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Editorial

The changing nuances of law warrant a continuous process of mapping, documenting and dissemination in order to answer the burgeoning challenges of technology in legal research. The *Kashmir Journal of Legal Studies* has been contributing substantially in the field of legal research, resulting in accreditation of the journal as UGC approved listed journal which is a great achievement for a Private Law college of the state. The journal is being indexed by Indian Citation Index (ICI) as a sequel to its quality of content in the field of legal education. It gives us immense pleasure to note that the ICI has authorized the college to use their Logo in this Journal which is duly acknowledged.

The present issue of the journal has eight articles and six cases and comments which are delineated as under:

Susmitha P Mallaya in her paper titled "*An Insight into Welfare of Consumers: Need for Revamping the Regulatory Mechanisms in Financial Sector in India"* has highlighted the financial sector regulations, problems faced by the consumers in financial sector and the loopholes in the current legislations. The author has stressed that lack of financial literacy creates major problem for the consumers while choosing financial products and to address such issues the Competition Commission of India has a vital role to play.

Showkat Ahmad Bhat and Mudasir Nazir in their joint paper titled *"Application of Theories of Punishment in Indian Criminal Jurisprudence"* have highlighted the various factors which are quite relevant while deciding the quantum of punishment, and also discussed the application of the theories to various socio-economic offences along with some relevant suggestions.

Iftikhar Hussain Bhat in his write-up titled "*Environmental Protection during Armed Conflict: A Critical Assessment of International Humanitarian Law*" has focused on how armed conflict causes significant harm to the environment and the communities that depend on natural resources and has provided a critical assessment of the protection afforded to the environment during armed conflict by International Humanitarian Law.

Imran Ahad and Fareed Ahmad Rafiqi in their joint write- up titled "*Patenting of Drugs and Pharmaceuticals: An Indian Perspective*" have highlighted the impact of pharmaceutical patenting in India in the post Doha Declaration. The article amply stressed on need to control the MNCs in patenting of generic drugs and thus developing country like India should be supported to use all possible costs to contain strategies to ensure access to medicine for all.

Shazia Ahad Bhat in her write up titled "*Constitutional Protection of Special Laws: A Historical Retrospect*" has focused to analyze the provisions of various special laws, their true nature and effects when implemented practically. The relationship between violence, power and the law is especially evident to those committed to democratic values has been the main focus of this article.

Syed Shahid Rashid in his write-up titled *"Parliament versus Judiciary, A Battle for Supremacy: An Excursion into Indian Constitutional System"* has highlighted the tussle between the Parliament and Judiciary and its impact on the laws and administration of justice in India. The author has discussed the dire need of maintenance of balance while performing their constitutional functions without overstepping in each other's domain.

Mohammad Rafiq Dar in his paper titled "*Role of Judiciary in Consumer Protection: An Analysis*" has highlighted the role of courts, particularly higher judiciary in consumer protection and need to aware the common masses about their rights as consumers. The author has suggested that consumer awareness has to be given the priority, since it is the lack of awareness of the rights in consumers which hinders the progress of achieving the object of the consumer protection legislation.

Yasir Latif Handoo and Fareed Ahmad Rafiqi in their *write up titled "Human Rights Protection and Forensic Science Application : A Case For Sensitizing Criminalistics and Adjudicators*" has highlighted how the misuse of technology violates human rights and suggested the need for educating Criminalistics in order to augment preservation and protection of human rights. In this write-up the authors have given role of practitioners and forensic science specialties vis a vis accepted techniques are being questioned. Deficits inherent in the current system,

include operational problems related to the efficiency of the justice system and the way it is administered has lead to disintegration of Human rights of individuals whose stakes are involved is the main focus of this write-up.

S.M.Afzal Qadri and Rehana Shawl in their joint write-up titled "*Euthanasia : Right to Life V/s Right to Die*" have discussed the subject of euthanasia from the medical and human rights perspective in the backdrop of the recent Supreme Court judgment Aruna Shanbaug v. Union of India, (2011) 4 SCC 454. In the concluding marks the author has said that euthanasia is an anti- humanistic and anti –religious activity which ends the pristine life or manifestation of image of God.

S. D. Sharma in his write-up titled "*Powerful Legal Arena of Dexterity of Unmarried Reckoned Wife*" has focused on the marriage as an institution of legal rights of domestic life of men and women equally under various personal laws. The author has further deliberated upon the issue and legal status of unmarried reckoned wife. The punch line in the author's perspective is expressed that societal recognition of the relationship of man and woman as husband and wife is a "grundnorm" of marriage.

