once all the parties of Warsaw system become parties to Montreal Convention, the earlier regime would abrogate to establish uniformity.[11]

[4] Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, 478 U.N.T.S. 371; 10 ILM 613 (1971).

[5] Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, 500 U.N.T.S. 31. y.

[6] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, 10 ILM 613 (1971).

[7] Additional Protocol No. 1 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air, 2097 UNTS 28; Additional Protocol No. 2 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air; Additional Protocol No. 3 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air, ICAO doc. 9151-LC/171-2; Additional Protocol No. 4 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air, 2145 U.N.T.S. 36.

[8] Montreal Convention for the Unification of Certain Rules for International Carriage by Air, 2242 U.N.T.S. 309.

[9] Pablo Mendes De Leon & Werner Eyskens, *The Montreal Convention: Analysis of some Aspects of the Attempted Modernization and Consolidation of the Warsaw System*, 66(3) J. AIR L. & COM. 1155, 1162 (2001).
See Thomas J. Whalen, *The New Warsaw Convention: The Montreal Convention*, 25(1) AIR & SPACE. 12, 14 (2000).

[10] This has posed difficulties in implementation of carriers' liability norms.
See Satadru Goswami, *The Warsaw System and the Montreal Convention: Questions over Implementation of the Liability Regime*, 2(1) ASIAN J. AIR & SPACE L. 97-106 (2012).

[11] J.C. Batra, *'Modernization of the Warsaw System - Montreal 1999'*, 65 J. AIR L. & COM. 429 (2000). (Purpose of the Montreal Convention is not just to amend the Warsaw system but to unify and replace the Warsaw system).
See Ehrlich v. American Airlines Inc. 360 F.3d 366 (2d Cir. 2004).

India is a party to Warsaw Convention, Hague Protocol and Montreal Convention. Consequently, the Carriage by Air Act 1972, which is enacted for implementing the international norms in Indian domestic level, contain three sets of liability norms. Section 3 read with First Schedule outlines the Warsaw Convention norms, Section 4 read with Second Schedule outlines the Hague Protocol norms, and Section 4A read with Third Schedule outlines the Montreal Convention norms as applicable to international carriage in India. Part I, II, and III of the Annexure provide the list of States which would be governed by Warsaw Convention, Hague Protocol and Montreal Convention respectively. Section 8 of the Carriage by Air Act empowers the Central Government to come out with the notification to extend carriers' liability norms to the domestic carriage with or without modifications.

LIABILITY NORMS RELATING TO DEATH OR INJURY

Air carriers are liable for death or injury sustained by the passenger during transportation by air under all three schedules.[12] While First and Second Schedules refer to death, wounding and bodily injury, the Third Schedule makes a reference only to death and bodily injury. There are debates about the interpretation of 'bodily injury' especially regarding the status of psychological injury being the part of bodily injury.[13] It is more or less settled in most of the States that mere psychological injury is not compensable.[14] However, the psychological injury, in order to be compensated, needs to emerge from physical injury.[15]

The victim needs to prove that damage is caused by the accident which took place on board the aircraft or in the course of any of the operations of

[12] See Rule 17 of First and Second Schedules, and Rule 17(1) of Third Schedule.

[13] McKay Cunningham, *The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?*, 41 VAND. J. TRANSNAT'L L. 1-40 (2008).

[14] Husserl v. Swiss Air Transport Co. 388 F. Supp. 1238 (S.D.N.Y. 1975); Rosman v. Trans World Airlines 314 N.E.2d 848 (N.Y. 1974); Eastern Airlines, Inc. v. Floyd 499 U.S. 530 (1991); Kotsambasis v. Singapore Airlines Ltd (1997) 42 NSWLR 110; King v. Bristow Helicopters Ltd. [2002] UKHL 7.

[15] Jack v. Trans World Airlines Inc. 854 F. Supp 654 (1994); Alvarez v. American Airlines Inc. (1999) 27 Avi 17, 214; 1999 WL 691922; Ratnaswamy v. Air Afrique 1998 WL 111652.

embarking or disembarking. Thus mere proof of death or injury is not sufficient, but the plaintiff has to prove the occurrence of accident, which is interpreted as 'happening of unexpected event', causing the damage.[16] In addition, the concerned accident must have occurred on board the aircraft or in the course of embarking or disembarking, which are the questions of fact to be established separately in each case.[17]

Limits of liability of carrier under the three schedules are different. Under First Schedule, the maximum limit of liability for passenger death and injury is fixed at 1,25,000 francs.[18] However, there can be a special contract between the passenger and the carrier to increase the limit. In addition, if there is wilful misconduct or a default equivalent to wilful misconduct by the carrier which causes the damage, the limit of liability is lifted to expose the carrier to unlimited liability.[19] Second Schedule increases the limit of liability for passenger death or injury to 2,50,000 francs.[20] Similar to First Schedule, the limit can be increased by a special contract. Finally, an intentional act or omission of the carrier to cause damage or his reckless act or omission with the knowledge that damage would probably result would lift the limit of liability of carrier, if the damage is resulting from such act or omission.[21]

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[16] Air France v. Saks (1985) 470 US 392.

[17] *See* for details Paul Stephen Dempsey, *Accidents and Injuries in International Air Law: The Clash of Titans,* 34 ANNALS AIR & SPACE L. 285-310 (2009).

[18] Rule 22(1), First Schedule: In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 1,25,000 francs. Where damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 1,25,000 francs. Nevertheless, by special contract the carrier and the passenger may agree to a higher limit of liability.

[19] Rule 25(1), *ibid*: The carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as is in the opinion of the Court equivalent to wilful misconduct.

[20] Rule 22(1), Second Schedule: In the carriage of persons the liability of the carrier for each passenger is limited to the sum of 2,50,000 francs. Where in accordance with the law of the Court seized of the case, damages may be awarded in the form of periodical payments the equivalent capital value of the said payments shall not exceed 2,50,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

[21] Rule 25, *ibid*: The limits of liability specified in rule 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

Same rule on lifting the liability limit is applicable under both First and Second Schedule, if servants or agents of carrier are found within the sphere of application of the provision.[22]

Third Schedule introduces a different scheme of liability consisting of two tiers. Under the first tier, carrier is strictly liable up to 1,00,000 SDR.[23] He cannot avail the defences or limits of liability except the defence of contributory negligence of the victim.[24] Under the second tier, carrier is liable over and above 1,00,000 SDR on the basis of fault liability. If the carrier wants to escape liability under the second tier, he has to prove either the absence of negligence or other wrongful act or omission on his part, or that the damage is solely caused by third party's negligence or other wrongful act or omission.[25]

Contributory negligence of the victim stands as a defence available to the carrier under all three schedules regarding the passenger death or injury.[26] This defence has got the effect of either complete or partial exoneration from liability depending on the extent of contributory negligence. In addition, First and Second Schedules provide the defence of taking all necessary

[22] *Ibid* and Rule 25(2), First Schedule.

[23] Rule 21(1), Third Schedule: For damages arising under sub-rule (1) of rule 17 not exceeding one lakh Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

[24] Rule 20, Third Schedule: If the carrier proves that the damages was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This rule applies to all the liability provisions of these rules, including sub-rule (1) of rule 21.

[25] Rule 21(2), Third Schedule: The carrier shall not be liable for damages arising under sub-rule (1) of rule 17 to the extent that they exceed for each passenger one lakh Special Drawing Rights if the carrier proves that - (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

[26] Rule 21, First and Second Schedules: If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may, [in accordance with the provisions of its own law], exonerate the carrier wholly or partly from his liability. Words in brackets are found only in Second Schedule. Rule 20, Third Schedule: see *supra* note 24.

measures to avoid damage or impossibility of taking such measures by the carrier[27], which is not available under Third Schedule in case of passenger death or injury. This is of particular relevance as it has the effect of completely changing the nature of liability from fault based liability (under First and Second Schedules) to strict liability with the only exception of contributory negligence of victim (under Third Schedule).

The above discussion clearly outlines the differences in the regime set forth under three schedules of Carriage by Air Act. This has resulted in the emergence of several critical issues in air carrier liability regime adopted by India. The major reason for problems is found in the conflicting basis of three international instruments, Warsaw Convention, Hague Protocol and Montreal Convention, on the basis of which the Carriage by Air Act is enacted. As mentioned above, the Warsaw Convention (First Schedule) is fundamentally carrier oriented and the Montreal Convention (Third Schedule) is completely victim oriented. Hague Protocol (Second Schedule) stands somewhere in between the two extreme points.

JURISDICTIONAL CONCERNS

First and Second Schedules provide four jurisdictions in which the plaintiff can file case seeking compensation. The jurisdictions include the ordinary residence of the carrier[28], principal place of business of the carrier, place of business of the carrier wherein the contract of carriage is made and the place of destination.[29] Exercise of jurisdiction by any other State or by a State that

[27] Rule 20(1), First Schedule and Rule 20, Second Schedule: The carrier is not liable if he proves that he and his [servants or] agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. Words in brackets are found only in Second Schedule.

[28] Gregory C. Walker. *Doing Business in Montreal: The Effects of Addition of Fifth Forum Jurisdiction under the Montreal Convention,* 23(1) PENN ST. INT'L L. REV. 125-146 (2004). (It has been interpreted in different cases to mean the location of carrier's headquarters, place where the carrier is managed and controlled by its officers and directors or place of incorporation of carrier)

[29] *See* Rule 28, First Schedule and Rule 29(1), Second Schedule.

is not a Contracting Party to the Warsaw Convention would result in rejecting the enforcement of the decision on the ground of forum not having jurisdiction to hear the case.[30] A glance at these jurisdictions show that they are chosen by giving due weightage to the interests of carrier. Third Schedule adds fifth jurisdiction in the form of place of principal and permanent residence of the plaintiff to or from which the carrier operates services for the carriage of passengers by air.[31]

The fifth jurisdiction under Third Schedule gives due consideration to victims' interest by allowing the victims to choose the most advantageous jurisdiction of their own respective State.[32] It is of added advantage to those victims and their families who are handicapped to move out of their country to seek compensation from carriers. However this may result in discrimination between victims of same accident depending on the State to which they belong, since the applicability of respective Schedule depends on the concerned State's ratification of corresponding international instrument/s. Purely looking from victims' perspective, discrimination does not seem to be on any sound premise but only due to the sheer chance of victim hailing from one particular State as against another.

Another question that has arisen on the jurisdiction under the Carriage by Air Act is, whether the consumer forum are courts of competent jurisdiction under the Act to entertain the cases? In other words, the question is about

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[30] LAWRENCE B. GOLDHIRSH, THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK, 141 (1988); Alan H. Collier, *Forum Non Conveniens in Foreign Air Carrier Litigation: A Sustained Response to an Evolving Plaintiffs' Strategy*, http://www.aircraftbuilders.com /UserFiles/File/lr2004b.pdf .

[31] Rule 33(2), Third Schedule: In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in sub-rule (1), or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

[32] Devendra Pradhan, *The Fifth Jurisdiction under the Montreal Liability Convention: Wandering American or Wandering Everybody*?, 68(4) J. AIR L. & COM. 717, 720 (2003).

the possible overlap between the Consumer Protection Act and Carriage by Air Act. This question was contested in many cases[33], finally reaching the Supreme Court for determination in *Trans Mediterranean Airways* v. *M/s. Universal Exports and Another*[34]. While answering the question in affirmative, the Supreme Court held that "Section 3 of the Consumer Protection Act gives an additional remedy for deficiency of service and that remedy is not in derogation of any other remedy under any other law." Thus, the consumer foram are the courts of competent jurisdiction under Carriage by Air Act.[35]

However, by virtue of Section 5 of Carriage by Air Act[36], the above logic is not applicable in case of death of the passengers consequent to aviation accidents. Section 5 has the effect of excluding the liability of carrier for death under the Fatal Accidents Act 1855 and any other enactment or rule of law in force in India except the three schedules of Carriage by Air Act. Hence, the consumer forams are not competent to deal with the cases involving the death of passengers.

COMPUTATION OF COMPENSATION

International instruments on carriers' liability do not provide guidelines for computation of compensation for passenger death or injury. In general

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[33] *See Bharat S. Modi v. British Airways* O.P. No. 48/96 decided on 10 December 2001 (National Consumer Disputes Redressal Commission); Govind S. Poddar v. M/s. Cathay Pacific Airways Ltd. and Others O.P. No. 167/2001, decided on 31 May 2002 (National Consumer Disputes Redressal Commission); Geetha Jethani v. Airport Authority of India and Others 2004 (3) CPJ 106 (National Consumer Disputes Redressal Commission); J. P. Singh v. British Airways No. C-220/1998, decided on 26 February 2007 (State Consumer Disputes Redressal Commission, Delhi); Marudhamuthu Varadharajan v. M/s.Bahrain Airport Services and Others C.C.No.30/2008, decided on 26 September 2011 (Tamil Nadu State Consumer Disputes Redressal Commission, Chennai).

[34] (2011) 10 S.C.C. 316 (India).

[35] Ranjana Kaul & Ram S. Jakhu, *Regulation of Space Activities in India, in* NATIONAL REGULATION OF SPACE ACTIVITIES 153, p 191, (Ram S. Jakhu (ed.), 2010).

[36] Liability in case of death - (1) Notwithstanding anything contained in the Fatal Accidents Act, 1855 (13 of 1855) or any other enactment or rule of law in force in any part of India, the rules contained in the First Schedule, the Second Schedule a [and the Third Schedule] shall, in all cases to which those rules apply, determine the liability of a carrier in respect of the death of a passenger.

liability cases, domestic courts have a more or less uniform policy of calculating the amount of compensation by considering multiple factors like, age, income, earning capacity, family status, loss of future prospects etc. of the plaintiff. The extent to which these multiple factors are relevant in the computation of compensation under Carriage by Air Act is a matter of debate especially under the Third Schedule.

Even before the Third Schedule was incorporated, there were conflicting decisions of High Courts on the computation of compensation. In *Kandimallan Bharathi Devi and Others* v. *The General Insurance Corporation of India*[37], the Andhra Pradesh High Court had to decide on the question, whether the benefit received out of the personal accident insurance policy has to be set-off in computing the compensation under the Carriage by Air Act? While answering this question in negative, the Court ruled that compensation under Rule 22 (1) is the minimum compensation in case of death subject to the higher limit under special contract between the carrier and passenger.[38] Hence, the Court did not base the computation of compensation for death on any extrinsic factor, rather went by the logic that death of passenger, irrespective of his/her status, would result in reaching the full limit of compensation set forth under Rule 22(1).

The question on computation of compensation under the Carriage by Air Act further came to the limelight in *Airport Authority of India* v. *Ushaben Shirishbhai Shah*[39]. In this case, despite poor visibility in Ahmedabad airport[40], Air India pilots decided to land the aircraft resulting in accident. Though this accident happened in 1988, it took 22 years of litigation for final

[37] A.I.R. 1988 A.P. 361.
[38] *Ibid*, para 23.
[39] (2010) 1 G.L.R. 321. Both Airport Authority of India and National Aviation Company of India Ltd. (Air India) are made as parties to the litigation, since both have contributed to damage. While the latter's employees (pilots) recklessly decided to land, the former had given permission for landing.
[40] Visibility was so poor that pilots could not see the runway even after descending below 1000 meters.

determination in 2010 by the Gujarat High Court. Plaintiff's claim to lift the limit of liability of the carrier under the Second Schedule (which was the applicable law) was allowed by the Court, since there was a reckless act of carrier's employees (pilots) causing damage.[41] However, the Court went on to calculate the compensation on the basis of victim's income in 1988 coupled with other extrinsic factors[42] and awarded a compensation of Rs. 7.53 lakhs.[43] This is certainly much less the amount than what is normally expected in an aviation claim in other States.

After the Third Schedule was incorporated in the Carriage by Air Act, the first major incident to test the norms on computation of compensation under the Third Schedule is Mangalore air crash of 2010. Soon after the accident, the carrier, Air India, negotiated compensation to be offered to the victims. The compensation offered was on an average Rs. 80 lakhs, but individually varied from Rs. 7.757 crores to Rs. 35 lakhs depending on victims' positions. One of the victims, Mohammed Rafi, was a 24 year old working at UAE as a salesman with a monthly salary of Rs. 25,000. The legal heirs of Mohammed Rafi were offered a sum of Rs. 35 lakhs as full and final compensation for his untimely death. Unsatisfied with the offered sum, the victim's family approached the Kerala High Court resulting in the case, *S. Abdul Salam* v. *Union of India and National Aviation Company of India Ltd.*[44]

The plaintiffs' contention in this case was that the principle of strict liability is applicable to the extent of 1,00,000 SDR (approximately Rs. 75 lakhs) while deciding the liability under Rule 21(1) of the Third Schedule. They went on to contend that the proof of extent of damage sustained is required only in case of bodily injury, which is partial damage, but not in case of full damage

[41] *See* Rule 25, Second Schedule.
[42] The factors such as likely residual life, potential expenses and interest at the rate of 9% are also considered in decision-making.
[43] National Aviation Company of India Ltd. (Air India) and Airport Authority of India were asked to pay the compensation amount at 70:30 ratio.
[44] I.L.R. 2011 (3) Ker. 457.

like death. In case of full damage (death), the compensation shall be full, that is, 1,00,000 SDR. Rule 26 was used in support of this argument, since it states that "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in these rules shall be null and void…"

The Single Judge while agreeing to the above argument, observed that the factors such as age, income, earning capacity, loss of dependency, loss of future prospects etc. need not be taken into consideration, since the liability norms under the Third Schedule do not make any specific reference to them. The proof of extent of damage caused by injury becomes irrelevant when the injury leads to death. In addition, the Court relied on the statement of Minister for Civil Aviation during the parliamentary debates leading to the amendment of Carriage by Air Act in 2009 to incorporate Montreal Convention 1999. While answering the question whether there would be a distinction in compensation between a passenger travelling in economy class and a passenger travelling in business class, the minister replied that all passengers would be treated equally, since compensation is guided by the principle of equity. Assessing all these cumulatively, the Court concluded that the plaintiffs are entitled to a minimum of 1,00,000 SDR on the basis of no fault liability under the Third Schedule.

The respondents went on appeal against the above decision to the division bench of Kerala High Court in *National Aviation Company of India Ltd.* v. *S. Abdul Salam*[45]. The Division Bench overruled the Single Judge's decision to hold that there is no minimum compensation fixed for death under the Third Schedule. For this conclusion, it relied on multiple factors. First, Rule 21(1) deals with the compensation not only for death but also for bodily injury as specified under Rule 17(1). The interpretation of minimum compensation of 1,00,000 SDR for death would by the same logic be transported to bodily

[45] I.L.R. 2011 (4) Ker. 4.

injury, which results in absurdity. Second, the Rule 21(1) is not without any exception, since applicability of Rule 20 exonerates carrier's liability even under Rule 21(1). This shows that 1,00,000 SDR under Rule 21(1) is not a hard and fast rule. Third, Rule 28 while obligating the carrier to make advance payments to meet the immediate economic needs of the victims in case of death or injury of passengers[46] does not stipulate minimum amount to be paid as advance. According to the Court, if Rule 21(1) is intended to provide minimum compensation, Rule 28 should have fixed a minimum sum as advance payment.

For the above reasons, the Court held that Rule 21(1) does not stipulate minimum compensation to be paid but has the effect of only preventing the carrier from taking the defence of want of negligence within the limit of 1,00,000 SDR. The effect of Rule 21(2) is that in cases where in the claimant can prove the damage caused beyond 1,00,000 SDR, the carrier can invoke the defences to exonerate from liability over and above 1,00,000 SDR. Therefore, the claimant needs to prove the extent of actual damage suffered to get proportionate compensation even in case of strict liability under Rule 21(1). In order to assess the extent of damage, the factors like age, income, earning capacity, loss of dependency, loss of future prospects etc. need to be taken into consideration.

Aggrieved by the verdict of the Division Bench, the claimants have appealed to the Supreme Court. One of the major issues in this regard before the Supreme Court is the interpretation of differing languages of Third Schedule as against the First and Second Schedules. While First and Second Schedules use the words "...liability of the carrier for each passenger is *limited to*[47] the

[46] Notwithstanding anything contained in any other law for the time being in force, where the aircraft accident results in death or injury of passengers, the carrier shall make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

[47] Emphasis added.

sum of..."[48], the Third Schedule mentions "...not exceeding one lakh Special Drawing Rights for each passenger, the carrier *shall not be able to exclude or limit*[49] its liability..."[50] in case of death or bodily injury. Thus, the First and Second Schedules expressly mention about the limit of liability, which is not found under the Third Schedule. Therefore, the Supreme Court's stand on the issue of computation of compensation is eagerly awaited.

INTERNATIONAL V. DOMESTIC CARRIAGE LIABILITY

Section 8 of the Carriage by Air Act empowers the Central Government to apply the above-discussed liability norms of international carriage to the domestic carriage with or without exceptions, adaptations and modifications by notification in the Official Gazette. While exercising this power, the Central Government had notified the Second Schedule[51] in 1973 and the Third Schedule in 2014 with modifications.[52] Since the 2014 Notification expressly supersedes the 1973 Notification, the Third Schedule's liability norms as modified in 2014 Notification apply currently to the domestic carriage in India.

Interestingly, the 2014 Notification modifies the Third Schedule substantially for application to the domestic air carriage. The sphere of application of liability norms has been reduced down by incorporation of several exceptions under Rule 2 of Third Schedule.[53] Such exclusion also includes the carriage of employees of the carrier who are performing duties on board the aircraft. Thus, the flying personnel of the domestic air carriage

[48] *See* Rule 22, First Schedule and Second Schedule.
[49] Emphasis added.
[50] *See* Rule 21(1), Third Schedule.
[51] Notification Regarding Application of the Carriage by Air Act, 1972, to Carriage by Air which is not International, Ministry of Tourism and Civil Aviation Notification No. S.O. 186(E) dated 30 March 1973. Hereinafter 1973 Notification.
[52] Ministry of Civil Aviation Notification No. S.O. 142(E) dated 17 January 2014. Hereinafter 2014 Notification.
[53] *See* Clause 1(c), 2014 Notification.

are entitled to relief for any damage caused to them under the labour laws and not under the Carriage by Air Act.

As far as the liability for the death of or injury to the passenger is concerned, though the norm of unlimited liability of the carrier is continued, the 2014 Notification reduces the strict liability of the carrier to Rs. 20,00,000.[54] Thus, the carriers are entitled to the defences available under the Third Schedule once the limit of Rs. 20,00,000 crosses. Added to this, the 2014 Notification exempts the carrier from taking mandatory liability insurance coverage.[55] These modifications clearly reflect the intent of Central Government to favour the domestic air carriers with a view to promote civil aviation.

The above changes in the liability regime may find support in light of ailing aviation industry in India. However looking from the consumers' perspective, they are problematic. Such a differential norm of liability may end up in being unjustifiable discrimination between the two passengers of equal status, one performing the international carriage and the other performing the domestic carriage in the same aircraft. To better illustrate, let us hypothetically consider that X and Y have equal status and background in all respects, and are travelling in the same aircraft. X is travelling from London to Mumbai with a stopover at Delhi (in the same aircraft), which makes his entire journey, London-Delhi-Mumbai, an international carriage. Y presumably enters the same aircraft in Delhi to reach Mumbai, which is essentially domestic carriage. Unfortunately, the aircraft meets with an accident after takeoff in Delhi due to a bird hit, and both X and Y are seriously injured in the accident. Also presumably both X and Y claim compensation to the tune of Rs. 60,00,000 by establishing the damage suffered by them. In this hypothetical situation, X would be entitled to the full amount without any exception, but Y can get only Rs. 20,00,000 on the basis of strict liability and he would fail to recover remaining Rs. 40,00,000,

[54] Clause 1(f), *ibid*.
[55] Clause 1(j), *ibid*.

since it would not be possible for him to overcome the defences of carrier under Rule 21(2). Thus the differential liability norms lead to arbitrary discrimination between the passengers in practical terms.

CONCLUSIONS

Failure to achieve uniformity in the international norms governing carriers' liability is invariably reflected in the Indian domestic legislation adopted to implement the carriers' liability norms. Parallel operation of three international instruments, the Warsaw Convention 1929, Hague Protocol 1955 and Montreal Convention 1999, in the Carriage by Air Act 1972 is of considerable concern in India. Since these three instruments were drafted at different stages of developments of aviation sector across the globe, they cater to different stakeholders' interests depending on the requirements of their respective period of drafting. This has resulted in some inherent contradictions in the fundamental aspects of the regime resulting in the above-discussed concerns relating to jurisdiction and computation of compensation. In addition, the differential approach adopted by the Central Government in implementing the carriers' liability regime to domestic carriage has added difficulties outlined above.

The author is of the view that the jurisdictional problems in the Carriage by Air Act may be solved in the course of time once all the States parties to the Warsaw system become parties to the Montreal Convention, since the Montreal Convention has the effect of superseding the Warsaw system. However, problem is that it is difficult to imagine any timeframe for the realization of this end. As far as concerns in the computation of compensation are concerned, the Supreme Court's decision in the pending appeal against Kerala High Court's decision in *National Aviation Company of India Ltd.* v. *S. Abdul Salam* is expected to set the precedent for future course of action.

Finally, the problem of difference in the compensation available to the victims of accidents in international carriage and domestic carriage coupled with the absence of obligation on the carrier to procure liability insurance for domestic carriage needs specific attention. This is not going to be solved in the course of time without a proactive step from the Central Government to eliminate such discriminations. Understandably, the Indian aviation sector is in chaos. However, this cannot be attributed to the consumers of air services; rather it is the unregulated competition between the air carriers that has resulted in the sorry state of affairs. Therefore, supporting the cause of domestic air carriers at the cost of consumers of domestic air services is not based on sound principles of justice and equity. This leads to the obvious conclusion that changes need to be introduced to keep the domestic passengers at par with the international passengers not only regarding their right of equal compensation but also regarding the carriers' obligation to procure the insurance coverage, so that the domestic passengers are ensured of their entitlement.

THE MEANDERING COURSE OF DEATH PENALTY SENTENCING IN INDIA: A CRITICAL ANALYSIS

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Abstract:

The Constitutional bench of the Supreme Court of India in Bachan Singh v. State of Punjab has laid down elaborate criteria that needs to be applied to decide whether an accused deserves death penalty or not. Analyzing the decision of the Supreme Court from 1973- 2013, the author argues that subsequent Courts have not only failed to apply the criteria laid down but have also grossly misunderstood the decision of the Constitutional bench, thereby sending several accused to the gallows for whom the appropriate punishment may have been imprisonment for life. This paper traces the path the meandering course of death penalty sentencing in India has taken and suggests corrective course.

Keywords: *Death Penalty, Rarest of Rare, Criminology, Deterrence, Retributive.*

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INTRODUCTION

'*Guilt once established, the punitive dilemma begins*'
-Late Justice V. Krishna Iyer[1]

The issue of awarding death penalty for certain crimes has always been a contentious one, not just in India but around the world. The world in this regard has been divided into two factions, the abolitionists, who argue for the removal of death penalty and the retentionists, who argue for its retention in the Statute book.[2]

The argument favoring death penalty is often founded on the deterrent theory of punishment.[3] This theory assumes that the motive behind awarding punishment is to deter other members of the community from committing the same crime.[4] The result is the establishment of a stable social order in the society. Since people fear death the most, death penalty serves as the most effective deterrence among people. This argument was given further credence by the research of a criminologist named Issac Ehrlich, who established that for every death penalty seven lives are saved because of the deterrence created in the society.[5] However employment of Deterrence theory as a tool for justifying continuance of death penalty has been severely criticized by several criminologists.[6] They argue that there is lack of any

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[1] Late Justice V. Krishna Iyer in, Ediga Anamma v. State of Andhra Pradesh, A.I.R. 1974 S.C. 799.

[2] According to the information available on the website of Amnesty International as of 2012, 140 countries have abolished death penalty while only 58 countries have still retained it. For more *See*, http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries, (last updated Dec. 20, 2014).

[3] Janet Chan and Deborah Oxley, *The deterrent effect of capital punishment: A review of the research evidence*, 84 CRIME. & JUST. BULL. (October 2004), http://info.lawaccess.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB84.pdf/$file/CJB84.pdf.

[4] *Id.*

[5] Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397-417.

[6] In 2009 research conducted by two criminologists to gage the opinion of other criminologists on the issues of abolition of death sentence, around 67% of the criminologists believed that death sentence does not create any deterrence in the society. Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views Of Leading Criminologists*, 99(2) J. CRIM. L. & CRIMINOLOGY 489- 508.

credible data in support of this claim. In fact in 1989, a resolution was adopted by the American Society of Criminology which had demanded the abolition of death penalty on the grounds that there does not exist any evidence which could give credence to the fact that death penalty causes deterrence among other members of the community and prevent them from committing any sort of crime.[7]

Another justification for the continuance of death penalty is the retribution theory of punishment. This theory is founded on the principle of *lex talionis*[8] and argues that a just punishment is one which inflicts the same amount of pain to the offender as he caused to the victim.[9] The retentionists argue that since death penalty is prescribed in those cases where the accused has caused the death of another person it is very much reasonable and justified that law takes the life of the offender to give retribution to the family of the deceased.[10] However, the abolitionists expose the absurdity in this hypothesis by arguing that modern punishment is not founded on the principle of retribution because if this was the case then no punishment can be given to rapists, thieves and whole lot of other criminals.[11] Instead they argue that reformation and rehabilitation is the primary purpose of punishment, which is defeated if death penalty is awarded to an offender.[12]

The Supreme Court of India in a series of decisions has consistently upheld the continuance of death penalty in Statute book. According to the available data, the Supreme Court has awarded 1,455 death penalty from 2001 – 2011 but during the same period it has commuted 4,321 death penalty awarded by

[7] The Resolution is Available on http://www.asc41.com/policies/policyPositions.html, (last updated Dec. 20, 2014).

[8] The Black's Law Dictionary defines *lex talionis* as, "the law of retaliation, under which punishment should be in kind- an eye for an eye, a tooth for a tooth and so on," BRYAN A. GARNER (ed.), BLACK'S LAW DICTIONARY 924 (7th ed. 1999).

[9] Hugo Adam Bedau, *Retribution and the Theory of Punishment*, 75 (2) J. PHIL. 601-620.

[10] Clarie Finkelstien, *Death and Retribution*, CRIM. JUST. ETHICS. 12-21, https://www.law.upenn.edu/cf/faculty/cfinkels/workingpapers/death%20and%20retribution.pdf (last updated Dec. 20, 2014).

[11] *Id.*

[12] *Supra* note 10.

the lower Courts.[13] This clearly indicates a much cautioned approach taken by the Supreme Court in awarding death penalty. The factors that a Court needs to consider while awarding death penalty was laid down by a Constitutional bench of the Supreme Court in *Bachan Singh v. State of Punjab*.[14] However, the researcher shall demonstrate through-out this paper as to how the continuous decisions of the supreme court have not followed this decision in letter and spirit thereby committing grave miscarriage of justice.

The main objective of this paper is to study and elicit the sentencing jurisprudence in India relating to death penalty. It is critical to highlight that the paper does not express any opinion on whether we should continue with death penalty or not? It rather concerns with the line of reasoning that a Court should give while sentencing a person to death. However, to completely ignore this debate would be absolutely foolhardy hence various arguments in favour and against death penalty have been considered from the perspective of criminology.

The decision of the Supreme Court from 1973- 2013 was studied. However, these decisions were filtered on the basis that only those cases which have either added/clarified the law relating to death penalty were studied in detail.

For the sake of convenience and brevity this paper has been divided into six sections. The first section introduces the paper while the second section discusses those judgments which have been delivered prior to the *Bachan Singh* case. The third section elaborates upon the Rarest of the Rare doctrine while the next two sections demonstrates the manner in which the Rarest of

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[13] ASIAN CENTRE FOR HUMAN RIGHTS, *The State of Death Penalty in India: Discriminatory treatment amongst the death row convicts*, Feb. 14, 2013, http://www.achrweb.org/reports/india/IndiaDeathPenaltyReport2013.pdf. The data was released by NATIONAL CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS.

[14] A.I.R.1980 S.C. 898. (India). (*Bachan Singh case).*

the Rare case doctrine has not been followed by the Supreme Court in its subsequent decisions. The last section is the conclusion which summarizes the various issues raised in the paper and also suggests the most appropriate sentencing guidelines the Courts should follow while awarding death penalty.

THE PRE- BACHAN SINGH ERA

Prior to the *Bachan Singh* case the Supreme Court had delivered a series of judgment which had set the backdrop and the tone in which the Constitutional Bench had rendered its historic decision. This section intends to survey and map those leading cases and tries to highlight the legal principles emerging from them.

In these lines of cases, *Jagmohan Singh v. State of Uttar Pradesh*[15] is one of the foremost cases because the Court for the first time authoritatively dealt with the dilemma in awarding deaths sentence in preference over life imprisonment. In the instant case the appellant was convicted and awarded death sentence, by the Trial Court and subsequently confirmed by the High Court, for the murder of one Chhotey Singh. On appeal the constitutional validity of death sentence was challenged on several grounds. *Inter alia*, it was argued on behalf of the appellant that in the absence of any guidelines for imposing death penalty there is a wide discretion in the hands of the judge. As a result, there may arise a situation where on similar facts two different judges' award death sentence to one accused and life imprisonment to another. It was argued that this unguided and unfettered discretion in the hands of the judges violates equality clause enshrined in Article 14 of the Constitution[16] as two similarly placed individuals may be treated differently.

The Constitutional bench of the Supreme Court while negating this argument

[15] A.I.R. 1973 S.C. 947.

[16] Article 14 of the Constitution of India reads, 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'

observed that there is an absence of absolute discretion in the hands of the judges while awarding death sentence. In its considered view, the principle that guides the sentencing Court while awarding death sentence is that it must, *'[balance] all the aggravating and mitigating circumstances of the crime*...."[17] Since the Court has to give due consideration to facts and circumstances, which in each case shall differ it refused to hold that there is violation of Article 14 while awarding death sentence. This is perhaps the first case where the court laid down the guiding principle for award of death penalty- i.e. to balance the aggravating and mitigating circumstances.

Another equally important case is that of *Ediga Anamma v. State of Andhra Pradesh*[18] In this case the accused, Anamma- a married lady who had a child of around 10 years at the time of commission of crime, killed another married lady and her 2 year old child because she suspected that the deceased was having an extra marital affair with another widower for whom she had deep seated affection and also an extra marital affair. The Trial Court and the High Court had both awarded death sentence to the accused. While deciding the appeal of the accused, the Supreme Court had observed that while deciding the sentence of an accused the focus should not only be on the crime committed but also on the criminal. It was reasoned by the Court that this balancing act would ensure that the pronounced sentence does justice to both the theories of punishment- reformation of the accused and deterrence towards the act committed. In the Courts words, '*Modern penology regards crime and criminal as equally material when the right sentence has to be picked out* .[19]

Hence, after duly considering not just the severity of the crime committed but also the overall social and other circumstances of the criminal, the Court gave due regard to the fact that the accused was a female,was of a young age,

[17] *Supra* note 15, at ¶ 28.
[18] A.I.R. 1974 S.C. 799.
[19] *Supra* note 18, at ¶12.

and was also expelled from the matrimonial home and had a young child to look after to, and hence commuted the death sentence to life imprisonment.

It is submitted that this case is the first in line which considered not just the crime committed but also the mitigating circumstances of the criminal while sentencing the accused. Post this judgment, in a series of cases, namely *Balwant Singh v. State of Punjab*[20], *Ambaram v. The State of Madhya Pradesh*[21], *Sarveshwar Prasad Sharma v. State of Madhya Pradesh*[22], the Supreme Court has held that there cannot be any straight jacket formulae definition of 'special reasons'. Hence, the decision of whether to award death sentence or life imprisonment was left entirely to the discretion of the judge.

In *Rajendra Prasad v. State of Uttar Pradesh*[23], the accused and one Ram Bharosey were involved in a long standing family feud. The accused in heat of passion murdered one of the family members of Ram Bharosey for which he was sentenced to life imprisonment. However, after being released from the jail on the occasion of Gandhi Jayanti he gruesomely murdered Ram Bharosey and his friend Mansukh. The Trial Court awarded death sentence which was duly confirmed by the High Court. The Supreme Court, while, reversing the sentence was of the opinion that death sentence is justified in only those cases where public interest, social defence and public order warrants. Exemplifying on its position further, the Court laid down several tests to decide whether to impose death sentence or life imprisonment.

Firstly, death sentence is warranted when due to the crime committed by the accused, the normal life in the community is paralyzed and there is absolute destruction of the social order.

[20] A.I.R. 1976 S.C. 230.
[21] A.I.R. 1976 S.C. 2196.
[22] A.I.R. 1977 S.C. 2424.
[23] A.I.R. 1979 S.C. 916.

Secondly, if the accused shows no remorse to the committed crime and is beyond repair within the confines of the prison then death may be awarded. The Court in this case interestingly observed that while sentencing the Court should not give any weightage to the brutality of the crime committed but should consider the brutality for the evidence as to whether the accused can be reformed or not.

Thirdly, the motivation of the accused for committing the crime must also be given due weight age and if the accused committed a cold blood murder with planning then such facts must be considered against him. In the opinion of the Court, the motivation of the accused was not the sole criterion but a relevant one in determining death penalty.

Fourthly, the Court quoted with approval several of its previous decisions like *Srirangan v. State of Tamil Nadu,*[24] *Nanu Ram v. State of Assam*[25] and *State of Uttar Pradesh v. Lalla Singh & Others*.[26] to hold that death sentence may not be preferred if the accused is too young or is suffering from any kind of economic hardship or mental imbalance and even if there has been sufficient time gap between the date of the commission of the crime and disposal of appeal by the Supreme Court.

RAREST OF THE RARE DOCTRINE

The previous section illustrates that in the absence of any legislative guideline on sentencing, the decision of awarding death penalty had become a function of judicial discretion. Sporadic judgments did try to curtail this discretion by enlisting specific instances in which death penalty may be avoided; still an authoritative pronouncement by the Supreme Court was lacking. This lacuna was soon realized and filled by a constitutional bench of the Supreme Court in *Bachan Singh* case[27], which formulated the *rarest of*

[24] A.I.R.1978 S.C. 274.
[25] A.I.R. 1975 S.C. 762.
[26] A.I.R. 1978 S.C. 368.
[27] A.I.R.1980 S.C. 898.

the rare doctrine. The doctrine was further explained in another landmark case of *Machhi Singh v. State of Punjab*[28]. The two cases serve an important pointer in guiding judicial discretion while sentencing an accused for death sentence or otherwise and hold water till today.

In *Bachan Singh* case, the petitioner Bachan Singh was sentenced to death, by the Trial Court and confirmed by the High Court, for the murder of three individuals under Section 302[29] of the Indian Penal Code, 1860. According to Section 354(3) of the Criminal Procedure Code, 1973 when death sentence is awarded to an accused in preference to life imprisonment then the Court must provide 'special reasons' for awarding death penalty.[30] Among other defenses on appeal to the Supreme Court, the petitioner contended that no special reasons existed for which death sentence should be granted to him. To drive home this point the petitioner relied on the host of judicial decisions which have been discussed in great detail in the preceding section.

The Court observed that death penalty must be awarded only in the *rarest of the rare case*. It is critical to highlight that the Constitutional Court in the *Bachan Singh* case substantially agreed with most of the findings of the Court in *Jagmohan Singh* case. However, it differed only on two accounts. *Firstly*, in the *Jagmohan Singh* case the Court held that death sentence may be awarded if the aggravating and mitigating circumstances of the case are duly considered. However, the Court in the *Bachan Singh* case was of the opinion that this is not needed in light of the new Criminal Procedure Code and introduction of Section 354(3) wherein death penalty may be given by detailing 'special reasons'. The Court took the liberty to define 'special reasons' as 'exceptional reasons'.

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[28] A.I.R. 1983 S.C. 957 (*Machhi Singh case*).

[29] § 302 of the Indian Penal Code, 1860 reads, 'Whosoever commits murder shall be punished with death, or imprisonment for life and shall also be liable to fine.'

[30] § 354(3) of the Code of Criminal Procedure, 1973 reads, 'When the conviction is for an offence punishable with dealt or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.'