Unanza Gulzar in her write-up titled "*Draft Surrogacy (Regulation) Bill, 2016: A Critical Exploration*" has evaluated how altruistic surrogacy itself causes mistreatment to the surrogated mother, both economically and psychologically and how the Bill oversteps upon Article 14 and Article 21 of the Indian Constitution and flops the assessment of legality.

Faizan ur Rahman in his paper titled "*Constitutional Right to Speedy Justice: Law and Practice*" has highlighted the concept, importance of speedy justice and a study of existing legal framework with regard to speedy dispensation of justice in India. The author has also discussed the relevance of providing timely and speedy justice has been acknowledged by international bodies as well as various forms of governments throughout the world.

Rubeena Iqbal in her write-up titled "*Beggars and Courts: A Critical Study of Judicial Control On Beggars*" has discussed the role of judiciary in protecting the right of beggars to live with dignity and also

examines the role of judiciary so far as interpretations of beggary laws are concerned. The author opines that beggars constitute the most deprived persons, as they are living a life of pity and disrespect, so here the law and judiciary has to protect them from living a degraded life and judiciary has to check whether the government agencies are properly functioning or not and also how far the law relating to beggary conforms to the constitutional imperatives.

Nayeem Ahmad Bhat in his write-up titled "*Women Workforce in India: Problems and Challenges in Perspective*" has highlighted women's problems and issues confronting their workplace in both organised and un-organised sectors of employment in India. He further says that women have been equal fighters for freedom in employment opportunities. They have demanded for and received equality in education and there lies the secret of their success. Education and the awareness that comes with it have enabled this gender to fight their cause.

Afshan Gul in her write up titled "*Legal Aid as a Means to Combat Crime against Women: An Analysis*" has highlighted the law related to legal aid and need to use legal aid as a tool to combat crime against women. The author has cautioned that it would not be inappropriate to designate legal aid movement as the future social barometer for gauging the overall social attitude towards the weak sections of society specially women.

The present issue is the combined contribution of the editorial board and the legal experts who have directly or indirectly helped to bring out the issue in the best possible presentable form. The efforts made by the team of editors has remained quite immense and laudable which is duly acknowledged. The editor wants to put on record the contribution of **Omer Zargar** for layout and the design of the Journal.

Last but not the least, all credit goes to Mr. Altaf Ahmad Bazaz, Chairman of the College for his unfailing commitment to academic excellence and financial support to make the publication of this journal possible.

Prof. A. S. Bhat.

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An Insight into Welfare of Consumers: Need for Revamping the Regulatory Mechanisms in Financial Sector in India

Dr. Susmitha P Mallaya*

Abstract

Financial sector in India made a remarkable progress due to globalisation and liberalization policies. It generally comprises of banking sector, insurance sector and securities market. These sectors directly or indirectly mobilize the public savings for the economic progress. Consumers play a predominant role in this progress which brings the need for the analysis of consumer welfare. In this sector lot of innovative financial products are launched by the financial companies for the benefit of consumers and society. However, lack of financial literacy creates major problem for the consumers while choosing financial products. Similarly, the emergence of technology in the financial sector products and their technicalities bring challenges to the consumers. Another problem which is faced by the consumers is with regard to regulatory mechanism. There are multiple regulations and regulators to govern the financial markets. Apart from this, in order to regulate the issues pertaining to competition in market which will have an impact on the welfare of consumers Competition Commission of India as a competition regulator is also constituted by the Government. The presence of multiple regulators in the financial market and the ambiguity with regard to their jurisdictions creates impediment for the welfare of consumers. There is an adverse impact of these multiple regulators on the rights of consumer. Similarly, there are loopholes in the respective legislations which brings hurdle to deliver justice to the consumers of financial sector. The objective of this paper is to highlight the financial sector regulations in India and the dilemma which the consumers face. A proposal to redefine the regulatory mechanism is also aimed.

Keywords: *Globalization, Competition Commission, Consumer, Financial sector, Internet banking.*

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I Introduction

Financial market regulations aim at welfare of the consumers.[1] Presently, financial markets offer easy credit facilities to the customers for the purchase of certain goods from the market. This results in the loss of self-control by the consumers and leads to over-indebtedness.[2] Moreover, lack of financial literacy also increases the concerns of the consumers of financial products. In India, over a century, institutional framework was built up which consisted of Reserve Bank of India to regulate banking, non-banking and payment sectors; The Securities Exchange Board of India to regulate securities market; and Insurance Regulatory and Development Authority to regulate insurance sector. On the basis of the Narasimham Committee recommendations major regulatory reforms were initiated in the financial sector. On the other hand, its impact on consumers was not given much importance. In order to overcome the problem of multiple regulators, Financial Sector Legislative Reforms Commission was set up by the Government of India. It proposed for major changes in the regulatory framework dealing with financial sector.[3]