Secondly, while in the *Jagmohan Singh* case the Court had held that only circumstances in relation to the crime must be considered, the *Bachan Singh* case partially modified this by holding that Court must not only, '*confine its consideration principally or merely to the circumstances connected with particular crime, but also give due consideration to the circumstances of the criminal.*'[31] Hence, while until *Bachan Singh* case the focus was only on the crime post this decision the focus shifted to both the crime as well as the circumstances of the criminal. This marks a critical shift in the Judicial attitude.

In *Machhi Singh* case the facts which gave rise to the dispute was that one Machhi Singh along with his eleven other companions had murdered seventeen persons belonging to the family of one Amar Singh. There was long standing animosity and feud between the two families and Macchi Singh sought to revenge this by killing family members of Amar Singh. As a result of being awarded death sentence by the Lower Courts, the accused preferred an appeal to the Supreme Court.

The Supreme Court while holding that *Bachan Singh* case was the law on the subject listed the following guidelines emerging from that case[32]:

Firstly, death penalty should be granted only in rarest of the rare case.

Secondly, while sentencing the accused the circumstances of the crime and that of the accused both are relevant and neither of them could be left out from consideration.

Thirdly, the fundamental guiding principle is that death sentence is exception to the general principle of awarding life imprisonment and hence it should be used only in sporadic cases where the facts and circumstances warrants nothing but the death of the accused and any other punishment would be wholly inadequate.

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[31] *Supra* note 27, at ¶164.
[32] *Supra* note 28, at ¶37.

Fourthly, before awarding death sentence the sentencing Court must draw a '*balance sheet of all the aggravating and mitigating circumstances*.'[33] After giving weightage to the mitigating circumstances and if the balance is still tilted in favor of the aggravating circumstances only then death penalty should be awarded.

While *Machhi Singh* case is considered to extrapolate the decision of the Supreme Court in *Bachan Singh*, it is submitted that the former case did not read the later decision correctly. While culling out the proposition laid down by the Supreme Court in the *Bachhan Singh* case, as detailed earlier, it required the sentencing Court to adopt *the balance sheet approach*. This is contrary to the express words of the Court in the *Bachan Singh* case and is in fact one of the two points where the Court disagreed with the *Jagmohan Singh* case. Moreover, the *balance sheet approach* is itself faulty because it tries to compare two dissimilar and different things- i.e. the crime with the criminal. It is indeed sad that until today this *balance sheet approach* though contrary to the Constitutional bench decision of the Supreme Court is being blindly carried forward by different Courts in the Country.

Moreover, besides enumerating the guidelines that needs to be followed in the case of awarding death sentence, the Court in *Macchi Singh* case listed two questions which must always be answered while deciding on the sentence.[34] *Firstly,* is the offence committed so exceptional that there is no scope for awarding any other sentence? *Secondly*, even when weightage is accorded to the mitigating circumstances does the circumstances still warrants death penalty?

It is critical to highlight that the Supreme Court in *Macchi Singh* case did attempt to define rarest of the rare by holding that they are those cases which

[33] *Id.* (Balance Sheet Approach).
[34] *Supra* note 28, at ¶38.
[35] *Id.* ¶32.

shocks the '*collective conscience of the community*.'[35] The Court did list five pointers which may be considered by the Court:

Firstly, the manner in which the crime was committed. Those cases where the murder committed by the accused was '*brutal, grotesque, diabolical, revolting, or dastardly manner*'[36] would fall under this category. *Secondly*, the motive behind the criminal act may be looked at. Killing people for money or cold blood murder would usually fall under this category. *Thirdly*, the nature of the crime which has been committed may be a relevant consideration. Killing of members of the Schedule Caste and Schedule Tribe Community with the intention to terrorize other members of the same community or death in pursuance of dowry would fall under this category. *Fourthly*, the degree of crime must be considered. Illustration could be those cases where members of the same family are killed. *Finally*, the status of the victim is also relevant and should be duly considered. Hence this category would comprise those cases where the victim is a child or a famous political leader who has been killed for nefarious political reasons.

These pointers even though may be of extreme help to the sentencing Court it is submitted, is against the spirit of the Court's decision in *Bachan Singh* case. In that case the Court[37] was of the firm opinion that it would not be possible to lay down with precision all the mitigation and aggravating circumstances. It had opined that any attempt by it to lay down circumstances would run the risk of frustrating the very purpose for which discretion was granted.[38] The rationale behind grant of discretion was that since facts and circumstances of each case are different, the sentencing judge

[36] *Id.* ¶ 33.

[37] Arnold v. Georgia, (1976) 224 SE 2d 386; Dennis v. United States, Trop v. Dulles, (1958) 356 US 86. (The Supreme Court besides discussing Commentaries and Law Reports of various jurisdiction, discussed in great detail in these judgments of the Unites States Supreme Court).

[38] To arrive at this conclusion the Court quoted with approval the decision of the Supreme Court in Gurbaksh Singh Sibbia v. State of Punjab, 1980 S.C.R. (3) 383.

can duly consider each of the circumstances independently without having to worry whether the circumstances would fit within the straight jacket formulae. This discretion by application of judicial mind would not only ensure that most suited punishment is awarded but also that ends of justice are always met.[39]

DEVIATING FROM BACHAN SINGH- A MISGUIDED APPROACH

This section shall demonstrate with the help of decided cases of the Supreme Court how the *Bachan Singh* approach of considering circumstances relevant to the crime and criminal was systematically given away by the Court. In deciding these cases, the Court not only gave no credence to the judicial authority in hand but also devised their own set of guiding factors while sentencing the accused. Even though these decisions suffer from the vice of *per incuriam*[40] and hence are bad in law they have sent several men and women to the gallows even when the alternate punishment of life imprisonment may have been available to them.

Shifting the Focus to Crime Only

As discussed earlier one of the contributions of the *Bachan Singh case* was that it shifted the focus from crime to crime and criminal both. However, this approach though pronounced by a Constitutional bench of the Supreme Court was short lived and a two judge bench of the Supreme Court in *Ravji alais Ram Chandra v. State of Rajasthan*,[41] brought the focus back to the *crime only* while completely neglecting the circumstances of the criminal.

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[39] 31(I & III) LAW COMMISSION OF INDIA, '*Capital Punishment*", 190 http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf, (last updated Dec. 20, 2014).

[40] JUSTICE G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION (2012). (In law of precedents when a bench does not follow the ratio laid down by a larger bench of the same or higher court then the decision of such Court is rendered *per incuriam* and other Courts are not bound to follow it).

[41] A.I.R. 1996 S.C. 787.

In *Ravji* case, the accused murdered his wife and three minor children and attempted to murder his mother and neighbors' wife. He was convicted and sentenced to death by the two Lower Courts. While considering the case of the accused, the Court erroneously believed that in a criminal trial while sentencing, '*It is the nature and gravity of the crime and not the criminal.*' [42] which must be considered. Hence, without even justifying that the case falls within rarest of the rare category the Supreme Court confirmed the death sentence. The decision exhibits complete absence of any discussion on the mitigating circumstances relevant to the accused and briefly inquires only into the severity and brutality of the crime committed by the accused.

Even though the *Ravji* decision was *per incuriam* in a shocking state of affairs the Supreme Court brazenly applied it and quoted with approval in as many as six other cases. These six cases are *Shivaji v. State of Maharashtra*[43], *Mohan Anna Chavan v. State of Maharashtra*[44], *Bantu v. State of U.P*[45]., *Surja Ram v. State of Rajasthan*[46], *Dayanidhi Bisoi v. State of Orissa*[47]and *State of U.P. v. Satta*[48]. It is submitted that it is not the contention of the researcher that these individuals do not deserve death sentence- perhaps they did. However, without any discussion on mitigating circumstances, there does exists a possibility that perhaps life imprisonment would have been the more suited punishment.

The Ravji decision was delivered by the Supreme Court in 1996 and was detected 13 years later in 2009 by another bench of same Court in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*,[49] the bench besides lamenting over the fact that a *per incuriam* judgment was being incorrectly

[42] *Id.* 25.
[43] AIR 2009 SC 56.
[44] (2008) 11 S.C.C. 113.
[45] J.T. 2008 (8) S.C. 136.
[46] 1997 Crim.L.J. 51.
[47] 2003 Crim.L.J. 3697.
[48] (2009) 4 S.C.C. 736.
[49] 2009 (2) A.L.T. (Cri) 386.

followed with authority by other Courts did not attempt to undo the wrong committed and perhaps save those individuals who due to reliance on an incorrect precedent were sentenced to be hanged by neck till death.

Shifting the Focus to Criminals Only

In *B.A. Umesh v. Registrar General, High Court of Karnataka*,[50] the accused committed the gruesome murder of a woman and thereafter looted her home while in *Sushil Murmu v. State of Jharkhand*,[51] the accused had sacrificed a two year old boy in order to please Goddess Kali. In both the two decisions the Supreme Court was hearing an appeal against the judgment of the Higher Court which had confirmed the death penalty of the lower Court.

The absence of discussion on mitigation circumstances relevant to the criminal coupled with the fact that the Court does not give any '*special reasons*' for awarding death penalty renders these two judgments bad in law. The brief facts of the case in both the two cases demonstrate that the crime was extremely heinous, committed with a lackadaisical motive and for petty gains and the circumstances may even warrant death penalty. However while discharging it duty as the sentencing Court, the Supreme Court ought to have given a thought to the circumstances relevant to criminal. It is submitted that a mere survey of cases relating to death penalty and vaguely mentioning that the case indeed falls under the rarest of the rare category would not meets the ends of justice.

MANDATORY DEATH PENALTY

A latest disquieting trend in the Supreme Court is of classifying certain offences as those that fall within rarest of the rare category and thus deserving nothing short of death penalty. It is submitted that this discomforting trend by the Supreme Court not only run foul to the judgment of the Constitutional Bench in *Bachan Singh case* but also of another

[50] (2011) 3 S.C.C. 85.

Constitutional Bench decision of the Supreme Court in *Mithu v. State of Punjab*.[52]

In *Mithu case*, Section 303 of the Indian Penal Code, 1860, which prescribes mandatory death sentence for those accused who have been previously convicted of murder and awarded life imprisonment was challenged under Article 14 and 21 of the Constitution.[53] The Union Government while defending the impugned section before the Court, among other defence availed by it, had argued that from a criminologist perspective the rationale for punishment was to reform the accused. However, a life convict who has already committed a heinous crime for which he is being punished for life when goes ahead and commits murder then it shows that there are no chances of him being reformed and that he poses a threat to the society. Hence, in such cases death is the only remedy available to the society.

The Court while striking down Section 303 of the IPC as unconstitutional observed that, '*A standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case*.'[54] The Court not only favored but also dwelt upon the necessity of having discretion in the hands of the sentencing judge. The rationale stems from the fact that there may be cases and events in which the circumstances warrant taking a lenient view in favor of the accused and awarding life imprisonment. However, taking away judicial discretion would result in the judge being relegated to the position of fence sitter post the determination of the guilt of the accused and allow travesty of justice to take place before his own eyes.

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[51] (2004) 2 S.C.C. 338.

[52] A.I.R.1983 S.C. 473 (*Mithu case*).

[53] § 303 of the Indian Penal Code, 1860 reads, 'Punishment for murder by life convict- Whoever, being under sentence of imprisonment for life commits murder, shall be punished with death.' For the text of Article 14 see *supra* note 16. Article 21 of the Constitution of India reads, 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'

[54] *Supra* note 51, at ¶22.

Despite this settled position of law of not prescribing mandatory death sentence, several recent judgments of the Supreme Court in the most brazen disrespect to the judicial precedents in hand have mandated compulsory death penalty in certain class of cases. In *Bhagwan Dass v. State (NCT) of Delhi*,[55] the married daughter of the accused-appellant had left her matrimonial home and was living with her uncle in an incestuous relationship. This act had angered the father so much that he killed her daughter in the name of protecting the honour of his family. The Supreme Court, while dismissing the appeal of the accused against death sentence awarded by the Lower Court, observed that all cases of honour killings fall within the rarest of the rare category and in such cases only death sentence should be awarded and other reasons and considerations should be completely overlooked.[56] What is even more bizarre is the fact that the Court did not attempt to define what honour killing would mean and left it to the colloquial understanding of the word.

In *Prakash Kadam & Othrs. v. Ramprasad Vishwanath Gupta & Anr.*[57], a two judges bench of the Supreme Court while hearing bail petition failed by the some police officers who have been accused of fake encounter, the Court while dismissing their bail application observed that all fake encounter cases fall within the rarest of the rare category. Hence once it is established that the accused are guilty they should be mandatorily sentenced to death.[58]

In *Satya Narayan Tiwari @ jolly & Anr. v. State of U.P.*[59], the accused and his mother was charged under Section 304B[60] and 498A[61] of the Indian Penal

[55] (2011) 6 S.C.C. 396.
[56] *Id.* ¶8.
[57] A.I.R. 2011 S.C. 1945.
[58] *Id.* ¶25.
[59] (2010) 13 S.C.C. 689.
[60] § 304 B of the Indian Penal Code, 1860, prescribes seven year to life imprisonment for the offence of dowry death.
[61] § 4898A of the Indian Penal Code, 1860, prescribes imprisonment upto seven years for the offence of cruelty by husband or his relatives towards his wife.

Code, 1860, for the killing his wife, as her family members were unable to satiate the dowry demands of her in-laws. While confirming the death penalty the Court observed that cases relating to dowry death fall under the rarest of rare category and hence death penalty should be compulsorily be awarded.[62]

While the observation of the Court in *Prakass Kadam*[63] and *Satya Narayan Tiwari*[64] case would have qualified as *obiter dicta* because while in the first case, the Court was dealing with a bail application and in the second case with Section 304B and 498A in which death penalty is not prescribed, the Supreme Court in *Ajitsingh Harnamsingh Gujral v. State of Maharashtra*[65] has expressly endorsed and confirmed these view and hence even these obiter have now become binding law. Moreover, this case further added that hired or contractual killing should also deserve nothing short of death penalty.

The instance of the division bench judgment of the Supreme Court on the fact that in certain categories carved out by them, the rarest of the rare category test is automatically satisfied and further inquiry into the facts and circumstances of the crime and criminal would be a futile exercise goes and that in such cases only death sentence is the *just* punishment is not only against the letter but also the spirit of the judicial pronouncements in *Bachan Singh case* and *Mithu case*. It is needed that the decisions which have been mentioned in this section of the paper should be urgently revisited by a larger bench of the Supreme Court before they are followed by any other lower Court as binding precedent.

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[62] *Supra* note 59, at ¶7.
[63] *Supra* note 57.
[64] *Supra* note 59.
[65] 2011 (10) SCALE 394.

CONCLUSION AND SUGGESTIONS

The present discussion reveals that death sentencing in India has largely become a judge centric exercise,[66] where the Courts are not shying from digressing from established legal precedent. It is submitted that the need of the hour is to come up with uniform sentencing guidelines which could be followed by the Courts while sentencing the accused. In fact the *Malimath Committee on Reforms of Criminal Justice System* had recommended way back in 2003, the need for sentencing guidelines so as to ensure that discretion in the hands of the judges remain thoroughly guided.[67]

A welcome step in framing of sentencing guidelines has been the decision of the Supreme Court in *Ramnaresh v. State of Chhattisgarh*,[68] where the Court after surveying various judicial decisions on death penalty[69] has framed principles which a Court of law must follow while awarding death sentence and if sentencing guideline relating to death sentence is ever rolled out. The principles are:[70]

Firstly, the application of rarest of the rare case doctrine is sine quo non for awarding death penalty.

Secondly, factors like the manner in which the crime was committed and the motive behind the commission of crime must also be considered.

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[66] Sangeet & Anr. v. State of Haryana, Criminal Appeal No. 490-491 of 2011, Supreme Court of India.

[67] 1 REPORT OF THE MALIMATH COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM, Part IV, §14.4, 170, http://mha.nic.in/pdfs/criminal_justice_system.pdf. (last updated Dec. 20, 2014).

[68] 2012 CRIM. L. J. 1898.

[69] Maharashtra v. Goraksha Ambaji Adsul, (2011) 7 S.C.C. 437; Dhananjoy Chatterjee @ Dhana v. State of West Bengal, (1994) 2 S.C.C. 220; Surja Ram v. State of Rajasthan, (1996) 6 S.C.C. 271; Prajeet Kumar Singh v. State of Bihar, (2008) 4 SCC 434; State of Rajasthan v. Kashi Ram, (2006) 12 SCC 254; Atbir v. Government of NCT of Delhi, (2010) 9 S.C.C. 1; Ronny @ Ronald James Alwaris Etc. v. State of Maharashtra, (1998) 3 S.C.C. 625; Allauddin Mian and Ors. v. State of Bihar, (1989) 3 S.C.C. 5; Bantu @ Naresh Giri v. State of M.P., (2001) 9 S.C.C. 615.

[70] *Supra* note at 68, ¶ 41-44.

Thirdly, the golden rule that death sentence is exception and to be used sparingly when the circumstances do not warrant giving life imprisonment to the accused must always be followed.

Fourthly, due consideration must be given to the circumstances of the crime and that of the criminal.

Fifthly, judicial discretion to the Court in matter of death penalty must always be given.

While no sentencing guidelines have been issued till date,[71] recently the Supreme Court in *Soman v. State of Kerala*[72] has listed out certain parameters which a Court must always keep in mind while sentencing the accused. Even though the facts of the case did not warrant death penalty the parameters issued by the Court can be said to be a starting point and are of equal importance for our present discussion. The parameters listed by the Court for consideration are:

1. The Court must always ensure that the punishment handed to an accused is in *proportion* to the crime committed by him.

2. The net effect of the punishment should be that it creates effective deterrence among others. A punishment which fails to create deterrence is no punishment at all.

3. It is relevant to find out whether under ordinary circumstances the accused was aware of the consequences of his act?

4. Severe punishment should be handed out when the accused was in possession of the knowledge of his intended consequences and it did occur.

[71] As on Dec. 25, 2014.
[72] 2013 (3) R.C.R. (Criminal) 503.

5. Even if the accused did not intend those consequences which did occur, if the consequences can be reasonable foreseen then he must be punished according to the severity of the occurred consequences and not those which he intended. Example, if a person is making spurious liquor; drinking which several people died then even he the maker did not intend those death he should be punished because they are reasonable foreseeable.

In light of this brief sentencing guideline issued by the Supreme Court and juxtaposing these with the judicial precedents on the issue of awarding death penalty, in the opinion of the researcher the correct law and sentencing guideline relating to death penalty as it stands today is:

1. Death penalty should be awarded only in rarest of the rare case.

2. It would not be possible to give a straight jacket formulae definition of rarest of rare and it would depend upon the discretion of the judge.

3. A sentencing judge while deliberating on the question of whether to award death penalty or not should consider not only the circumstances with reference to the crime but also to the criminal.

4. However, it is not only unnecessary but also incorrect for the Court to adopt the *balance sheet approach*. To do so would be comparing two unequal and different things, which is wholly unwarranted and uncalled for.

5. Instead of drawing *balance sheet* the judges should give *special reasons* in accordance with Section 354(3) of the Code of Criminal Procedure, 1973 for preferring death penalty over life imprisonment.

6. Death should be the last preferred option and to be used sparingly in only those cases where the accused cannot be transformed.

7. The Supreme Court should refrain itself from creating categories of crime in which death should compulsorily be awarded, to do so would not only take discretion from the hands of the judges but also against the letter and spirit of the judgment of the Court in *Bachan Singh* and *Mithu* case.

POLICE-PUBLIC LIAISON IN COMMUNITY POLICING ENDEAVOURS: AN EVALUATION BY THE PEOPLE OF GUWAHATI.*

Dr. Arpita Mitra** & Prof. Nirmal Kanti Chakrabarti***

Abstract

Community policing drives can augment the bond between the police and the community. Public involvement in policing activities can foster improved and more sustainable societies. Concern for the community and delivering service for the people both by the police and the public can foster commendable development and safe neighborhoods. This requires both the police and the people to join hands and come out of the cocoons by shedding inhibitions to create peaceful communities. The present study is an evaluation of police public alliance by the people of the city of Guwahati in Assam.

Keywords: *police, policing, community policing***.**

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I. INTRODUCTION

In India, and more expressly north-east India, police and people's perception about police-public relationship is a less traversed path in research and literature. The north east is unique not only in landscape and vegetation and fauna but also because of its distinct cultural identity. However, it has not witnessed much development in comparison to other states of India and not aroused much interest in social science research. Triggered by internal and external disturbances, north-east India requires police and the people complementing each other in peacekeeping. People's participation in policing and more specifically police's participation in problem solving can reduce the risk of turmoil. The easy resort to make this relationship formidable is through community policing initiatives which can bring the police and the public in close quarters to make the community safe and secure.

Community policing in order to be successful requires a professional body with soft skills and adept in handling new technologies to ensure enhanced police public interaction. However, in India, the police forces are still struggling to prove their credentials of professionalism and so community policing is nothing but a mere slogan.[1] Proper police community relationship has not been developed because of the heterogeneous nature of the Indian society. Caste, communal and religious discords act as a barrier in developing a common awareness of the common interests of the community.

In view of continuous extreme left wing or terrorist movements and violence, the issues of special force and rule of law is a matter of concern in the north eastern states of India. Thus we have observed presence of The Assam Rifles and Indo-Tibetan Border Force in the North East. In this connection, we may

[1] R.K. RAGHAVAN, POLICING A DEMOCRACY 161-68 (1999). *See* R. C. DIKSHIT, POLICE: THE HUMAN FACE (2000).

mention the debate on withdrawal or repeal of Special Power Armed Forces Act, 1958 in Manipur and the rule of law principle enshrined in our Constitution. Terrorist movements were also observed in the state of Tripura but the said Special Power Act was not applied there. In the state of Assam incidents of racial violence were also observed. In this background the study on community policing at its operational level is very significant and needed also. The present study is an endeavor to explore police community relationship in the district capital of the north eastern state of Assam.

II. POLICE, POLICING AND COMMUNITY POLICING: CONCEPTS, APPLICATION AND OBSTACLES

"The police is an organized body of civil officers in a city, town or district whose particular duties are the preservation of good order, the prevention and detection of crime, and the enforcement of the laws".[2] The word 'police' is used to identify the institution of social control which attempts to prevent crime and disorder and preserve peace.[3] Policing may be defined as "those organized forms of order maintenance, peacekeeping or law enforcement, crime investigation and prevention and other forms of investigation and associated information brokering which may involve a conscious exercise of coercive power – undertaken by individuals and organizations, where such activities are viewed by them and by others as a central or key defining part of their purpose".[4]

The historical context in which policing developed can be summarized through three eras, namely, political era, the reform era and the community policing era. Each era of policing is characterized by differences in public

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[2] G. E. RUSH, THE DICTIONARY OF CRIMINAL JUSTICE 271 (1997).
[3] A.G. Germann, *Community Policing: An Assessment,* 60(1) J. CRIM. L. CRIMINOLOGY & POLICE SCI. 89 (1969).
[4] T. JONES & T. NEWBURN, PRIVATE SECURITY AND PUBLIC POLICING (Oxford:Clarendon 1997). *See* G.L. Kelling & M.H.Moore, *The Evolving Strategy of Policing,* N.C.J. 114-213 (1988).

perception of police legitimacy and authority, view of police function, relationships between the police and the public, principal programs and technologies adopted. The political era dates from the introduction of municipal police forces in the 1840s and continued until the early 1900s when there was a close ties between police and politics. This era was characterized by corruption and discrimination against minorities. In this system police and political leaders had frequent contact and communications. It has been argued that political bosses and police often acted in their own interest rather than the public interest. The reform era took place in the 1930s, reached its peak in the 1950 and 1960s, and began its decline in the 1970s. The reform era is said to be both a reaction to the corruption in political era and keeping with the scientific management. The reform era was characterized by a professional crime fighting approach, reliance upon routine patrol, quick response to public calls and above all criminal investigation. Policing in this era was more professional and more sophisticated one. The community policing era began in late 1970s and developed during last three decades of 20th century and continues in the 21st century. But today community policing is taking different forms from its origin. The community policing is characterized by close relationships between police and public, attention to quality of life and problem solving and decentralization in police organization. During this era police become more concerns about community problems and that is why the era is also known as *problem solving era*. The rising crime, the growing isolation of the police from the community, complaints of police brutality and indifference, especially towards minority communities contributed towards development of community policing.[5] Problem-solving policing enlists analysis and creativity in the service of addressing crime and other community concerns. In problem solving approach police attention focused from individual incidents to community problems, and from the particular incident to the

[5] R. Morin, Three Eras Of Policing (2013). *See* K. J. Peak, Encyclopedia Of Community Policing And Problem Solving *288-293 (*Los Angeles*:* Sage).

more complex one, often untraditional. On the other hand, community policing, which explicitly recognizes the importance of communities' concerns and community support and priorities in partnerships in setting police priorities and restoring security. Community policing offers neighborhoods necessity, reducing victimization and increases police accountability to neighbour the kind of service and crafts innovative working relationships. In practice, the two approaches tend to become one: Problem solving, once begun, eventually forces police to attend to community concerns, and cultivate community allies, while community policing forces beyond traditional tactics. Community policing has become the dominant label for the new policing, implementing community policing are in fact doing both, but we will use the term here as encompassing both approaches.[6]

To be precise, the basic idea of community policing is keeping close to the community. Here the police is the public and the public is the police. The chief duty of the police officer is to improve the quality of life of the people in the community. The idea of community policing first emerged in the writings of H.Goldstein (1979) in his work 'Improving Policing: A problem oriented Approach' in the journal *'Crime and Delinquency'*. Community oriented policing and problem oriented policing, are two important models of community police. According to Peak and Glensor "Community oriented Policing and Problem Solving is a proactive philosophy that promotes solving problems that are criminal, affect our quality of life, or increase our fear of crime, as well as other community issues. COPPS involves identifying, analyzing and addressing community problems at their source.[7]

Interest in public view of the police began in 1960s in the US as a result of urban riots. The civil rights movements and anti war protests, highlighted

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[6] M.M. Berlin, The *Evolution, Decline and Nascent Transformation of Community Policing in the United States: 1980-2012*. *See* D. PALMER, THE GLOBAL ENVIRONMENT OF POLICING 27-48 (Florida: CRC Press).

[7] K. J. PEAK & R.W. GLENSOR, COMMUNITY POLICING AND PROBLEM SOLVING: STRATEGIES AND PRACTICES 99 (New Jersey: Prentice Hall 3rd ed. 2000).

the strained relationship that existed between the police and the public in many communities.[8] At the outset, community policing actually evolved out of two early experimental foot patrol programs in Newark, New Jersey, Flint and Michigan. Foot patrol officers were used as a strategy to involve officers directly in community problem solving with the officers trained to do far more than to act as a viable deterrent to crime. Community policing provides a new way for the police to provide decentralized and personalized police service that offers every law abiding citizen an opportunity to become active in the police process. Community policing stresses exploring new ways to protect and enhance the lives of those who are most vulnerable - juveniles, the elderly, minorities, the poor, the disabled, the homeless.[9]

Community policing entails four general principles: (a) it relies on organizational decentralization and a reorientation of patrol in order to facilitate communication between police and the public, (b) it assumes a commitment to broadly focused problem-oriented policing, (c) it requires that police respond to the public when they set priorities and develop their tactics and (d) a commitment to helping neighbourhoods solve crime problems on their own, through community organizations and crime-prevention programs.[10] Interestingly, community policing is not just a program but an operational and organizational philosophy designed to promote police citizen community based problem solving. Partnering with the community, the police seek to find effective long-term solutions to neighborhood crime problems. Police officers must be proactive and anticipate the social and law enforcement concerns of the community before they become problem areas. Community policing officers are viewed as

[8] M.D Reisig & R.B. Parks, *Can Community Policing help the Truly Disadvantaged*, 50 CRIME & DELINQ. 139-67 (2004).
[9] R. TROJANOWICZ & B. BUCQUEROUX, COMMUNITY POLICING: A CONTEMPORARY PERSPECTIVE 5-7 (Anderson Publishing Co. 1990).
[10] W.G. SKOGAN AND S.M. HARNETT, COMMUNITY POLICING: CHICAGO STYLE 4-8 (1997).

intelligent agents of the criminal justice system who are able to intellectually and emotionally react to citizen concerns. [11]

Ferrandino observes that community policing is not a monolithic program that can be easily transferred from one department directly to another. In contrast to a such an orientation, community policing is intended to be an innovative approach to police management that can be implemented through the use of specific tools tailored to the environment in which it is utilized. For example we mention the Chicago Alternative Police Strategy (CAPS) In this approach the Department employs tools rather than programmes. From this perspective , community policing is more flexible, innovative, variant and suited to particular needs rather than the programmatic approach.[12]

However there are identifiable and persistent constraints to the development of community policing:

(a) the culture of policing is resistant to community policing;

(b) Community policing requires emotional maturity more likely to be present in older officers;

(c) The innovative management cop is receptive to a more expansive vision of the police role. Traditional management cop remains rooted in his earliest training experiences;

(d) The responsibility to respond to limitation of resources;

(e) The inertia of police unions who see community policing as a threat to police professionalism;

[11] G.F. Vito, W.F. Walsh & J. Kunselman, *Community Policing: The Middle Manager's Perspective*, 8(4) POLICE Q. 490, 492-511.
[12] J. FERRANDINO, COMMUNITY POLICING: WHAT IT IS NOT? (2013).

(f) The two officer car engenders a sense of security and job enjoyment among those who are policing and it may also generate a sense of remoteness from the population being policed;

(g) Command Accountability;

(h) Reward structure as it is impossible to measure the amount of crime a certain police officer prevented;

(i) Public expectations of police;

(j) Failure to integrate steps for crime prevention; and

(k) The ambiguity of community as police community reciprocity can be achieved when there is a genuine bonding of interests between the police and the served citizenry and among definable section of the public.[13]

Community policing in India operates as some programmes and not as a philosophy to be internalized by police officers. The National Police Commission (1970) expressed deep anguish over the poor state of police public relations. In 1980 the NPC gave a call to the police authorities to improve the quality of beat patrolling and traffic duties to improve police public relations. However these intiatives even though implemented with good intention suffer from several drawbacks. Following are a few of the weaknesses: gap between conceptualizers and implementers, lack of policy support, police officers lack awareness about participative policing hence mission is fruitless, use of discretion in including people from the community, lack of proper orientation and conviction, image of the police remains tarnished and low self efficacy of the police officers.[14]

[13] J.H. Skolnick & D.H. Bayley, *Theme and Variation in Community Policing*, 10 CRIME & JUST. 18-28.
[14] V. MISRA, COMMUNITY POLICING: MISNOMER OR FACT 117-20 (2011).

III. OBJECTIVES OF THE STUDY

The present study will seek to assess the perception of the people about the community policing programmes that have been undertaken in Guwahati.

The study will also attempt to understand the level of awareness and sensitization of the citizens about the philosophy of community policing and their level of participation in such programmes.

The study seeks to evaluate whether the community policing initiatives have been successful in bridging the gap between the police and the public.

Lastly, the study also seeks to explore the extent to which Information and Communication Technologies (ICTs) are being used by the public as well as the police to reach out to each other.

IV. METHODOLOGICAL ORIENTATION

(a) Universe of the study

The residents of the city of Guwahati in Assam in the North- East of India is the universe of the study.

(b) Area of Research

The area of research is Guwahati in Assam.

Guwahati (26° 9' 0" North, 91° 46' 0" East) is an ancient urban area, largest city of state of Assam, a major metropolis of eastern India and one of the fastest developing cities of India. The city lies between the banks of the Brahmaputra River and the foothills of the Shillong plateau. Pragjyotishpura along with Durjaya (North Guwahati) were the capitals of the ancient state of Kamarupa under the Varman and Pala dynasties. Many ancient Hindu temples are in the city, so also known as the “The City of Temples”. Dispur, the capital of the Indian state of

Assam, is in the circuit city region located within Guwahati and is the seat of the Government of Assam. Guwahati is one of the most rapidly growing cities in India. The city's population grew from just 200,000 in 1971 to more than 500,000 in 1991. In the census of 2001 the city's population was found to be 808,021. By 2012, it is estimated that Guwahati will boast more than 1.6 million residents. The Police-public ratio in the city is 1:573.[15] The Guwahati Police is an new Commissionerate established on 1st January, 2015 operating through 21 Police Stations. It was a part of the Assam Police. The data has been collected when it was a part of the state police.

(c) Sampling Frame

Since the study is exploratory in research, no sampling frame was required as non- probability sampling techniques will be employed to collect primary data.

(d) Sampling Procedure

Non-Probability Quota Sampling is used to collect relevant data. "Non-probability sampling may be used effectively in studies that seek to explore ideas that are still underdeveloped'. [16] Quota Samples are non-probability samples in which sub-samples are selected from clearly defined groups. Groups are defined and the sizes specified, and then individuals who fit those descriptions are selected to fill the quotas wherever they are found.[17] The main criteria for selection of the sample is sex.

[15] Data on Police Organization in India, B.P.R. & D., 24, 2014.
[16] T. LBAKER, DOING SOCIAL RESEARCH 138 (McGraw Hill College 3rd ed. 1999).
[17] *Id.* at 139.

(e) Units of Observation and Sampling Size

The sample is of 100 respondents where an equal division of male and female is maintained in this regard.

(f) Methods of Data Collection and Data Analysis

In this exploratory study, multiple methods used for data collection. That can involve face to face interviews, observation and analysis of secondary data. We have selected multiple methods in order to best utilise both qualitative and quantitative data in view of the fact, that community policing in India in general and north eastern states is not yet developed as expected in comparison to other countries.

Primary data has been collected through direct face to face interview of the people. Interview schedule will be employed to collect the relevant information. The interview schedule will contain open-ended, closed-ended, matrix and contingency questions. Government Reports in this regard have also been used to collect relevant information.

Secondary data will be collected by studying the websites of the police organizations of the north-eastern states of India. Other relevant encyclopedia, newspaper reports, journals and articles in magazines have been used to collect data.

After coding, the data has been quantitatively represented through univariate tables and graphs followed by analysis of the same.

V. POLICE PUBLIC ALLIANCE : EMPIRICAL FINDINGS

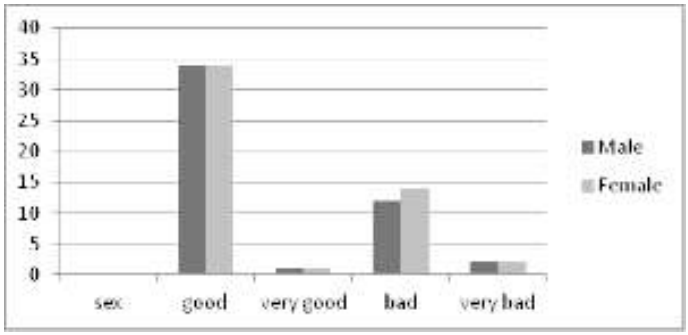
Out of the 100 respondents, 50 were men and 50 women. 35% of the respondents were of the age group of 25-31 years. 86% of the respondents were between 18-60 years of age. Only 14 were senior citizens.

55 of the respondents had a graduate degree out of which 30 were women. Out of 11 postgraduates seven were women. This is a positive trend towards women's education in the city.

65% of the respondents were employed. 27 were self employed, 29 were in private sectors and only nine were in government jobs. The number of employed men is more than employed women.

V.1. Opinion about the police.

Diagram-1. Opinion about the Police



68% of the respondents were happy with the police. However about 30 % felt that the police was bad.

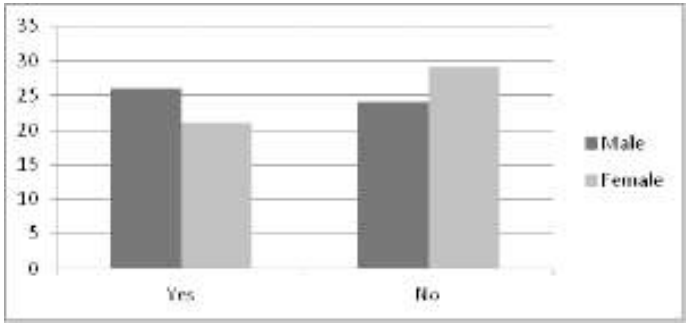
When asked as to what work should the police primarily do , 73% of the respondents were of the opinion that police maintains law and order. 17% of the respondents believed that prevention of crime is the chief work of the police. Law and order maintenance is believed to be the chief function of the police.

Among the 100 residents, 56% of the female are happy with the police work while. 52% of the male respondents are unhappy with the police. Most men share a strained relationship with the police.

48 respondents were unhappy with the police, out of them 17 wanted the police to cooperative and friendly.

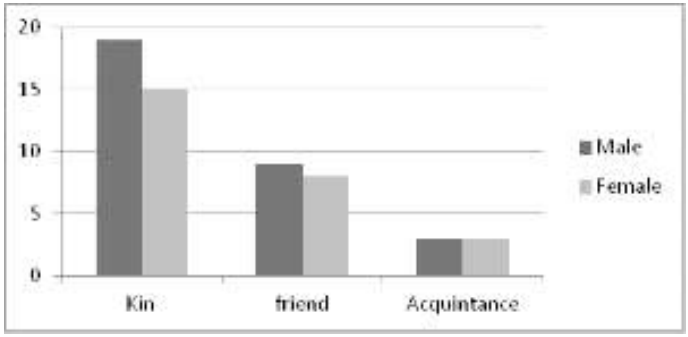
V.2. Acquaintance in police station

Diagram 2. Acquaintance in Police Station



Out of 50 women 29 (58%) did not have any acquaintance in the police station. However 26 (52%) of the 50 males had acquaintances in the police station. Men have more acquaintances in a police station than women.

Diagram 3. Relationship with Acquaintance



47 of the respondents had known persons in the police service. 34 of them had relatives in the police service.

V.3. Visit to the police station

33 of the male respondents have visited the police station. 70% of the female respondents have never visited the police station. 22 of the male went for general diary or to lodge an FIR. Nine of the 15 women who visited the police

station did so to lodge an FIR. Women generally visit the police station to complain about serious crimes.

More than 90% of the respondents who had visited the police station were satisfied with their experiences in the police stations. Most of the residents are happy with the response they received at the police station.

25 of the male and 11 of the women felt that the response that they received at the police station was speedy. In these capital cities the population is less and therefore, the police public relation is good and hence the response is fast.

92% of the respondents have never lodged a complaint to the police station over telephone. However 50% of those who have lodged complaint over telephone were unhappy as the response was slow. It may be because complaint over telephone is not taken seriously.

V.4. Awareness, Interest and Participation in Community Policing Programmes

Table 1. Police/Public Involvement in Community Service

Type of Community Service	Police involvement in community service		Public involvement in community service	
	Yes	No	Yes	No
Blood Donation	11	89	15	85
Sports	8	92	3	97
Helpline	16	84	3	97
Traffic Rule Awareness	25	75	3	97
Cyber Crime Awareness	8	92	2	98
Night Guard in neighbourhood	50	50	1	99
Everyday foot beat patrol	47	53	1	99
Community service during festivals	54	46	2	98
Committee for welfare	4	98	5	95
Education	1	99	8	92

N=100

93% of the respondents were not aware of community policing programmes. Only seven respondents had information about community policing programmes out of which five of them got it from newspapers. People view the police as a law enforcement agency and may be they are not interested in tracking other activities of the police.

90% of the residents of Guwahati are of the opinion that the police do not engage in any community service. The rest ten believed that the police are engaged in traffic awareness and sports activities as community service. This shows that there is a lack of awareness about community service programmes of the Assam Police.

During festivals, night ward and watch and everyday foot beat patrolling, the presence of the police is felt in community service. However, even though foot beat patrol is a part of community policing it is done mainly to prevent crime. The direct interaction of the police and the people can be possible in all these services. Assam Police has *Nagarik Committee* in Guwahati city whose main principle is 'watch thy neighbour'. It has also Community Liason Group which hold regular meeting with eminent political and non-political personalities and the police.

The public participation in the community service programmes is sparse. These initiatives if undertaken can be successful only if the police and the people join hands in the community development.