It is true that consumers play a vital role in the economic system. However, in developing economy, unfortunately, consumers are cheated by way of overcharging, misleading and by providing confusing financial advices by the financial consultants and are becoming vulnerable to exploitations by the market players. In the field of financial sector, Consumer Protection Act,1986 is ineffective especially in the realm of banking sector where credit card, debit card and the lending by the financial institutions, consumers are facing problems because of the lack of financial education. Even the educated masses are getting targeted of the complicated financial deals. Reserve Bank of India's guidelines pertaining to credit card and debit card transaction needs to be

1 Peter Cartwright, "Understanding and Protecting Vulnerable Financial Consumers", 38 *Journal of Consumer Policy ,* (2015),pp.119-138.

2 John Gatherwood, "Self-control, financial literacy and consumer over-indebtedness", 33*Journal of Economic Psychology*,(2012), pp.590-602.

taken adhered to by banks for authorization of online monetary transaction.[4]

Apart from this, technological innovations also create problems for consumers. Internet banking, mobile banking etc. has become a buzzword. Many of the financial products are purchased by the consumers through on-line transactions. The regulators remain only as the watchdogs. It is a fact that the financial services regulators chiefly aim at economic stability rather than consumer welfare.[5] In this scenario, no country can knowingly or unknowingly disregard the interest and welfare of the consumers. The modern concept of consumer protection traces its foundation way back in the golden era concept of a "duty of reasonable care".[6] At present NEFT transactions, net-banking, credit cards, debit cards etc. are promoted by banks including many private and foreign banks and they generally encourage customers to use ATM and plastic money. This makes the financial transactions easy for the consumers on one hand since they can avail their banking services from anywhere sitting with their computers and laptops. However, technological fault and complexities in the transactions, and of late, cybercrime sometimes brings concerns for the consumer.

In banking sector, consumer generally faces concerns with regard to the in-operative accounts. Presently bank charges penalty for non-operation without any prior intimation to the account holders. Apart from this, non-banking financial institutions also lure the consumers with high returns and then vanish from the market. This shows the lack of supervision and co-ordination between the regulators. In case of loans and advances they initiate a very strict approach especially with the weaker sections of consumers while the big corporate giants escape from their clutches.

4 V.Sudesh & Sangeetha Murali, E-commerce – legal challenges and the Competition Catastrophe in India, *Bangalore Law Journal* 255 (2015).

5 K.Vidyullatha Reddy, "Consumer Welfare in Banks Lending", 2*National Law School of India University Journal of Law and Public Policy* 1 (2015).

6 *Richarad Thorold Grant* v. *Australian Knitting Mills Ltd*, AIR 1936 PC 34.

II Banking Sector Regulations And Consumer Protection

The institutional framework of financial services relating to banks can be broadly divided into three major divisions comprising of banks, Development Financial Institutions and Non-banking Financial Companies. Institutional regulation is the key for macro and micro economic management. RBI issues various guidelines in the interest of customers of the banking service. However, many of the guidelines remain in the papers as there is no proper mechanism to monitor whether they are implemented by banks or not. Consumer Protection legislation addresses the concerns of banking customers in case of deficiency of service provided by the banks. However, the major focus of regulators needs to be to prevent the abuses of consumers.

The Consumers courts have also contributed for the welfare of consumers of banking service though in a limited manner.[7]Thus in *State Bank of Hyderabad* v. *Bairi Lingam,*[8] the National Consumer Dispute Redressal Commission held that court or commission cannot order a bank to sanction loan; however once loan is sanctioned, disbursement has to made within stipulated time. In another case,[9] the petitioner challenged the decision of the bank to refuse education loan as he did not have 60% marks. However, the bank's decision on minimum 60% marks was based on RBI and Indian Banks Association guidelines. The High Court held that under article 21-A and Article 41 of the Constitution of India that there is a Right to education, but there is no inherent right to educational loans. In *Choudhary Traders* v. *State Bank of India*,[10] the distinction between the directions and guidelines issued by RBI were considered by the courts. The right to issue directions is provided under the Banking Regulation Act, 1949 and also the guidelines and advices. However, if a bank violates the guidelines, customers cannot ask the High Court to enforce them through writ of *mandamus*. Thus it can be viewed that In *Amar Jwala Paper Mills (India)* v. *State Bank of India,*[11] the court held that in the case involving the complicated questions of fact