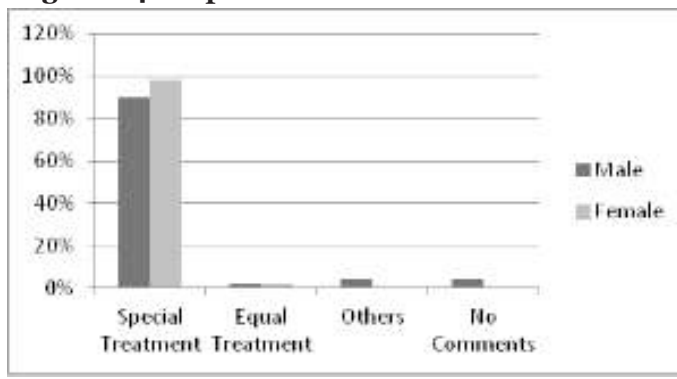
96% of the respondents did not benefit from the community service programmes of the police. This may be because there is lack of public awareness and involvement in the community development programmes is the need of the hour.

56% of the respondents felt that apart from maintenance of law and order the police should engage in other activities. 43 of them stressed that the police should do community development related social services apart from maintenance of law and order.

91% of the respondents were interested to join hands with the police in the community development initiatives. 60 of them want to help the police in social service.47 of them wants to actively participate in the social service programmes of the police. This zeal among the people to participate in community development services should be harnessed.

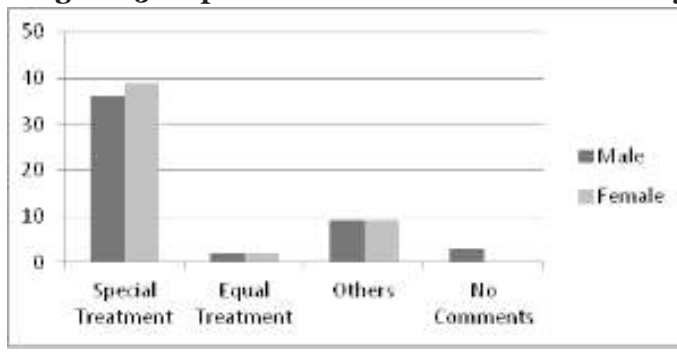
V.5. Police help for the vulnerable sections of the society

Diagram -4. Expected Police Treatment for Women



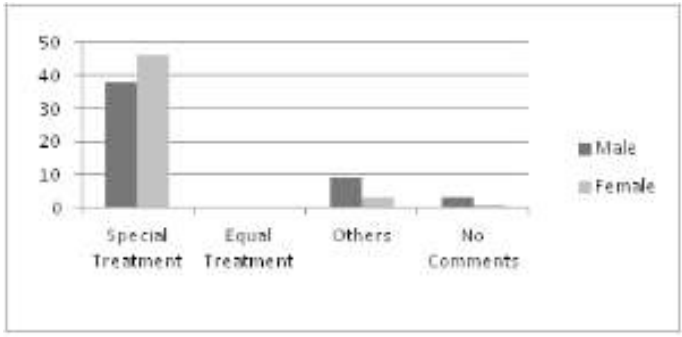
94% of the respondents felt that the police should give special treatment to the women. 49 out of 50 women residents feel that the police should treat them differently and not as they treat the male counterparts. Guwahati has a All Women police Station at Panbazaar.

Diagram 5. Expected Police Treatment for Elderly



75 of the respondents out of which 39 women felt that the elderly deserve special treatment by the police. Special services should be offered to the elderly for their care and security.

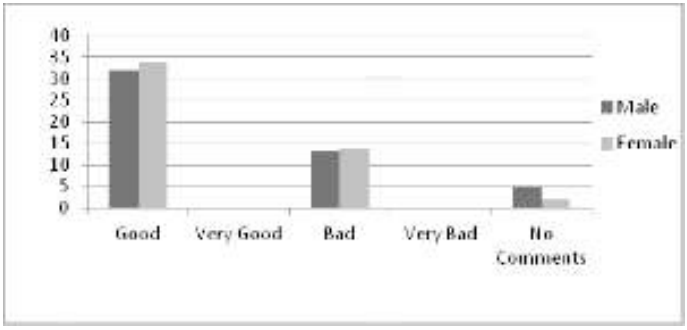
Diagram -6. Expected Police Treatment for Children



84 of the residents with 46 women felt the need for special treatment of the children by the police. Help lines for child protection, speedy response to children related issues should be given topmost priority.

V.6. Opinion about police public relations in the city

Diagram -7. Opinion about Police Public Relations in the city



64% of the men and 68% of the female residents felt that the relationship between the police and the people is good

42% of the respondents felt that healthy police public relationship can be developed through active involvement and collaboration of the people and

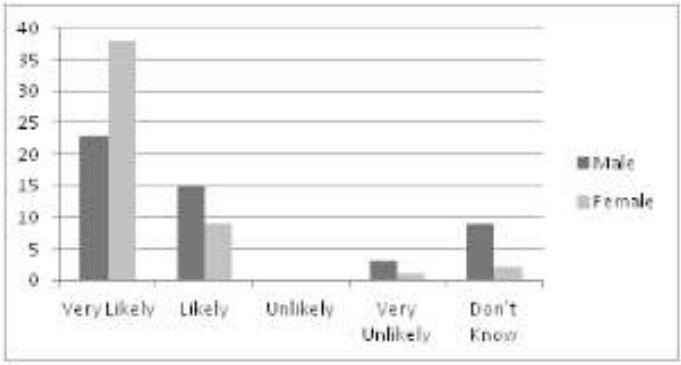
the police in police work. The police should interact with the people and involve them in policing. This can help them solve many issues in relation to neighbourhood security, crime prevention, peaceful environment, pollution control, traffic control and managing festivities.

V.7. Necessity of community policing

95% of the residents believed that community policing initiatives are necessary. The awareness about community policing must be ingrained in the minds of the people so that they realize that their involvement is required.

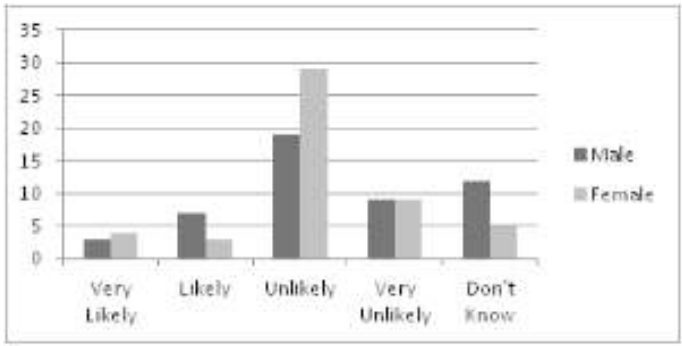
50 respondents felt that community policing initiatives can improve the bond between the police and the people. 43 of the respondents believed that the more the police will engage in community service and involve the people in it the stronger will be the bond between the police and the public.

V.8. A poor person is arrested on suspicion of theft and taken into custody. How likely is it that the police will inflict minor/severe physical harm on the suspect to admit the crime?



38(76%) of the women felt that it is very likely that the police will inflict harm, while 23(46%) of the men had a similar belief.

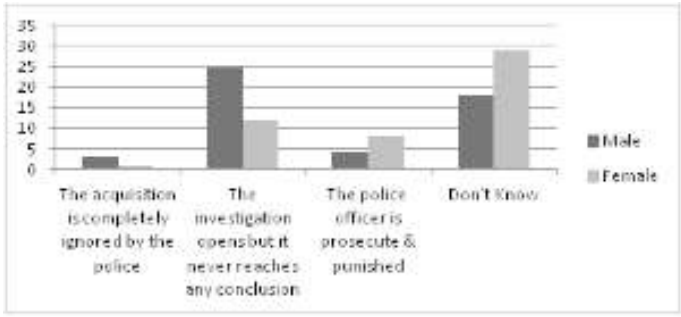
Diagram -9. Severe physical harm on a suspect



However 29 female and 19 male felt that it is unlikely for the police to inflict severe harm on a suspect. The citizens are confident that the police will not inflict serious harm on a suspect.

V.9. If a police officer inflicts severe physical injury on a suspect, and he/she files a formal complaint to the competent authority, which of the following outcomes is most likely?

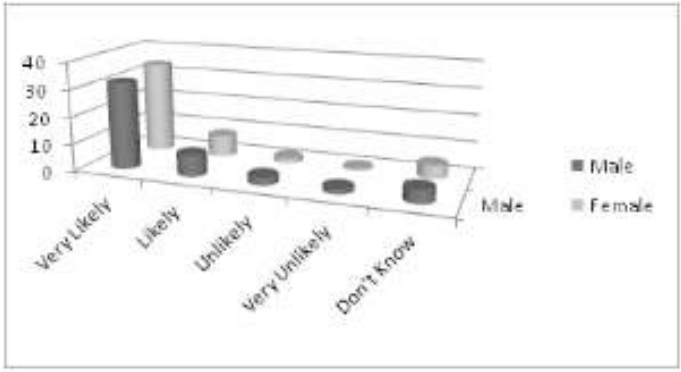
Diagram -10. Outcomes of complaint against police



37 of the respondents were of the opinion that the investigation opens up but never reaches a conclusion. 47 of the respondents were clueless which shows that there is a lack of transparency in regard to the information about citizens' complaints against the police.

V.10. If a police officer is exposed by a reporter taking bribe, how likely is it that he/she will be punished?

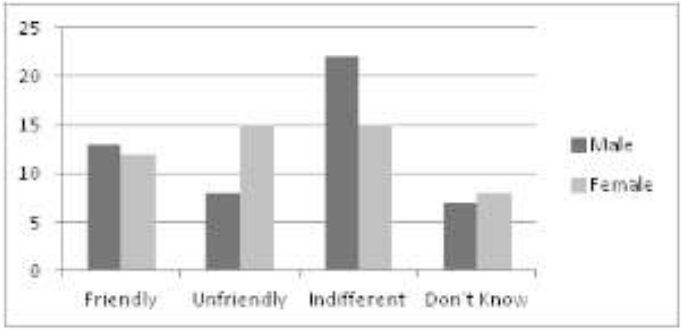
Diagram-11. Consequence of report against corrupt police officer



However the people have a trust factor in regards to the justice delivered as 66 of the residents felt that it is very likely that the complaint will be heard and punishment will be imparted.

V.11. Relation between the police and the media

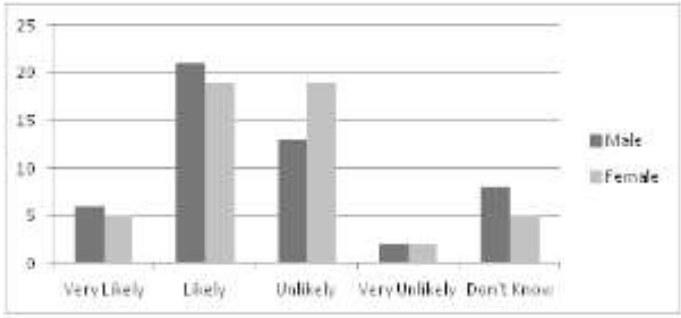
Diagram -12. Relation between the police and the media



Only 25 respondents were of the opinion that the relation between the media and the police is friendly. 60% of the people believed that the relation is strained and indifferent. The people believe the police and the media are at loggerheads.

V.12. How likely is it that the police will inflict severe physical harm on a suspected member of a criminal organization?

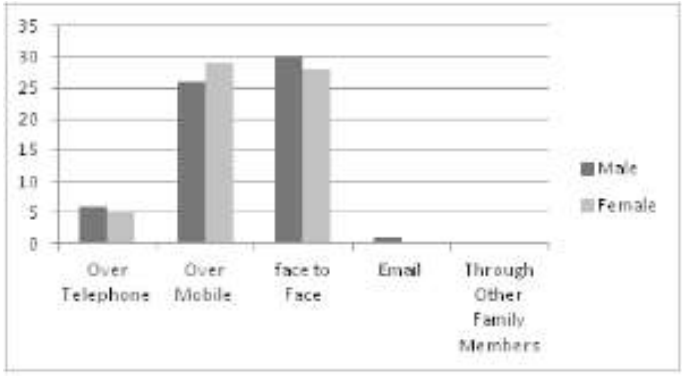
Diagram -13. Severe physical harm on a suspected member of a criminal organization



27 men and 24 women felt that there is likelihood that the police will inflict severe physical harm on a suspected member of a criminal organization. The police is repressive and physically assaults suspected member of a criminal organization.

V.13. Most preferred medium of communication with the police

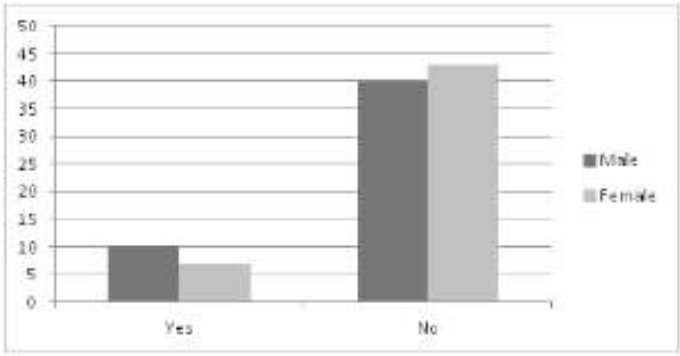
Diagram-14. Most preferred medium of communication with the police



58% of the respondents prefer to communicate face to face with the police. Direct interaction is preferred option for communicating with the police.

V.14. Information about city police website

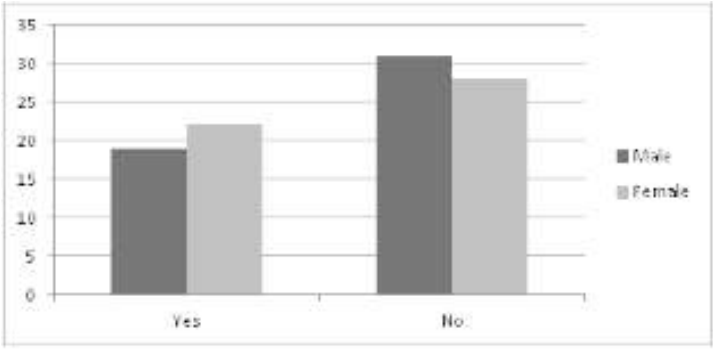
Diagram-15: City Police Website



83% of the respondents said the city police does not have a website. 10 men and 7 women know that the police has a website. However all the seven women have visited the website but 80% of the males who had the information of the city police website have never visited it.

V.15. Information about mobile number of any police officer

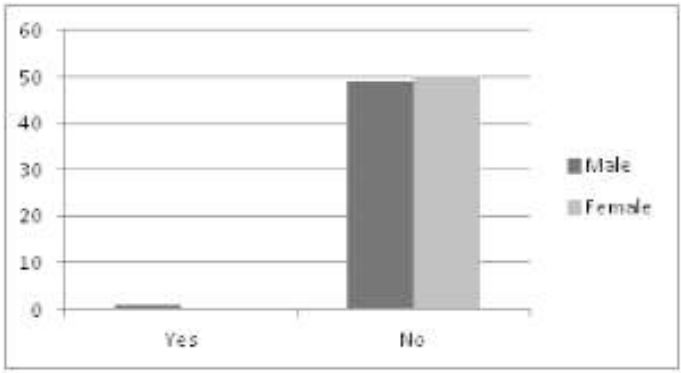
Diagram -16: Information about mobile number of any police officer



59% of the residents did not know the mobile number of any police officer out of which 31 are men. So even though people feel that the police can be reached through mobile telephones they do not utilise it.

V.16. Information about the email id of any police officer

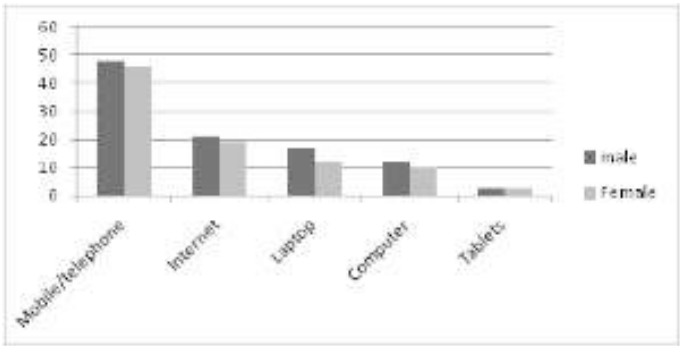
Diagram -17. Information about the email id of any police officer



99% of the residents did not know the email id of any police officer. There is no trend towards communicating through Internet.

V.17. Commonly used Information and Communication Technologies (ICTs)

Diagram -18: Commonly used ICTs



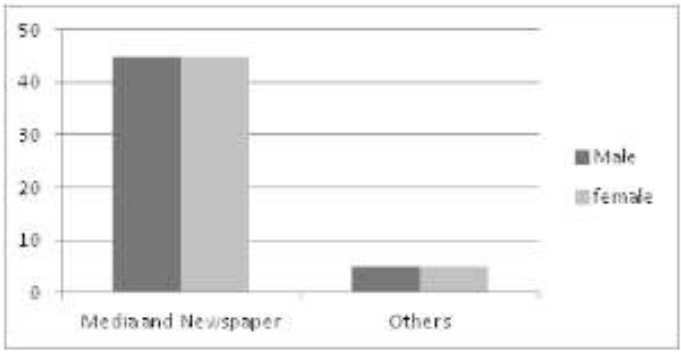
92% of the respondents were using mobile telephones for day to day communication. Among ICTs the most commonly used is mobile telephones as it is accessible, affordable and easy to use.

58% of the residents did not have Internet connection at home. 37 out of the 58 who did not have Internet connection at home visited cybercafé to surf

the net. Quite a good proportion of residents do not have Internet connection at home.

V.18. Means to publicize community policing programmes

Diagram-19: Means to publicize community policing programmes



90% of the residents felt that the print and electronic media can play a very constructive role in publicizing the community policing programmes. This is because the population which can be targeted through media is quite large.

V.19. Role of ICTs in publicizing community policing programmes

86 residents felt that ICTs can play a positive role in publicizing community policing programmes. 47 of them believed that ICTs can reach out to wide number of people quickly while 17 said that the ICTs can also provide detailed information about the community policing initiatives of the police.

68 residents believed that ICTs can improve police public relationship. ICTs can bring forth transparency, speed, accuracy and enhanced communication which can foster police public relationship

25 out of the 68 residents who felt that ICTs can affect police public relationship felt that ICTs can be used by the police to procure public feedback. 24 out the rest felt that ICTs can be used to spread awareness about the community policing programmes of the police.

VI. Summary of the Findings

- 53% of the residents with 29 women did not have any acquaintance in the police station.
- 68% of the respondents were happy with the police.
- 73% of the respondents were of the opinion that police maintains law and order.
- 56% of the female are happy with the police work. 52% of the male respondents are unhappy with the police.
- 90% of the residents of Guwahati are of the opinion that the police do not engage in any community service.
- 93% of the respondents were not aware of community policing programmes.
- 33 (66%) of the male respondents have visited the police station. 70% of the female respondents have never visited the police station.
- More than 90% of the respondents who had visited the police station were satisfied with their experiences in the police stations.
- 92% of the respondents have never lodged a complaint to the police station over telephone.
- 48% residents felt that it is unlikely for the police to inflict severe harm on a suspect.
- 66% of the residents felt that it is very likely that a complaint against a corrupt police officer will be heard and punishment will be rendered.
- Only 25% respondents were of the opinion that the relation between the media and the police is friendly.

- 96% of the respondents did not benefit from the community service programmes of the police.
- All the respondents felt that the community development programmes by the police are required.
- 94% of the respondents felt that the police should give special treatment to the women.
- 75% of the respondents out of which 39 women felt that the elderly deserve special treatment by the police.
- 84 of the residents with 46 women felt the need for special treatment of the children by the police.
- 91% of the respondents were interested to join hands with the police in the community development initiatives.
- 64% of the men and 68% of the female residents felt that the relationship between the police and the people is good.
- 95% of the residents believed that community policing initiatives are necessary.
- 50 % felt that community policing initiatives can improve the bond between the police and the people.
- 83% of the respondents said the city police does not have a website.
- 59% of the residents did not know the mobile number of any police officer.
- 99% of the residents did not know the email id of any police officer.
- 90% of the residents felt that the print and electronic media can play a very constructive role in publicizing the community policing programmes.

- 86 of the residents felt that ICTs can play a positive role in publicising community policing programmes.
- 68% of the residents believed that ICTs can improve police public relationship.

VII. CONCLUDING REMARKS

Police public interaction in India is still inflexible, unyielding and cold. Dispur/Guwahati is in no way different. Inspite of having several community policing programmes the people seem unaware and have not benefitted from them. Even though people expect the police to take part in community service, the people's participation has been sparse. The people have shown an interest in participating in community policing initiatives and this should be harnessed through proper awareness and publicity. In this regard, new communication technologies can be utilized to reach out to the people. The drive towards community policing can showcase and bring forth the younger generation in community-building activities and thereby check vagrancy, isolation and alienation. The police can too reap the benefits of having more manpower and more eyes to keep a vigil.

DOMESTIC VIOLENCE – AN INSIGHT INTO INCEST

Dr. Sudha Jha Pathak*

Abstract

Gender-based violence has emerged as a global issue extending across regional, social, cultural and economic boundaries. Domestic violence is a universal phenomenon and one of the most vicious methods adopted by a patriarchal social system to keep women subordinated. However, domestic violence largely remains invisible since whatever is happening within the four walls of the house is regarded as a 'private issue.' It is a manifestation of unequal power relation signified by men's domination over and discrimination against women. Of all the forms of violence against women, domestic violence remains the least reported and largely suppressed. In this paper while covering the wider subject of domestic violence, I would specifically deal with the issue of incest. Incest is a grave crime which is highly detrimental to the victim, leaving a long-term deleterious impact upon the victim. Incest unfortunately will persist as long as the collective conspiracy of silence within the family, the state and the society allows it to go on. This paper will argue that, the problem of incest needs to be tackled in a comprehensive manner at all levels - personal, societal and state.

Keywords – *Domestic Violence, Incest, Social Change, Social Issue.*

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As a near universal phenomenon, gender-based violence threatens the well-being, rights and dignity of women. However, the perception of domestic violence has undergone a change with international agencies like the UN and the State coming to the forefront to grapple with this problem, and it is now being viewed as a serious violation of gender and human rights.

Documents like the Beijing Platform of Action have taken note of domestic violence against women, though it is placed under the broader concept of violence against women. "Violence against women is an obstacle to the achievement of the objectives of equality, development and peace", declares the Beijing Platform for Action. It also states that "In all societies, to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture. The low social and economic status of women can be both a cause and consequence of violence against women." The UN Declaration on The Elimination of Violence against Women (1993) defines violence against women as "any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." The U.N. Declaration on Violence emphasizes violence as "the essential and ultimate social mechanism by which women are forced into a subordinate position as compared to men." It is not only an impediment to development but it also perpetrates inequalities and gender-based violence.

In India, the attempt at legally defining domestic violence reached a milestone with the passing of the Domestic Violence Against Women (Prevention and Protection) Act of 2005. This Act was the outcome of the Government's initiative as well as years of concerted efforts by the women's movement in India.

The debate on the issue of domestic violence in India has emerged as a result of the consistent struggle spearheaded by the women's movement against the dichotomy of public and private sphere. The women's movement posed a challenge to the patriarchal society by stating that whatever takes place within the four walls of the house is not invariably a private/personal issue, but may rather also have a broader societal/public dimension, as it may have repercussions for the society as a whole.

Domestic violence affects the entire psyche and personality of the women and girls besides inflicting physical pain and trauma on the victim. However, violence against women is not limited to beating, rape or murder as newer forms of victimization are coming to the forefront. Domestic violence could be both verbal and physical but it usually involves physical brutality. Rape and sexual abuse including incest are also associated with violence. It is worth noting that in India marital rape is not recognized as an offence, though it comes under the purview of violence against women. Besides the physical assault inflicted in crimes such as rape and sexual abuse, the mental agony is more disturbing. It may be identified as psychological violence, suffered by the victim. In fact, the covert aspect of violence though being more widespread is rather difficult to identify as it remains largely invisible.

There could be various forms of domestic violence -

- Physical Violence (causing serious harm to the victim by various means like punching, hitting, hair- pulling and use of weapon)

- Psychological and Emotional Violence which has a deep impact on the victim's psyche.

- Sexual Violence is one of the most invisible forms of domestic violence. Sexual violence could be in the form of marital relationships like marital rape or could be incest.

- Economic Violence which means denying the available resources to women, having adverse impact on their health and economic status. It also consists of exclusion of women from financial decision-making, unequal pay, and denial of property rights.

INCEST

"The prohibition of incest can be found at the dawn of culture….[It] is culture itself." (Levi-Strauss, 1969, p. 41).

Incest is one of the most ghastly crimes of all, and yet more common than imagined[1]. The word incest is derived from the Latin term "incestus" which means impure.[2] The dictionary meaning of incest is sexual intercourse within the prohibited degree of relationship defined by law, like daughter and father, sister and brother, son and mother and relations by affinity or consanguinity.[3] The relationships not based on blood but are culturally sanctioned like step-parents, *rakhi*-sisters and the like are also included in the definition.[4] A definition by Bronson (1989) states that any definition of incest necessitates some attention to the 'imputed trust and power imbalance' that are integral aspects of incest (p.21).[5]

Rape and incest are the severest form of barbarity inflicted on women and girls. Hilberman, a psychiatrist, has termed rape as the 'ultimate violation of self.'[6] The gravity of offence is even greater in the case of incest where even trust is violated.

If we go back in history, we find the prevalence of incest from the ancient times. The Egyptian Pharoahs had the practice of marrying their sisters,

[1] Gupta Shriniwas, *Incestuous Relations and Sexual Abuse of the children in India and Abroad*, 3 AMITY L. REV. 79 (2002).
[2] SANFORD KADISH, ENCYCLOPAEDIA OF CRIME AND JUSTICE 880 (1983).
[3] JOHN MCDONALD, RAPE-OFFENDERS AND THEIR VICTIMS 192.
[4] OC SHARMA, CRIME AGAINST WOMEN 161 (1994).
[5] Joan D. Atwood, *When Love Hurts; Preadolescent Girls' Reports of Incest*, 35 AM. J. FAM. THERAPY 287-313 (2007).
[6] 133 AMERICAN JOURNAL OF PSYCHIATRY 436-37 (1976).

purportedly to maintain the purity of blood. Incest was also committed by Oedipus and his mother Jocasta as referred to in Oedipus Rex by Homer.[7] Cleopatra also provides a classic example of incest. In the instances mentioned above, incest was confined to noble families only. We come across incest in Indian mythology as well. In the *Mahabharata*, Arjuna married Subhadra, the daughter of his aunt Rohini. There are other instances too such as the union between Yama with his twin sister Yami; Prajapati and his daughter Ushas; Pushan and his sister Surya etc.

However, the practice of incest was condemned and prohibited by most civilized societies. The Code of Hammurabi prohibited it in 1750 BC. There exists a universal taboo on the issue of incest. "The taboo on incest within the family is one of the few known cultural universals."(Peacock & Kirsch, 1970, p. 100).

However, a domain where there is very little information is that of abuse of girls/women within the home. It is a highly sensitive issue which has the potential to destroy the essence of a family; hence it is very often kept hidden in the dark corners of the family. The fact that strikes us on reviewing research and writings on incest is the silence around its prevalence and its denial. It is the recent awareness of women to say 'no' to all forms of abuse against them that has opened up the Pandora's Box of incest and has acted as an eye-opener to the horror.

A shocking fact and stark reality is that the incidents of incest are widely prevalent in society. We usually do not talk about the sexual abuse of children and the incidents of incest, but it is no secret that they exist in society. It is prevalent not only in slums and among the deprived segments of the society, but also in educated, well-to-do families. The actual statistics for this horrific crime is rather difficult to find due to the stigma and trauma

[7] Preeti Misra*, Growing Menace of Incestuous Behavior in India calls for Legislation*, Cr. L.J. 1999 (May).

associated with it. The eminent sociologist M.N. Srinivas has stated that the sexual abuse of children is rampant yet it has escaped the researcher as the fear of stigma is a major hurdle, especially among the middle and upper class families.[8]

The magnitude of the problem is indeed shocking and mind boggling. RAHI (Recovering and Healing from Incest), a Delhi based organization, working on the issue of child sexual abuse titled *Voices from the Silent Zone* has revealed that 76% of respondents to its survey had been abused when they were children - 40% of those by a family member. The findings of a study undertaken by the BBC point to the fact that one out of ten women covered by the study reported some kind of sexual abuse during childhood by known persons, ranging from father and uncles, to doctors and counselors.[9]

Voices from the Silent Zone: Women's Experiences of Incest and Childhood Sexual Abuse, the RAHI findings states that "incest" or "child sexual abuse" comprises of sexual exploitation between a child and another person, who by virtue of his power over the child on account of his age, position of strength or relationship exploits the child to meet his own sexual needs. The exploitative act also includes the betrayal of trust and abuse of power. A child's necessity for care, nurturing are not identical with an adult's sexual needs. The abusive act includes not only the exploitation of the child's body, but also of the trust associated with the relationship. The sexual abuse of the child within the family is generally not reported due to the associated stigma.

We find that incest transcends barriers of caste, community, sex, family, age and class. The only common factor remains power, which triggers incest to take place in families. The abuse mostly takes place within the confines of the family home. Indeed, the most disturbing aspect of the offence is that family

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[8] M.N. Srinivas, *Sexual Abuse of Children: Hidden Peril*, INDIA TODAY, October 31, 1992, at 101.
[9] Amarjit Kaur, *Socio-Cultural Norms About Girl-Child Must Change*, 37 KURUKSHETRA, September, 1990, at 8.

members or relatives themselves sexually abuse the woman/girl in the home itself, maybe even for a prolonged period of time. We find that about 85-95 per cent of all sexual crimes against children are committed by a known person and about 80-90 percent is intrafamilial. The abuser often builds up trust by giving gifts, money, and affection etc to lure the child and then violates the relationship. A child is usually warned to be cautious of strangers; hence the child is caught off-guard when advances are made by a family member, relative or neighbor.

The abuse usually goes on for a prolonged period of time and is not restricted to a one-time incident. The abuse and trauma is multiplied several times when the relationship between the abuser and abused is that of father and daughter. Denial, cover-up to maintain the family 'honour' are usually placed above the interests of the child and its abuse. The personal hell that the victims undergo, in many cases for months and years, is very traumatic for them since they usually suffer alone and are overcome with feelings of fear, helplessness, and sadness. A child abused by a stranger can take refuge in her home for help and comfort, whereas a victim of incest has nowhere to go.

Victims of incest are usually reluctant to reveal the crime since the abuser is a known person who is trusted and is usually in a position of authority to the victim. Sometimes the victim is threatened to maintain the "secret." Quite often the victims do not even confide in their parents. In cases where the victim is very young, she does not even realise that there is anything wrong with the incestuous behavior. Sometimes the victim could be hesitant to report it due to fear of being blamed and punished or not likely to be believed. The report, "Voices from the Silent Zone" based on the survey conducted by Delhi organisation RAHI suggests that disbelief, denial and cover-up to preserve the family reputation is often put before the individual child.[10]

[10] BBC News, South Asia, *India's Hidden Incest* (1999).

The patriarchal family structure, the authoritarian position of the fathers and the other males, the submissiveness and passivity of women who remain mute witnesses to the gross injustice and the ideological mindset of not allowing the "family shame" to be exposed whatever the cost, are the contributory factors that help the abusers get away with the offence.

Violation of trust is an integral aspect of incest "Incest- unlike abuse by a stranger or an acquaintance- violates an ongoing bond of trust between a child and a caretaker." (Blume, 1990, p.2). Hence, incest includes a violation of trust, love along with the bodies of the victims. The abuser has control and authority over the victim due to her dependency on him, which undermines her position. As the male is physically and mentally more powerful than the victim, he can easily take advantage of her. The physical power can be utilized to abuse the victim while the emotional power can be used to threaten the child not to reveal the abuse to anyone. Blume (1990) has observed that the real damage results from the fact that the child is taken advantage of by a person she relies on. Unlike as in adults, in children the use of force is not an essential part of the abuse. There are countless instances when elderly relatives make sexual advances on unsuspecting children especially girls, not sparing the disabled either. These advances could be in the form of caressing, or exhibitionism thinly disguised as play. Sita is a 7 year old girl. She is very attached to her grand-parents and spends a lot of time with them. Her grandfather holds her on his lap for long periods and strokes her inner thighs. She does not understand what is happening but feels uncomfortable. Is he sexually abusing her? Yes. (Excerpted from counseling centre Sakhi's Booklet on Child Sexual Abuse Awareness).[11] Many such instances are not recognized let alone reported.

Says Delhi-based senior consulting psychiatrist Dr. Sanjay Chugh, "child sexual abuse often comes to light when childhood histories are explored and

[11] PREETI MISRA, DOMESTIC VIOLENCE AGAINST WOMEN (2007).

in most cases the perpetrator is a known person who is close to the family or inside the family."

The dominant patriarchal set-up generally does not confront or punish men who are the abusers. Patriarchal domination characterizes the incest family and perpetuates sexual abuse across generations. Male dominance may be manifested by force or threat of force and maybe maternal powerlessness (could be due to absence or any other incapacity).[12]

Telling the secret' or 'breaking the silence' could provide a challenge to incest, but even when the information leaks out of the family, communities often maintain silence. Perpetrators of incest are usually not identified and punished. Taking into consideration the wide prevalence of the crime, very few abusers are prosecuted and convicted. Thus even though public awareness regarding the nature and extent of the problem has increased, which in turn has led to increased reporting, nevertheless, incest remains an extremely unreported crime. Not surprisingly, only a fraction of the cases are reported and there is continuous sexual abuse of women/girls within families.

If we try to identify the factors responsible for the offence there could be many as-poverty, helplessness, despair, socio-economic handicaps, personal incapacities, and frustration.[13] However, the genesis of incest could be traced to the socio-cultural ethos emanating from the patriarchal set-up. The gendered power equation between men and women is based on the ideology of male superiority and female inferiority. This patriarchal ideology perpetuates women's dependence and reflects itself through violence in the private domain, where men try to control girls and women in the public and private sphere. Since the girl or woman is dependent and vulnerable in her position in relation to men, fear is also a factor leading to their silence on

[12] Lucy M. Candib, *Incest and other Harms to Daughters Across Cultures: Material Complicity and Patriarchal Power,* 22 WOMEN'S STUD. INT'L F. 197 (1999).

[13] Henry H Foster Jr, Violence Towards Children: Medico Legal Aspect, J. AM. ACAD. OF PSYCHIATRY.

incest. The economic dependency of girls and women due to men's control over means of resources is a factor contributing to her being treated as commodity or property by men and for her tolerance of incest.

The scenario in India is more serious and grave owing to the process of socialization which girls and women are subjected to. They have been conditioned to be submissive and obedient to men. The feeling of inferiority is so internalized in women that they often fail to question it. Similarly, men have been socialized to consider themselves to be superior to women and have a right to even control women's behavior. The sense of male superiority is deeply engrained in our cultural ethos and widely put into practice though it has no legal sanction. In this way, the process of socialization makes both men and women define their roles in relation to the other sex and internalize their individual status as assigned to them.

The consequences of incest could be physical-mental pain and suffering, with long-term implications affecting the psyche and personality of the victim. Incest perpetuates the economic, social and psychological dependency of the hapless victim, which, in turn, makes her even more vulnerable to such abuse. Incest results in the victims feeling insecure at home; simultaneously it also endangers their self-development and human rights.

RAHI has studied the experiences of the survivors of incest. Their findings reveal that the victims suffer from depression, frustration, low self-esteem, isolation, anxiety etc. In some cases it has also led to PTSD (Post Traumatic Stress Disorder).

'Voices from the Silent Zone' also highlight another problem confronting the victims of abuse in India - the complete absence of any support system outside the family to help the victims. According to psychiatrist Achal Bhagat, 'The juvenile homes, the social support system is so lacking and so insensitive to the children, that I wouldn't be sure what is worse - to stay with an abusive family, or the environment the system would put them in.'[14]

[14] BBC News, *South Asia, India's Hidden Incest* (1999).

The crisis gets exacerbated in our country by the fact that the concept of family is considered to be almost sacred and abuse, if it happens, is met with disbelief.

References to some of the cases reported in newspapers

Shocking figures submitted by the Delhi Police to the Delhi High Court have revealed that of the 1704 rape cases registered in the capital in the first 10 months of 2014, 215 were cases of incestuous rapes. More disturbingly, in 43 cases it was the father who committed the crime and in 27 cases it was the brother. The figures demonstrate that in most rape cases, the offender was a known person to the victim. The gravity of the situation, as emerges from the said report of the Delhi police, is illustrated in the table given below.

MONSTERS AT HOME

RAPES - Total cases reported in 2014 (till 15th October) - 1704

NO. OF CASES	ACCUSED
43	Father
23	Step-Father
27	Brother
27	Husband/ex-husband
32	Uncle/maternal uncle
4	Cousin
8	Father-in-law
3	Son-in-law
74	Brother-in-law
352	Neighbour
83	Family friend
642	Friend
72	Stranger

A few widely reported cases of incestuous rape are mentioned below –

April 27, 1995—A case was reported where an Under-Secretary in the Union Home Ministry, Karamchand Thakur, was charged, along with his colleagues of sexually abusing his eight year old daughter.

July 24, 1995— A resident of Noida was arrested by the police for raping and murdering his 8 year old daughter.

A farmer in his early 50s developed a sexual relation with his 30-year-old daughter-in-law in a village in Kaithal district of Haryana. Their liaison continued for almost a year. The matter even reached the village panchayat, which ordered separation of the two unlikely partners so that the woman could go back to her husband.[15] Experts believe that such relationships have existed behind closed doors for many years. But given the modern means of communication and the spread of the media, the skeletons are now tumbling out of family cupboards.

Interestingly, the youth believe that incest is a traditional practice and not a novel feature." *Yeh to hame virasat mein mili hai* (incest is part of our tradition)," says Naresh Kumar, a villager in Rohera in Kaithal district. Sociologists, in turn, say that the ethnic history of the region is full of such instances.[16]

"In the pre-Independence era, in some parts of north India, the father-in-law almost had the right to physical relations with a daughter-in-law, and in most cases the female was not in a position to resist much. The very young husband also had no say in the matter. Widows would be married to a brother of the dead husband. Sharing of wife by brothers was also not uncommon," says Ravinder Kaur, a professor at IIT-Delhi.[17]

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[15] Sukhbir Siwach, *Incest: Haryana's Shameful Social Heritage*, THE TIMES OF INDIA August 28, 2010.
[16] *Id.*
[17] *Id.*

Certain factors specific to a region may also accentuate the problem. For instance, as Ravinder Kaur has observed, "Adding to the problem in Haryana is the adverse sex-ratio caused by the practice of female foeticide. Its effects are now being felt on intimate relationships within and without the family. The shortage of marriageable women can have many unintended consequences, especially when only one out of four men find a bride (as in the case of Haryana) in their own community".[18]

Chilling reports of incest and abuse can be heard from various parts of India. In some instances, even a woman's physical relations with a husband's brother is not considered unusual. "Such relations are not objected to. They are considered a family's 'internal affair", says Prem Singh, a farmer-leader from Kaithal.[19]

The recent controversy over the Indrani Mukherjee case in 2015 has rocked the entire country, in which she is accused of murdering her daughter Sheena Bora. This case is also believed to have the incest angle besides property as a possible factor and it is even said to be a case of honour killing. However, the true facts will be revealed only after the investigation is over.

Law is expected to play a crucial role in curbing and eradicating offences against girls and women, and to question their subordinate status. The legal system is expected to play an instrumental role in delivering justice to the hapless victims of abuse, exploitation and injustice and to restore their dignity and identities as individuals and human beings with their sacrosanct rights. As Martin Luther King stated, 'Law cannot change hearts, but can restrain the heartless.'

However, the existing legal apparatus largely seems to have failed in securing justice to the victims of incestuous rape. It is a disturbing and alarming scenario that the abusers are usually not even identified let alone punished

[18] *Id.*
[19] *Id.*

due to the lacunae in the law. Studies reveal the gravity of the situation when we realize that the reported cases of incest are only the tip of the iceberg.

In 2010, the trial court convicted Sant Ram, who raped his daughter for several years and even fathered her child, under 'rarest of rare' category and sentenced him to life imprisonment. Although the court awarded maximum punishment to the accused in the said case, it also pointed out the lacunae and inadequacy relating to the legal provisions in respect of incestuous rape. The court said that though many children are sexually violated, the existing laws in the country are 'highly inadequate' in dealing with cases of incest.[20] It is pertinent to mention that the rape laws in India still do not define incestuous rape despite the recent amendments in the Criminal laws in 2013.