7 *Citi Bank N.A* v. *Greekay Agro Pach Private Limited* (2008) 15 SCC102.
8 (1991) 1 CPR 148 NCDRC.
9 *A Kashinathan* v. *Branch Manager, Canara Bank*, MANU/TN/1078/2012.
10 2008 (4)ALT 193.
11 (1998) 8 SCC 387.

and evidence required, the order passed by the Commission will be sufficient and the Supreme Court will not interfere. In *Viswalakshmi Sasidharan* v. *Branch Manager, Syndicate Bank, Belgam*[12] the Supreme Court held that the Bank's failure to disburse the total amount of loan contracted with petitioner which resulted in failure on the part of the petitioner to carry on the business and consequent failure to manufacture the product for which orders had been placed, amounted to deficiency in service. In *Haryana Gramin Bank* v. *Madanlal,*[13] the Supreme Court while dealing with the act of bank staff misappropriating and embezzling customer's money held that the same amounted to deficiency in service.

Similarly, the Banking Ombudsman Scheme, 2006 also provides for the grounds on which a complaint can be made in relation to deficiency in services pertaining to loans and advances.[14] It is the regulatory power of the RBI to determine the policy in relation to advances and the rate of interest generally or specific to any bank which shall be binding on the banks, however, it cannot be availed as a matter of right by the customer.

Generally, banks do not offer different maturity schemes. Almost all of the banks, irrespective of private or public, their rate of interest will be similar. This restrains the choice of customers to choose the best deposit schemes or compare the financial products from different banks. Similarly all the banks are offering credit card facilities to its customers. However, the rates of interest charged are not uniform and there are many hidden charges which the customers fail to understand or even realize. This is highly unjustified. At present, they insist to maintain a minimum balance of Rs.5000-10,000 in the Savings bank account, absence of which will attract penal charges by the banks. Many of them even levy charges for not transacting with them for a year. The directions issued by the Reserve Bank of India to the banks to provide the details of charges levied by them for the services offered is not completely adhered to by all the banks. This creates an adverse effect on the consumers especially those who are weaker sections of the society or can be termed as vulnerable consumers. Vulnerable consumers are described as those "who are more susceptible to economic, physical, or

12 (1999) 10 SCC 173.
13 (2011) 15 SCC 113.
14 Banking Ombudsman Scheme Cl.8 (2).

psychological harm in, or as a result of economic transactions because of characteristics that limit their ability to maximize their utility and well-being".[15]These people lack access to commercial advisors and have limited savings.

Another problem faced by the customers of banking service relate to the availing loan facility offered by the banking and non-banking financial institutions. Irrespective of educational level of the customer, by signing the loan agreement they become the target group of these financial institutions to extract money in the form of interest which is high. The concern related to the poor sections of society like farmers are becoming prey to this practice. They force them to provide so much of details in order to avail the loan. On the other hand, the big industrialists are offered loans even on fake documents and callous attitude is shown by the employees while examining the documents submitted by them. This also raises concern about the safety of the consumers of banking products.

Competition Commission of India also was forced to safeguard the interest of customers of banks. Their order led to the waiver of the pre-payment penalty from the agreement of loans by the banks all over the country.[16]The practice of prepayment was in vogue since long time but their impact on the customers of bank was never examined by the regulator. Apart from this, with regard to the issues of abuse of dominance,[17] anti-competitive agreement, Reserve Bank of India as a banking regulator has limited role to play. The efforts of the CCI to examine the concerns relating to banking field generated bitter relations between both the regulators which will have an adverse effect on the welfare of the consumers. The concern raised by the banking regulator is that the presence of another authority in the banking sector will act as deterrence against the principles of Reserve Bank of India Act, 1934.[18]

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15 NC Smith and E-Cooper-Martin, "Ethics and Target Marketing: The Role of Product Harm and Consumer Vulnerability" 61 Ethics and Target Marketing (1997).

16 *Pre payment penalty* case, decided by CCI on 23.05.11 (relating to charging of foreclosure charges on prepayment of mortgage loan)

17 *Pranav Mohanty* v. *HDFC Bank Ltd* ,Case No.17/2010, May 23, 2011

18 Natasha Nayak, "Towards an Effective Cooperative Regime to Resolve Regulatory Overlap Conflicts in India", 1 Comp L R 212 (2012).