In countries like the US, UK, and Germany incestuous rape is distinguished and classified in specific terms and there exist stringent laws to deal with the offence. In the UK, the Sexual Offences Act, 2003 made the offence of incest punishable with a punishment of 12 years. In the US, punishment varies from one state to another; in Massachusetts punishment for incest is 20 years imprisonment, while in Hawaii it is 5 years. In Australia it is treated as a Federal offence and the punishment could extend to 25 years.[21] The most shocking case of incest was that of Joesph Fritzl in Austria who imprisoned and raped his daughter in the basement of his house for 24 years and was the father of her seven children. Fritzl was tried and sentenced to life imprisonment.

On the other hand, besides the infirmities and inadequacies in the legal provisions relating to incest, the response of the society is also very often not only lackadaisical but even outrightly callous, inhuman and brutal. In this rather grim and vicious scenario, Additional Sessions Judge Kamini Lau has been constrained to observe: "Instances are not rare in India of people taking

[20] Smriti Singh, *Need to define incestuous rape in India*, THE TIMES OF INDIA, April 1, 2010.
[21] *Id.*

law into their own hand. Incest offences in many cases often end up in honour killings in our society. It is time to wake up to this situation and acknowledge the existence of incest in our society before it is too late".[22]

Anuja Gupta, founder-executive director of RAHI says, "Not legislating a strict punishment amounts to the law reiterating that it is not a serious issue. If stringent punishment were made legal, then it has to be accepted that incest exists. But we don't even want to admit that. It is treated more like an aberration so there is no harsh punishment. This is true across the world and it is a terrible truth to own up to."

The broader and endemic problem of incest is a vexatious and very grave issue facing the women's movement in India. In 1983 and 1986, by means of two Criminal Amendment Acts, the criminal laws were amended to bring within its ambit certain forms of violence within the home and make the offence punishable. Section 498A was inserted in the IPC so as to ensure that punishment could be meted out to a felonious husband and his relatives for perpetuating cruelty upon women. The 1986 Amendment added a provision in the IPC categorizing and penalizing dowry deaths separately under Section 304B. After a long struggle, the Act on Domestic Violence against Women (Prevention and Protection) was passed by the Parliament in 2005. The Criminal Law (Amendment) Act, 2013 was passed after the Delhi gang rape incident. It amended sections of the Indian Penal Code, Code of Criminal Procedure, Indian Evidence Act and Protection of Children from Sexual Offences Act. But incest still remains outside the purview of law in our country. Hence, there is an urgent need to legislate a strict law incorporating stringent and rigorous punishment against the offence relating to incest which will act as a deterrent for abusers.

However, it is obvious that law alone cannot be effective until the mindset of the society also changes. To check the menace of incest, it is imperative to

[22] *Id.*

treat it as a societal rather than an issue affecting only a person or individual. This could be done by eliminating the personal/private domain dichotomy, which requires transformative action to transform the patriarchal society into a society free from gender inequalities. Accordingly, efforts have to be directed towards changing the family relations from a hierarchical to one based on gender equality.

In our country, the 'honour' of a family or community is considered to be something absolutely sacrosanct and inviolable. Unfortunately, it is girls and women who have to usually pay the price for maintaining the family 'honour'. Even when they are victims of injustice and cruelty, women and girls are made to restrain themselves from indulging in any action which would lead to bringing shame or dishonor to their families. This so-called 'honour' overlooks the damage caused to children and compels them to bear with the agony of incest and suffer in silence, often for many years.

A transformation in the mindset of the society is required towards achieving a fair, just and equitable approach regarding the equations between men and women. This would be facilitated only through an increasing level of literacy, greater general awareness and improvement in the economic well-being of the people. There is a need to propel the social institutions to adopt a more pro-active and humane approach, aimed at initiating a multi-pronged and concerted effort towards providing an impetus to preventive and ameliorative action while dealing with the instances of incest.

Above all, it is imperative that the families and society should not provide protection to the perpetrators in order to pander to their primordial and criminal belief of the need to safeguard the family name and reputation at any cost. The society must ensure that cases of incestuous rapes are invariably reported, the culprits are identified and cases are filed against them, as well as the family members, aiding or abetting in the commission of offence or attempting to torment the victim and force her into silence. Active

social support from family, friends, guidance centers and counselors can bring the victim's faith in the goodness of human beings back

A legal mechanism needs to be established wherein private households and parental behavior are manifested to surveillance, thereby making the family more visible to social regulation. In the cases of child sexual abuse the intervention of the state becomes imperative when the state should take over the responsibility of the child. Usually the state adopts an ambivalent attitude towards the family members who sexually exploit children and hesitates to take action against them, justifying this on the grounds of privacy of the family. The abused child could be placed in an institution or in the custody of a trustworthy person/relative entrusted with the care of the child. The child should be treated as a victim rather than as an offender and a sensitive and compassionate approach needs to be adopted towards the child. It is imperative to treat incest as an offence and make separate provisions to deal with the offence so that the abuse within the family is dealt with effectively.

Criminal and civil sanctions alone cannot provide an adequate solution to the abuse within the home. A comprehensive approach involving diverse agencies becomes imperative to effectively deal with the menace.

Hence, it is necessary to build up public pressure against the menace of incest through the mobilization of community protest in the form of demonstrations, *dharnas*, social boycott, and community patrolling etc. to prevent any occurrence of incest and to crystallize public opinion against it. Further, not only the police has to ensure swift punitive action against the culprits, there is also a need for a mechanism which can provide free and speedy legal aid to the victims of incest.

There is a need to set up more rehabilitation homes for the victims which will help the affected women and girls to rebuild their shattered lives and generate confidence and self-reliance among them. These homes should also

provide training and skill to the victims who have no means to earn their livelihood. These homes also need to be linked to government and non-governmental organizations, which are engaged in taking up education, self-employment or any other income-generating activities.

Incest is a grave crime which is highly detrimental to the victim, leaving a long-term deleterious impact upon the victim. The widespread prevalence of incest points to the inherent hypocrisy of our society as it shrugs off and overlooks or plays down the gravity of the crime of incest though the so called champions of the social equity and justice let go of no opportunity to disparage any societal behavior impinging on their vested interests or domineering and ascendant position in the society.

Obviously, patriarchy has no qualms in overlooking the most despicable instances of social injustice and sexual abuse where women are victims. This is rooted in a situation where the disempowered and devalued women 'enter into marriages with authoritarian men who regard it as their right to control and abuse the women and children in their families' (Candib, 1995, p.108). Thus, one can say that incest is a physically, sexually, and psychologically destructive practice victimizing and debasing girls, which is sometimes even sustained by their mothers, serving male sexual interest, that strengthens male patriarchal control and is passed across generations.[23]

The Convention on the Rights of the Child states the family as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children. The Convention grants children rights which can be used against exploitation in families, schools etc.[24] Even more significant is the fact that it segregates the rights of the child from that of the family. Children have rights vis-à-vis the family as well as the state. It is the responsibility of the family to provide for, nurture

[23] Foster, *supra* note 13.
[24] M Adenwalla, Child Sexual Abuse And The Law (2000).

and protect children and it remains the state's responsibility to provide adequate services and means in order to enable the family to perform its role.

Laws and legal systems are major tools that could be used to promote justice as they play a vital role in securing and maintaining the well-being of a society. However, several lacunae and infirmities exist in the Indian legal system which does not provide adequate redress to victims of sexual abuse. Legal provisions dealing with incest are not clear; the law does not differentiate between sexual abuse by parents or relatives. Since the abuse is committed by the most trusted persons, it has the most adverse and damaging impact on the victim. Hence, such cases need to be looked at with a different perspective imbued with a sense of empathy, compassion and justice towards the victims. The most detrimental impact of incestuous relationships is that the victim is overcome with feelings of guilt, frigidity, depression and even suicidal tendencies. It must, therefore, be the duty and responsibility of the family and society to ensure that the victim is not blamed for the offence.

The victims of incest suffer possibly for months and years, going through a trauma which could be characterized as 'personal hell.' Even when a case is registered against the perpetrator of the crime in a few instances, which are miniscule in number, the victim would have suffered a lot. The cases drag on for many years which is a major impediment in the delivery of justice. The delay in ensuring justice virtually amounts to a denial of justice to the victims. Therefore, the entire legal process needs to be reformed and overhauled to ensure quick trial and deliverance of speedy justice. Audio or video recording of the victim's evidence should be regarded as adequate legal requirement. Making her repeat or recreate the obnoxious incidents *ad nauseam* before the police or the court makes the victim feel traumatized and it may even impair the evidence and most likely result in the travesty of

justice. The victims, especially children, are helpless before the perpetrators of crime; hence, they need to be provided solace and protection, keeping in mind that they have been subjected to sexual abuse of the worst possible nature.

We need to comprehend and accept incest as a part of our society and realize that closing our eyes and denying it will not provide a solution to the problem. We need to spread the word at the mass level regarding its existence and also about the help available. Workshops in schools and colleges that highlight such problems should be conducted for children and teachers to become more sensitized. Parents need to be educated and made aware about how they can protect their children or help those who have suffered. We need to take on the responsibility of reaching out to each other and take concrete steps to stop this physical, psychological abuse and pain that gets inflicted upon innocent lives.

Incest, unfortunately will persist as long as the collective conspiracy of silence within the family, the state and the society allows it to go on.

Hence, the problem of incest needs to be tackled in a comprehensive manner at all levels - personal, societal and state. The enlightened sections of the society as well as those at the cutting edge, holding the position of authority or capable of contributing to the process of female emancipation, such as the doctors, counselors, police, judges, media-persons and the social activists will have to come to the forefront and be the vanguard of the wider social movement in this sphere. Further, there is a need to bring about greater sensitization and awareness among the less educated and less progressive sections of the society about the issues relating to domestic violence and sexual abuse directed against the women and girls. There is a need to give impetus to generating awareness and the sensitivity of compassion among the general public so that the attitude of the society towards the victim could turn positive and more sympathetic. At the same time, there should also be

emphasis on the core area of education, by way of increasing the level of female literacy, making girls and women aware of their rights, instilling confidence in them to speak up and report about the incidents of incest. In short, we have to ensure their holistic empowerment and give a fillip to the fight for securing rights and justice for them. The media could also play a crucial role in this regard by reporting cases relating to injustice, exploitation and victimization of girls and women and by assisting in the task of bringing the culprits in the public domain. The basic and structural causes of incest throughout the world have many strands of similarities and commonality. Hence, it is essential to also build up an International collusion to combat the problem of domestic violence and incest. The course of action in this regard would require collaborative efforts by the government authorities, NGOs, women's organizations and the civil society, geared towards taking determined efforts, accompanied with resolute action at all levels, to ensure the advancement and safeguarding of the rights of women and girls.

DETERMINING APPROPRIATE DISPUTE RESOLUTION FORUM: A SUGGESTIVE MODEL

Sakshi Singhal*

Abstract

In India, the alternative dispute resolution forums are being encouraged, but the cardinal question of how to determine the most appropriate dispute resolution forum amongst Negotiation, Mediation, Arbitration and Litigation to resolve the dispute remains unanswered. This paper proposes a model containing six parts to answer this fundamental question. First part will involve understanding the emergence and transformation of client's dispute through the process of naming, blaming and claiming. This process even though essential, is often neglected. Second part will explain about understanding the client's expectation from the case. Third part will demonstrate evaluating the strengths and weaknesses of the client's case by conducting a financial, reputational, organizational, personal, and legal risk analyses. This part will also explain the importance of framing a Best Alternative to a Negotiated Agreement and Worst Alternative to a Negotiated Agreement with the help of a case study. The benefit of evaluating the strength and weaknesses of the case, and framing a Best Alternative to a Negotiated Agreement and Worst Alternative to a Negotiated Agreement will also be covered in this part. Fourth part will

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include defining the client as a 'repeat player' or a 'one shotter' which will significantly affect the choice of appropriate dispute resolution forum. Fifth part will explain about the tiered dispute resolution process and escalation clause. Last part will emphasize that even though concept of 'vanishing trial' is becoming popular, cases which have the potential of setting precedents and rules for public good must be resolved through litigation. The paper will conclude by explaining the circumstances in which a particular dispute resolution process is suitable.

***Keywords**: appropriate, risk, bargaining in the shadow of law, escalation clause, vanishing trial*

I. INTRODUCTION

In this era characterized by a wide variety of processes for resolving disputes, the 'primary processes' for dispute resolution are Negotiation, Mediation, Arbitration, and Litigation.[1] These processes can be classified into Litigative process consisting of Traditional litigation, which is based on adversarial adjudication, and Non-Litigative Processes or Alternative Dispute Resolution[2] (hereinafter referred to as ADR). ADR refers to alternatives to litigation[3] and includes, inter alia, Negotiation, Mediation and Arbitration.[4]

In the current Indian scenario, the litigation system is being widely criticized due to its various shortcomings such as delays or arrears in disposal of cases[5], high pendency of cases[6], results in strained relationships, is costly,

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[1] Carrie Menkel Meadow, *Mediation, Arbitration, and Alternative Dispute Resolution (ADR)*, INT'L ENCYCLOPEDIA SOC. & BEHAV. SCI., Elsevier Ltd. 2015 , UC Irvine School of Law Research Paper No. 2015-59 (Sept. 29,2015, 11:52 PM), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2608140). (*Menkel Meadow*).

[2] MADABHUSHI SRIDHAR, ALTERNATIVE DISPUTE RESOLUTION: NEGOTIATION AND MEDIATION 98 (2007). (*MADABHUSHI SRIDHAR*).

[3] HENRY J. BROWN & ARTHUR MARRIOTT, ADR: PRINCIPLES AND PRACTICE 18 (2011). (Henry J. Brown & Arthur Marriott).

[4] SRIDHAR, *supra* note 2, at 98.

[5] Report of The Mallimath Committee (1989-90).

[6] 27th Report of Law Commission Of India (1964) & 54th Report of Law Commission Of India (1973).

stressful and time consuming. Thus, to reduce the burden on the judiciary and to provide a solution to its other shortcomings, ADR is being encouraged by various legislative measures and judicial pronouncements. Legislature inserted *Section 89* in *Code of Civil Procedure, 1908* by the *Code of Civil Procedure (Amendment) Act, 1999* to provide for settlements outside the court[7] in those cases "*where it appears to the court that there exist elements of a settlement which may be acceptable to the parties*"[8]. The constitutional validity of this section was challenged in the case of *Salem Advocate Bar Association v. Union of India,*[9] *in which Supreme Court while rejecting this challenge held "Keeping in mind the laws delay and the limited number of Judges which are available, it has now become imperative that resort should be had to Alternative Dispute Resolution Mechanism with a view to bring to an end litigation between the parties at an early date*". The Apex Court again expressed its intention of promoting ADR in the case of *Afcons Infrastructure Limited and Another* v. *Cherian* V*arkey Construction Company Private Limited and Others,*[10] by laying down a list of cases which are suitable to be referred for ADR.

Thus, '*Alternative*' Dispute Resolution is being promoted but it has never been emphasized that what should be the '*Appropriate'* Dispute Resolution forum for a case considering the parties involved[11], their reputation, subject matter of dispute, costs and public good. "Appropriate" Dispute Resolution forum apart from including Negotiation, Mediation and Arbitration also includes Litigation.[12] Therefore, author through this paper will provide a model based on which a dispute resolution practioner can determine the most appropriate forum, which may be Negotiation or Mediation or Arbitration or Litigation, to resolve the dispute before him.

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[7] Clause 7, The Code Of Civil Procedure (Amendment) Bill, 1999.
[8] Code of Civil Procedure, § 89 (1908).
[9] A.I.R. 2003 S.C. 189.
[10] (2010) 8 S.C.C. 24.
[11] MENKEL-MEADOW, *supra* note 1.
[12] BROWN & MARRIOTT, *supra* note 3, at 3.

For a better understanding of the model it is necessary to understand each of these primary dispute resolution processes briefly.

II. PRIMARY DISPUTE RESOLUTION PROCESSES

II.I NEGOTIATION

Negotiation is the simplest dispute resolution process. It involves communication in the form a dialogue between the parties to reach a mutually acceptable solution. It is a non binding process initiated by the parties themselves, who have some shared and opposite interests, without any interference of third party[13]. Thus, this process is characterized by bilateral exchange of information between the parties leading to a common understanding and joint decision making[14].

II.II MEDIATION

Mediation is a party-centered, voluntary[15], non binding and structured negotiation process. In this process parties are assisted by a neutral third party, called the Mediator, to resolve the disputes between them "amicably"[16]. He uses specialized techniques of negotiation and communication to facilitate communication between the parties leading to a mutually agreeable solution. Mediation can range from facilitative to evaluative. In facilitative mediation, the role of mediator is merely to enhance the process of communication between the parties and allow them to arrive at a mutually acceptable solution for themselves. But in evaluative mediation, the role of

[13] S. C. TRIPATHI, THE ARBITRATION AND CONCILIATION ACT, 1996 WITH ALTERNATIVE MEANS OF SETTLEMENT OF DISPUTES 262 (2002).

[14] SIMON ROBERTS & MICHAEL PALMER, DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DISPUTE RESOLUTION 87 (2005). (Simon Roberts & Michael Palmer).

[15] 7 S. B. SINHA, MEDIATION: CONSTITUENTS, PROCESS AND MERIT 33 (2006).

[16] The Mediation and Conciliation Project Committee Supreme Court of India, *Mediation Training Manual Of India*, 16, http://supremecourtofindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf (Mediation Training Manual).

the mediator involves guiding the parties about the appropriate grounds for settlement.[17]

II.III ARBITRATION

Arbitration is a binding process[18] involving determination of the dispute between the parties by a neutral third party. In this process dispute is submitted to an arbitration tribunal, which may consist of a sole or more than one arbitrator, for adjudication[19]. Arbitration tribunal gives its decision in the form of an award which, in India, is enforceable in the same manner as if it was a decree of the court.[20] Arbitration usually takes place pursuant to an agreement between the parties.

II.IV LITIGATION

Litigation is the traditional method of dispute resolution. It starts when the claimant brings a civil action in a court of law against the defendant, based on legal principles recognized in the country.[21] It terminates with the pronouncement of judgment by the court, but is open to appeal within the limitation period provided by the laws of the country.[22] There are established substantive and procedural laws for the conducting litigation in every country.

Comparative Analysis of these Primary Dispute Resolution Processes is as follows

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[17] Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed,* 1 HARV. NEGOT. L. REV. 7, 24 (1996).
[18] SRIDHAR, *supra* note 2, at 99.
[19] P. C. RAO & WILLIAM SHEFFIELD, ALTERNATIVE DISPUTE RESOLUTION: WHAT IT IS AND HOW IT WORKS 84 (2002).
[20] The Arbitration and Conciliation Act, § 36 (1996).
[21] BROWN & MARRIOTT, *supra* note 3, at 18.
[22] SRIRAM PANCHU, MEDIATION PRACTICE & LAW: THE PATH TO SUCCESSFUL DISPUTE RESOLUTION 34-36 (2012). (Sriram Panchu).
[23] *Id.* at 35.

- *Cost*: Negotiation is the most economical dispute resolution process followed by Mediation which involves reasonable cost. Arbitration and Litigation are potentially expensive.[23]

- *Time*: Negotiation and Mediation are quickest, whereas, Arbitration involves some delay. Litigation is the most time consuming and elongated process.

- *Control over process*: In negotiation and mediation, parties have control over the process and outcome. In Arbitration, parties have lesser control and arbitrator has more control over the process and the outcome, whereas, in litigation, the control lies wholly in the hands of judges and not with the parties.[24]

- *Binding or non-binding*: Negotiation and Mediation are non-binding processes, whereas, Arbitration and Litigation are binding processes.[25]

- *Creative solutions and maintenance of relationships*: In Negotiation and Mediation creative solutions are possible which results in win-win[26] situation for the parties and also maintains the relationship between them. Arbitration is not likely to result in creative solutions or maintenance of relationship between the parties. Litigation is characterized by win-lose situation as no creative solutions are possible through it. Litigation strains relationship between the parties.

- *Confidentiality*: The process of Negotiation and Mediation is confidential. Confidentiality in Arbitration varies, while, there is no confidentiality in litigation as decisions form part of public record.