The major problem faced by the bank customers traditionally was relating to the lethargic attitude of bank employees to address the concerns of customers and the presence of excessive bureaucratization. The monopoly of the Government in the banking sector and lack of competition also resulted in the poor customer services. Another problem faced by the banking customers relates to the filing of KYC norms. There is multiplicity and cumbersome procedures which creates a barrier for the consumer to enter the financial sector. For instance, with regard to the filing of KYC norms, different formalities and norms are required from one financial provider to another. There is a report which suggests that because of this diverse norm by financial entities it is the lower middle income group customers who face the difficulty in getting access of financial products than the higher income group customers.[19] Hence, there is a need for implementation of uniform KYC requirements and avoid multiple KYCs which will promote accessibility of financial markets to all the consumers of financial products irrespective of their income structure.

On the other hand, at present, consumers of banking services are in an advantageous position after adopting and implementing the technology in the banking services. Competition in the banking industry between the private banks and public banks also resulted in the drastic change in the approach of providing banking service to its customers. However, the modern financial market containing new options and opportunities are making consumer vulnerable to new form of unfair trade and unethical business practices by banks. They try to get customers' account with lot of facilities initially, later imposing hidden charges for non-maintenance of minimum balance etc. and offering instant loans for various products especially to salaried people and luring the customers to buy insurance business also pose new challenges to consumer protection. This calls for appropriate and swift executive interventions to prevent consumer exploitation by the banks.

Impact of banking frauds on the welfare of customers

Banking institutions are used mainly by the fraudsters to indulge in illegal activities which will create an adverse effect on the consumers.

19 Josy Joseph, Banks suppressing alerts on suspect dealings: RBI probe, The Times of India, May 2013.

Many a time, banks' customers are becoming victims of these fraudsters especially with debit and credit card frauds. There is a tremendous change in nature of banking transactions like emergence of hybrid financial products and the cross border financial transactions. The banking fraud reported can be categorized as technology related and KYC related frauds which are directly linked with deposit accounts and advances. Technology related fraud is committed generally through internet banking and mobile banking because of tech-savvy customers. Banks also provide a lot of online banking services and products to its customers. This helps perpetrators of technology fraud in banking system to explore loopholes in technology system and processes and commit frauds. They employ hostile software programmes or malware attacks, phishing techniques and also extract the confidential data of the customers provided with the bank. Apart from this, many customers becomes the victim of many fraudulent e-mails, sms messages that are in circulation which convey the customer false, misleading and misguided information to attract and trap them in the fraud. For instance, a E-mail or SMS stating winning of prize money. Many customers fall prey to such e-mails and pay money in designated accounts inspite of repeated warning issued by the Reserve Bank to customers. These accounts are quickly siphoned off through ATMs located in far flung areas of the country. Fraudsters generally use those accounts which remain inoperative for long especially deposit accounts of banks which relaxes the KYC norms. All these frauds will have an adverse impact on the welfare of the customers of banking service.

III Insurance Sector Regulations And Consumers

There was a time when limited insurance services were available to the customers of insurance products due to the state monopoly of insurance business. Shri R.N.Malhotra Committee on Insurance sector reforms remarked that the Indian insurance industry lacks depth, diversity and reach, both geographically as well as in terms of insurable population, as there was immensely vast potential yet to be tapped. It provides poor customer service in terms of pricing, adequacy and appropriateness of covers and the much needed and timely claims settlement. It lacks the global dimensions having remains in isolation too

long. Insurance policies bundled with other goods and services in the market also raised the concern for the consumers because of the misleading information given to them and the real cost of insurance were hidden from them.[20]Moreover, the intermediaries sometimes duped the consumers by not providing proper information relating to lapse of policy for non-payment of premium. Even the apex court highlighted the presence of unequal bargaining power and forcing the customers to accept the unreasonable and unfair terms set out by the insurance companies.[21]

In order to protect the welfare of consumers, CCI was forced to enter into the insurance sector also. They penalized the insurance company for indulging in anti-competitive practices which has an appreciable adverse effect in the insurance market.[22]This shows that the insurance sector regulator is not concerned much with the welfare of the consumers. Thus different insurance products and lack of proper information brings concerns for the consumers. Similarly, the hidden charges and the misleading advice by the insurance agents and financial advisers also create problem for the consumers. The liability in case of deficiency in service apart from approaching the consumer forum is difficult to address.

CCI also came across a matter of cartelization by public sector insurance companies,[23] in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojana. CCI imposed a penalty of Rs.672 Crores, cumulatively, on four public sector general insurance companies. These type of agreements have an adverse effect on the competition in the insurance market and ultimately harm the interest of the consumers of insurance products.

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20 Pradeep S Mehta (Ed), *Competition and Regulation in India, 2013 ; leveraging Economic Growth through better regulation*, CUTS International, Jaipur

21 *LIC of India* v. *Consumer Education & Research Centre,* 1995 AIR 1811.

22 Sanjay Vijaykumar, 'CCI slaps Rs.671 cr fine on four PSU insurance firs', Business Standard, 17.7.15.

23 Suo Motu case No.02 of 2014, available at http://www.cci.gov.in/sites/default/files/022014S.pdf., visited on 8.5.17. Also see, K.K.Sharma, "Matter of Penalty on Insurance Companies", *Competition Law Reports* 106 (2017).

IV Capital Market And Consumers

In the capital market, SEBI is entrusted with power to safeguard the interest of investors. It is vested with punitive powers of investigation and passes orders against persons who are found to be guilty of manipulating markets, apart from prosecuting and judging directly the violation of certain provisions of the Companies Act. There is no objective and transparent availability of the products. Moreover, they are flooded with identical type of products which limits the choice of consumers. There are different depositories of shares in this market who lure the customers to purchase share and assure higher returns. It is after the purchase many a times they state that it is subject to market fluctuations.

The lack of proper regulation to protect the interest of customers by the regulator invited the attention from the CCI. It penalized the NSE for indulging in the practice of predatory pricing which will have an adverse effect on the interest of investors.[24]All these regulatory overlaps and confusions create an adverse impact on the consumers of the capital market products. The Satyam Scam and Sarada Scam highlight the lapse of the proper regulatory monitoring mechanism to protect the interest of the consumers.

V Financial Sector Legislative Reforms Commission: An Analysis

In order to avoid confusion with the multiple regulators in the financial market and to address the current challenges in the financial sector, Financial Sector Legislative Reforms Commission (FSLRC) was constituted by the Government in 2011.[25]Accordingly, they drafted Indian Financial Code to regulate the financial sector. This Code introduces comprehensive changes in the financial sector governance from the rule based regulations. It tries to put financial consumers at the heart of the financial sector eco- system. Accordingly, all regulators under the Code will have to pass the litmus tests of consumer protection

24 *National Stock Exchange of India* v. *MCX*, Case No.13/2009 available on www.cci.gov.in/May 2011/order of Commission/MCXMain order 240611.pdf., visited on 4.06.2017.

25 Business Line, The Hindu, 10th May 2015.

and promotion of public awareness about financial products and services. Regulators will have to particularly care about vulnerable retail consumers who are expected to have limited knowledge and experience in the financial jungle.[26] It is heartening to note that the revised draft extends this responsibility to financial service providers who also are required to consider differences in knowledge, experience and expertise of consumers, while dealing with different kinds of consumers.[27] The report submitted by Financial Sector Reforms Commission highlights the importance of protection of consumers in financial market. It states that regulators should ensure that financial firms are doing enough for consumer protection. The draft Code establishes certain basic rights for all financial consumers and creates a single unified Financial Redressal Agency (FRA) to serve any aggrieved consumer across sectors. In addition, the FSLRC considers competition an important aspect of consumer protection and envisages a detailed mechanism for cooperation between regulators and the Competition Commission.[28]

VI Conclusion

The consumers of financial products are diverse. There are some who are reasonably well informed and observant about the financial products launched in the market while on the other hand many are ignorant who becomes vulnerable to market frauds. It is, therefore, a challenge for the regulators to protect such a wide range of individuals. The information available through internet is so wide that it generates the risk of information overload to the customers of financial service. There is ample scope for creation of confusion of the all these available information which will lead consumers to ignore all information.

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26 Pradeep Mehta, "A financial idea whose time has come", Business line, The Hindu, 10.05.2015.

27 T.N.Pandey, " Securing the interest of consumers in the financial sector-Recommendations of financial sector Legislative Reforms Commission(FSLRC), [2013]122 SCL 125 (Mag.)

28 Report Summaries of Financial Sector Legislative Reforms Commission, available at http://www.prsindia.org/parliamenttrack/report-summaries/financial-sector-legislative-reforms-commission-2792/ visited on 31.05.2017.

Apart from this, in the financial market, there are differences in the bargaining power of the consumers, considerable information asymmetries, high costs for the products offered to consumers and unhealthy competition in the financial market all resulting in the adverse effect on the interest of consumers. Financial sector regulators should be assigned with more responsibility by avoiding uncertainty and conflicts which hamper the interests of the consumers. In financial sector, there should not be any discriminatory practice against the consumers regardless of their financial status and they should be provided with basic and reliable financial products. Practical approach need to be initiated to understand the behavior of the consumers while framing policies and regulation by the regulators.[29]The confidence of the consumers on the financial products can be enhanced by offering simple and understandable products. Technology can be used for this purpose because of the greater access it provides in this era of technology in all sectors of market. There is a need for regulators to use a variety of regulatory techniques to reduce the potential harm from technological innovation.