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[24] *Id.* at 35.
[25] SRIDHAR, *supra* note 2, at 103.
[26] Bruce H. Aydt, *Mediation - The Alternative for "Win-Win"*, http://coar.com/files/pdf/Mediation_Win-Win_Article.pdf.
[27] *Supra* note 16, at 20.

- *Formal or informal*: Negotiation and Mediation are informal dispute resolution procedures and thus increase flexibility and convenience for parties, whereas, provisions of Arbitration and Conciliation Act, 1996 govern the conduct of Arbitration proceedings in India.[27] But the procedure followed in arbitration is not as formal as that of the court. Litigation is a completely formal method of dispute resolution.

III. MODEL TO DETERMINE THE APPROPRIATE DISPUTE RESOLUTION FORUM

The model will be divided into six parts, reflecting the six steps which must be followed by every dispute resolution practioner before determining the dispute resolution forum which would be appropriate for resolving the dispute between the parties.

III.I UNDERSTANDING THE EMERGENCE AND TRANSFORMATION OF DISPUTE

Emergence and transformation of dispute, as said by Felstiner, Abel and Sarat[28], is a result of three stages. These stages are "*naming, blaiming and claiming*".[29] The first stage of *naming* takes place when a person perceives that a particular experience has been injurious to him. For example: a worker comes to know that he is suffering from eye problems, as a result of the radiance to which he is exposed during working at his workplace. This perception of the injury done to oneself is called naming.

Second stage of *blaming* involves transformation of this perceived injurious experience to a grievance. This happens when a person attributes his injury to another entity or individual. Thus, blaming happens when a person blames someone for his injury.[30] For example: blaming occurs when worker

[28] William L.F. Felstiner, Richard L. Abel & Austin Sarat, The *Emergence And Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW. & SOC'Y. REV. 631, 631-36 (1980). (Felstiner, Abel & Sarat).
[29] *Id.* at 635-36.
[30] ROBERTS & PALMER, *supra* note 14, at 79.

in the above example holds his employer responsible for the eye problem, as employer did not undertake proper safeguards which were required in such cases of radiance.

Third stage of *claiming* takes place when a person with a grievance voices it to an entity or individual which he believes to be responsible for the injury and asks for some relief or remedy. In the above example, stage of claiming occurs when the worker voices his grievance to the employer and asks for some remedy.

Transformation of a claim into a '*dispute'* occurs when this claim is rejected in whole or in part.[31] Thus, in the above example when employer refuses to provide any remedy to the worker, then dispute occurs between them.

It is necessary to understand this process of emergence and transformation of a dispute because this process reveals the information about the antecedents of dispute such as the prior relationship which existed between the parties, the behavior and attitude of parties towards the dispute, hidden agendas or the emotional factors involved.[32] This information significantly assists the practitioner in making a correct diagnosis of the problem between the parties and choosing the most appropriate forum for resolution of their dispute. For example: if the practitioner feels that the relationship between the worker and the employer or the loyalty of the worker towards the employer is long standing and needs to be preserved, then he will try to resolve dispute through negotiation or mediation. But if he feels that employer is completely unwilling to concede to the demands of the worker then he will approach the court of law to get the rights of the employer enforced.

[31] Felstiner, Abel & Sarat, *supra* note 28, at 636.
[32] BROWN & MARRIOTT, *supra* note 3, at 7.

III.II IDENTIFYING THE CLIENT'S EXPECTATION FROM THE CASE

The most important step before initiating any dispute resolution process is to identify, what the client wants to achieve out of that process. It needs to be understood that what is the primary aim or *real interest*[33] or objective of the client behind entering into any dispute resolution process.

Client might be interested in monetary consideration such as getting a high amount of compensation or exemplary damages. But it can also happen that rather than fulfillment of a monetary objective, the primary aim of the client is getting a non-monetary objective fulfilled. Non-monetary objectives can be seeking an apology, obtaining answers about what happened and why, making defendant accept fault or responsibility, seeking acknowledgement of harm, assurance that such conduct will not be repeated.[34] Apart from these, client might consider getting justice or punishing the opponent as the right outcome of the dispute resolution process.

In cases where the client focuses on monetary or non-monetary objectives, mediation[35] can be adopted as the mode for dispute resolution as only an informal method facilitated by a third party can help the client to achieve his desired outcome in such cases.

But in cases where client aims at punishing the opponent, litigation is the only appropriate mode of dispute resolution because only a court of law has power or is authorized to punish any individual or entity.

It is also necessary to get an idea about the interests of other party while identifying the interests of client as the parties might be having *different*

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[33] PANCHU, *supra* note 22, at 36.

[34] TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES 37-40 (2009).

[35] *See* Annual Report of Delhi Mediation Centre (2006-2007), http://delhimediationcentre.gov.in/annualreport2006-07.pdf.

interests and thus, they can reach a mutually acceptable outcome, through the process of negotiation or mediation. For example[36]: if there are two sisters who are quarrelling over an orange. But the real interest of one sister lies in the peel whereas the real interest of other sister lies in the juice of the orange. Thus, either by initiating a negotiation themselves or in mediation with the help of a third party, they can reach a mutually acceptable solution in which one sister gets the peel and the other gets the orange leading to full satisfaction of both the sisters.

Therefore, it has been said by Fisher & Ury[37] that differences do not always create problems but sometimes they can lead to solutions also.

III.III EVALUATING THE STRENGTHS AND WEAKNESSES OF THE CASE

For determining the appropriate dispute resolution process it is essential to evaluate the strengths and weaknesses of the case by conducting an analysis of the following:

- *Financial Analysis*: This involves calculating the cost of pursuing various dispute resolution processes which can be in terms of legal fees such as court fees or arbitrator's fees, fees payable to experts, investigation fees. The amount of such cost, which will be recoverable if client wins or settles or loses or does not settle, will also need to be considered. For example: court fee is returned if the dispute is settled through mediation.[38]

  If the client can afford a high litigation related cost[39] then litigation can be initiated otherwise dispute can be resolved through arbitration which

[36] *Supra* note 16, at 56.
[37] ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AN AGREEMENT WITHOUT GIVING IN 39 (1991). (Fisher & Ury).
[38] The Court Fees Act, § 16 (1870).
[39] LAW AND ECONOMICS, http://www.law.harvard.edu/faculty/shavell/pdf/12_Inter_Ency_Soc_8446.pdf.

is less costly than litigation and resolves the dispute with the help of an arbitrator who is usually a specialist in the field. Negotiation and mediation can be chosen for resolving dispute where need of the hour is to resolve dispute with minimum possible expenses.

- *Reputational Analysis*: This analysis is usually necessary in cases of those clients whose business depends on their reputation such as popular brands, investors. This analysis considers whether the client can undertake any risk regarding his reputation, which is usually involved in litigation as it is conducted in public.

  When the reputation is of prime importance, the best possible dispute resolution mode is negotiation or mediation as they are conducted in private and in mediation no third person can attend the proceedings unless otherwise agreed by the parties.[40]

- *Organizational analysis*: This includes finding the time which different dispute resolution processes would take to resolve the dispute, importance which the client places on resolving the dispute quickly, and whether delay in dispute resolution affects the business or profession of the client.

  If the delay in processes like litigation[41] and arbitration adversely affects client or his business then mediation would be the appropriate dispute resolution process because, in mediation influence of a third party helps to resolve the dispute quickly.

- *Personal cost analysis*: This considers the stress and effect on long term relationships between the parties, which would result due to the

[40] Civil Procedure Mediation Rules (2003).

[41] S.B. Sinha, *Articles*, DELHI MEDIATION CENTRE http://delhimediationcentre.gov.in/articles.htm. (last updated Oct. 1, 2015).

procedure followed in various dispute resolution processes. This also takes into account the possibility of parties working together in future.[42]

Negotiation and mediation are considered appropriate for resolving disputes, where the emphasis is on maintenance of relationships. For example: Mediation is mostly considered appropriate to resolve family disputes where parties even after separation may have to come together to take decisions for their children.[43]

- *Legal risk analysis*: This takes into account the chances of winning the case in trial, the availability of credible witnesses, the period of limitation, availability of precedents in support of the case.[44]

  If these are in favour of the client then litigation can be chosen as the dispute resolution process but otherwise where result of the trial is uncertain[45], negotiation or mediation can serve as the appropriate dispute resolution forum.

After conducting these analyses it is also necessary to frame a *BATNA* and *WATNA*, based on the above analyses, which means Best Alternative to a Negotiated Agreement and Worst Alternative to a Negotiated Agreement respectively. Thus, BATNA means what is the best alternative available in case negotiation fails or in context of mediation, if negotiation in mediation fails and WATNA means what will be the worst alternative if negotiation fails and in context of mediation, if negotiation in mediation fails. These terms were coined by Fisher & Ury.[46] According to them these serve as standards for measuring any proposed settlement. They protect a person from

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[42] THE STATE BAR OF CALIFORNIA, http://www.calbar.ca.gov/Public/Pamphlets/Resolvea Dispute.aspx. (Last updated Oct. 1, 2015).

[43] MARIAN ROBERTS, MEDIATION IN FAMILY DISPUTES: PRINCIPLES OF PRACTICE 178 (2008).

[44] LINDA MULCAHY, CONTRACT LAW IN PERPECTIVE 223 (2008).

[45] Beron, B., *Litigation Risk management and ADR*, LITIGATION RISK MANAGEMENT, http://litigationriskmanagement.com/wp-content/uploads/2014/01/Litigation-Risk-Management-and-ADR.pdf.

[46] FISHER & URY, *supra* note 37, at 50-53.

accepting any terms which would be unfavorable for him and also from rejecting any terms which would be favorable for him. Thus, framing a BATNA and WATNA also acts as reality check[47] for the client in terms of examining the best and worst possible option available. Most common BATNA is litigation but it comes along with WATNA of delays, cost and uncertainty[48] which is usually involved in litigation.

Case study on BATNA and WATNA[49]

In this case study, Turnbull was the tenant and Jones was the landlord. In March, Jones rented an apartment to Turnbull for $ 300. In July, when Turnbull wanted to move out, he learned that the apartment was under Rent Control. Maximum rent which was legally allowed to be taken with respect to the property was $ 233. Thus, he had been paying $ 67 more than the legally allowed rent. Disturbed by the fact that Jones had been overcharging him, he decided to start a negotiation with Jones. He decided to start a negotiation because he wanted to maintain the relationship between him and Jones, and he has a busy schedule in which it would have been difficult for him to take out time to pursue litigation

BATNA which was available to Turnbull and which guided him in his negotiations was initiating litigation in a court of law. Litigation was his BATNA as he had a strong legal case and with the help of Rent Control provisions he could easily prove that a legal wrong has been done to him in the form of overcharging rent. His WATNA was the costs, delays and stress involved in litigation.

Thus, considering his BATNA and WATNA, he decided to agree to receive an amount from Jones which was close to the amount that he would have been

[47] *Supra* note 16, at 32.
[48] PANCHU, *supra* note 22, at 69.
[49] FISHER & URY, *supra* note 37, at 59-63.

awarded in litigation. He could take this decision as the outcome of this settlement was close to the possible outcome of his BATNA or litigation and at the same time this settlement also saved him from his WATNA which was the delay, cost and stress involved in litigation.

Evaluating the strengths and weaknesses of the case and framing a BATNA and WATNA places the client in a position, to settle or bargain in the "*shadow of law*"[50]. This means that even in dispute resolution processes such as negotiation and mediation, where the dispute is being resolved without going to trial, the client can use the threat of going to trial to increase his bargaining power and to persuade the other party to agree to his terms. If a strong legal case or high chances of winning at trial form the strength of the case or BATNA, then this can prove to be an efficient bargaining chip and can help him to coerce even an unwilling party[51] to accept his demands.

For example: In the above case study Turnbull had a strong legal case and thus, litigation was his BATNA. Therefore, even if Turnbull did not intend to go to court, he could use the threat of going to court to persuade Jones to refund a satisfactory amount.

III.IV DEFINING THE CLIENT AS A REPEAT PLAYER OR A ONE SHOTTER

The fact that the client is a repeat player or a one shotter has a significant impact on determining the appropriate dispute resolution forum. Galanter[52] coined the terms "*repeat player*" and "*one shotter*".

He emphasized that some people because of the size of their resources, size of their organization, and state of law have more occasions to make claims in courts and are involved in similar litigations whereas, some people due to

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[50] HAZEL GENN, JUDGING CIVIL JUSTICE 21, 35 (2009). (Hazel Genn).
[51] *Id.* at 21.
[52] Marc Galanter, *Why the Haves Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y. REV. 95, 97-101 (1974).

similar reasons, as said above, have less occasions to approach courts. The former are called repeat player such as insurance companies or a finance companies and the latter are called one shotter such as a party in a divorce case or a person aggrieved of medical negligence.

Repeat players, when compared to one, shotters, are in a better position to play the game of litigation.[53] This is because by being part of numerous litigations they gain experience, develop expertise themselves and also have ready access to experts. Thus, they can develop better wining strategies to pursue and win in litigation. They generally have huge resources, which gives them added advantage of undertaking risk involved in litigation and freedom to play for immediate gains or rules.[54] On the other hand, the appropriate dispute resolution process for one shotters who have little or no experience and who are usually playing for immediate gain is mediation. This is because in mediation, irrespective of their experience and resources, they can expect a creative and satisfactory solution. Thus, the choice of appropriate dispute resolution forum is also affected by distribution of power and resources between the parties.[55]

III.V TIERED OR ESCALATED DISPUTE RESOLUTION

Negotiation, mediation, arbitration and adjudication, which are the primary processes of dispute resolution, do not exist in isolation from each other. In a majority of disputes the parties would have attempted negotiation before going for mediation and in many other cases a failed mediation would have resulted into an arbitration or litigation. Some parties adopt such a tiered approach voluntarily. Whereas, in some other cases, usually pertaining to commercial and consumer contracts, a tiered approach is made compulsory by insertion of a *stepped* or *tiered* escalation clause.

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[53] *Id.* at 98.
[54] *Id.* at 100.
[55] GENN, *supra* note 50, at 7.

Escalation clause is a dispute resolution clause which provides that any dispute arising between the parties shall be resolved on a tiered or staged basis.[56] Each tier or step will be characterized by a dispute resolution mode and parties would escalate to the next step only when they have attempted to resolve the dispute by mode provided by the previous step but have failed.

Usually the escalation clause is so drafted that the first step is negotiation between the parties. This is to enable the resolution of dispute at an early stage with least expenses in terms of cost and time.

This is followed by mediation or the next step is mediation. This implies that if negotiation fails due to any reason such as behavior of negotiators[57] or concealment of information or parties reach an impasse, then parties will take recourse to mediation. Mediation is the next step as a mediator who is a third party can improve the flow of information[58] between the parties and help them reach a mutually acceptable solution.

The third stage is usually Arbitration or Litigation[59], which can be resorted to by parties if they fail to reach an agreement by mediation also. In case of failure of mediation, arbitration can help parties to resolve their disputes as it is conducted formally, according to established rules of law, by an arbitrator who is usually expert in the concerned field. Arbitration should be attempted before litigation as arbitration is less formal than litigation and can be conducted in private which maintains privacy. However, parties can approach a court of law to resolve their dispute by formal litigation system, if

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[56] BIRD & BIRD: KNOW HOW BRIEFS ESCALATION CLAUSES, http://www.twobirds.com/~/media/PDFs/Brochures/Dispute%20Resolution/Client%20know%20how/Client%20briefings%20-%20Escalation%20clauses.PDF.

[57] Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers To The Resolution Of Conflict*, 8 OHIO. ST. J. DISP. RESOL. 235, 239 (1993).

[58] Robert A. Baruch Bush, *What Do We Need A Mediator For? Mediation's Value Added for Negotiators*, 12 OHIO. ST. J. DISP. RESOL. 1, 13 (1996).

[59] Quick Guides: Tiered Dispute Resolution Clauses, https://www.ashurst.com/doc.aspx?id_Resource=4645.

they have attempted to resolve their dispute by modes available in all the previous stages but have failed or have not achieved a satisfactory solution.

III.VI CONSIDERING THE POTENTIALITY OF THE CASE TO SET PRECEDENT

Recently, there has been a rising trend in common law jurisdiction countries to refer cases out of the litigation system to private dispute resolution forums like mediation.[60] This has resulted in the disappearance or decline of trials in court which is termed by Galanter[61] as "*vanishing trial*". But while such referring to private dispute resolution forums, it is almost forgotten to consider that, whether the case involves an issue relating to public good and whether its adjudication by a court would lead to setting up of rules and precedent apart from resolving the dispute.[62]

Such cases which have the potential for setting up precedents and rules for public good must be adjudicated by court and not settled by any other dispute resolution process. This is because the precedent and the rules which will result as a part of the judgment of the court are important and necessary for "*guiding future behavior and imposing order and certainty on a transactional world that would otherwise be in flux and chaos*"[63].

Moreover, the new developments in law[64] are primarily based on the decisions pronounced by the court in cases which are brought before it. These cases reflect existing problems in different areas in the society and the court while deciding these case gives binding rules or sets precedents which solves not only the present issue but also puts at rest any controversy which may arise in future regarding that issue. Thus, contributing to the

[60] Linda Mulcahy , *The Collective Interest in Private Dispute Resolution*, 33 OXFORD. J. LEGAL STUD. 59, 61 (2013).
[61] Marc Galanter, *A World Without Trials*, J. DISP. RESOL. 7, 7-15 (2006).
[62] David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L. J. 2619, 2622 (1994).
[63] *Id.* at 2623.
[64] GENN, *supra* note 50, at 22.

development of law and providing clarity regarding conduct to be followed in society in future.

For example: The case of *Donoghue v. Stevenson,*[65] established the responsibility of manufacturer towards every possible consumer of his product. But, if this case would have been settled privately then law relating to protection of consumers would never have been transformed.

Thus, the appropriate dispute resolution forum for those cases which can result in setting up of precedents or binding rules to guide future conduct is litigation in a court of law.

IV. CONCLUSION

Determining the appropriate dispute resolution forum for resolving a dispute implies finding the remedial process which is most suitable for the particular dispute.[66] Every dispute resolution process has some advantages and disadvantages, but suitability or appropriateness of each process has to be considered keeping in mind the dispute involved, client's primary objective to enter into a dispute resolution process, his bargaining power and the strengths and weaknesses of the case.

Thus, negotiation is usually best suited in those cases in which parties are looking for a non litigative, speedy and economical remedy to reach a mutually acceptable solution.[67] But the parties should be evenly balanced in terms of bargaining power to reach an effective solution. Negotiation cannot serve the purpose of reaching an effective solution in those cases in which parties don't want to compromise or have huge differences in terms of power and resources.

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[65] [1932] All. E.R. Rep 1.
[66] PANCHU, *supra* note 22, at 34.
[67] AVTAR SINGH, LAW OF ARBITRATION AND CONCILIATION INCLUDING ALTERNATIVE DISPUTE RESOLUTION SYSTEMS 409 (2005).

Mediation can help parties reach a mutually agreeable solution with the assistance of a third party, called the mediator.[68] Thus, it is most successful in those cases where parties could not reach a solution by negotiating with each other, but desire to resolve their dispute through a speedy and less expensive process, which also maintains their relationships and reputation. In such a situation, mediator, by facilitating the flow of information between the parties, helps them to reach an amicable solution.

Arbitration as a mode of dispute resolution is most suitable for those cases in which help of a specialist is needed along with need for privacy. But it involves some delay and expenses, thus it should not be resorted to when parties are looking for a quick and cheap remedy.

Litigation is suitable for those cases in which there is a potential for setting precedents or rules for public good or which have the scope of leading to development of law. But it is usually not to be resorted to, in those cases where stress is on relationships or reputation.

It is always preferred that a tried dispute resolution process is adopted, even if the parties are not bound by an escalation clause. Thus, dispute should be first attempted to be resolved through negotiation and if negotiation fails then by mediation. In cases where mediation also fails, the parties can take recourse to litigation. The objective of this is to enable the parties to resolve their dispute at the earliest stage and through the simplest process possible. However, in cases which can lead to setting up of precedents, litigation should be the only mode of dispute resolution to ensure continuity in the development of law.[69]

[68] V. A. MOHTA & ANOOP MOHTA, ARBITRATION, CONCILIATION AND MEDIATION 532 (2008).
[69] GENN, *supra* note 50, at 22.