Similarly, there is a need for strong monitoring of the financial market by the regulators to safeguard the interest of the consumers in financial sector. There is also a need for awareness programmes about the grievance redressal mechanism available in case of deficiency in financial products for the consumers. The Civil Society Organization can play a crucial role in this regard. Therefore, considering the changes in the financial goals of the consumers of financial market in this contemporary age, there is a need to give importance to the welfare of consumers to have a strong economy in our country.

29 Meglena Kuneva, "Consumers and Competition: The Quest for Real Choice Opportunities", Competition Law Reports 223 (2012).

APPLICATION OF THEORIES OF PUNISHMENT IN INDIAN CRIMINAL JURISPRUDENCE

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"Punishment is the last and the least effective instrument in the hands of the legislator for the prevention of crime……John Ruskin"

Abstract

In a society which is governed by the idea of constitutionalism, the state is wedded by the duty to protect the society from crime and criminals. The protection of society and security of person's life, liberty and property is one of the ultimate goals of the State. This could be achieved through criminal law by imposing appropriate sentence for the offence committed. Law as a cornerstone of the edifice of 'order' should meet the challenges confronting the society. The concept of crime and punishment has achieved a global recognition since ancient times. The concept of crime and punishment is a progressive concept which changes from time to time, society to society and civilization to civilization. The fundamental object of the Indian criminal jurisprudence is not only to deter the criminal by strict punishment, but also to rehabilitate the criminal in a society. The duty of the state doesn't end by giving punishment to offender but the duty continues till the offender is rehabilitated in a society. With the change in the perception of crime and criminal, the concept of punishment went into drastic change from punitive theory of punishment to rehabilitative theory of punishment. In this back-drop the paper is an attempt to discuss the application of various theories of punishment in Indian criminal jurisprudence along with their merits and demerits. The paper also highlights the various factors which are quite relevant while deciding the quantum of punishment. At the end of paper the author's also discuss the application

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of these theories to various socio-economic offences along with some relevant suggestions.

Keywords: *Constitutionalism, Crime, Punishment, Order, Quantum of Punishment*

Introduction

According to *Black's Law Dictionary*, the definition of punishment in criminal law is "penalty, suffering, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law". If the main objective of punishment is to cause physical and mental agony and pain to the offender, it serves little purpose. However, if punishment leads him to realize the gravity of the offence committed by him, and to repent at once for it, it may be said to have achieved its desired effect.

The five characteristics of punishment are as follows:[1]

(1) It must involve pain or other consequences normally considered unpleasant

(2) It must be for an offence against legal rules

(3) It must be imposed on an actual or supposed offender for his offence

(4) It must be intentionally administered by human beings other than the offender.

(5) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

In recent times, there has been a fundamental change in the way the society perceives the value of punishment. It has started to realize that the main objective of the punishment is to acknowledge the crime and protect the society which can be achieved partly by reforming the criminal and partly by preventing him from committing crimes in the future. The reforms in punishment have been proportionate to the

1 "*Punishment: Definition and Justification"* (Blackwell Publishing on behalf of the Analysis Committee), *available at:*http://jthomasniu.org/class/Stuff/Temp/pundefjust1.pdf (last visitedon February 26, 2017).

reforms in our society. In the ancient period the history of punishment was more severe and imposing fear was considered as a major instrument to prevent the crime. However, the modern society is not inclined to adopt such method and instead discredited the stringent theories of punishment. In the present scenario, movement for abolition of capital punishment is getting stronger day by day and there is a huge uproar calling it as immoral and it infringes the inalienable right to life of an individual.

Punishment as ultimate objective in Criminal Law

The main purpose of the criminal law is to maintain the law and order in the society. It defines a standard of conduct for all individuals of the society. If the laws are not respected and followed, then it would lead to serious punishments which act as a deterrent against crossing the boundaries of law. In this way, punishment aims at protecting not only the individuals but also the society from undesirable, evil and notorious activities of individuals who try to disrupt the equilibrium and coherence in the society. It is for this reason that people place their ultimate reliance on this branch of law for protection against all injuries that human conduct can inflict on individuals and institutions.

Awarding punishment for a criminal act is also meant to deter that person from repeating the act. If the penalty is significant enough, then the wrongdoer will think twice before committing it again. Also when the punishments are well known and there is a public dissemination of punishments for a particular crime, it is expected that others who might contemplate the crime would be deterred from engaging in the prohibited activity. The object of punishment has been very well summarized by Manu, the Great Hindu-law giver, in the following words:[2]

Punishment governs all mankind; punishment alone preserves them; punishment wakes while their guards are asleep; the wise considers the punishment (danda) as the perfection of justice.

2 Mahendra K. Sharma, *Minimum Sentencing for offence in Indian Law and Policy* 6 (Deep & Deep Publications, New Delhi, 1996).

The protection of society and security of person's life, liberty and property is one of the ultimate goals of the State. This could be achieved through criminal law by imposing appropriate sentence for the offence committed. Law as a cornerstone of the edifice of 'order' should meet the challenges confronting the society.

Jurisprudential View

The role and perspective of punishment for the violation of criminal laws has been defined and theorized by various policy makers, philosophers, criminologists. These efforts were helped to provide a better understanding about the role of punishment within the criminal justice system and society in general. Different authors have offered various theories of punishment but those can be broadly classified as non-utilitarian and utilitarian. Utilitarian theories are forward looking concerned with the future consequences of punishment and so popular in the latter half of the 20th century. It does not rely for their justification on the freewill of the criminal. Just as social philosophies such as Marxism and Environmentalism believe that altering the physical or natural climate will change human behaviour, rehabilitative theories of punishment maintain that an enlightened punitive system can per se lead to positive change in the criminal. Non-utilitarian theories are backward looking, interested in the past acts as mental states; and mixed theories are both forward and backward looking.

Jurists' view

Punishment is awarded to reduce crimes and used as means to an end, is the claim of the utilitarian. George Hegel and Immanuel Kant criticized and rejected the theory, presented the contrast retributive theory of punishment, which is of non-utilitarian on the premises that punishment is not means to an end but end in itself. This tug of war between the George Hegel and Immanuel Kant on one side and Jeremy Bentham on the other side is carried even by 20th century scholars. In

1949, Lord Denning appearing before the Royal Commission on 'Capital Punishment' expressed the following view[3]:

The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizen for them. It is a mistake to consider the object of punishment as being deterrent or reformative or preventive and nothing else … The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime: and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all namely the death penalty.

A focus on the history and changes in social conditions has illuminated the relationship between punishment and society, which in turn has broadened the investigation of the notion of punishment into questions concerned with how order and authority are maintained in society. Garland summarizes social theory about punishment as "that body of thought which explores the relations between punishment and society, its purpose being to understand punishment as a social phenomenon and thus trace its role in social life".

Garland has argued that punishment is the product of social structure and cultural values. Thus, whom we choose to punish, how we punish, and when we punish are determined by the role we give to punishment in society.[4] If we construe criminal punishment as a wrong for a wrong, then we must conclude that society is, in a sense, wronging the offender. The question therefore arise "can the infliction of pain or a wrong upon an offender be justified ethically? To answer this question one must first look at the purpose of criminal punishment and question the various rationales put forward for punishment, such as deterrence, incapacitation, rehabilitation, just deserts, retribution and restorative justice.

3 As quoted in Government of India, Report: *Committee on Reforms of Criminal Justice System*, (Ministry of Home Affairs, 2003), hereinafter referred to as Malimath Committee Report, 2003.

4 Cyndi Banks, *Criminal Justice Ethics: Theory and Practice* 130 (Sage Publications, London, 3rd edn., 2013).

Sociological perspectives of punishment include the thinking of Durkheim and Weber. Sociologists expand the notion of punishment to "penalty", which they explore in various societies at various times. Hudson defines penalty as:[5]

"….the complex ideas (about proper punishment, about effective punishment), institutions (laws, policies and practices, agencies and buildings) and relationships (who has the power to say who is punished, whose ideas count, what is the relationship of those who punish and are punished to the rest of society) involved in the punishment of offenders.

Durkheim explains crime, as crime exists in every society which does and does not have laws, courts and the police. He asserts that all societies have crime, since all societies involve a differentiation between two kinds of actions, those that are allowed and those that are forbidden. He calls the latter type criminal.

According to Durkheim "punishment is the reaction of the society against a crime and if punishment be a proportionate response to the harm caused to the society then the extent of the punishment inflicted must be clearly sorted out". Also he emphasized on the point that punishment can never be calculated; it is an intensely emotional- sense of outrage- the desire to exact punishment. He says, it is not the specific nature or result of the offending action as such which matter, but he fact that the action transgresses widely shared ad strongly held sentiments, whatever these might be in any particular case. He explains that if punishment is a reaction of the society against the offenders then it is generally in the form of an outrage or anger thus rather being reparative or reformative becomes punitive. This approach of the society towards the criminals is what makes us treat them as outcasts and deviant from the social norms. This two-fold approach has been criticized severely by

5 Hudson Barbara, *Understanding Justice: An introduction to ideas, perspectives, and controversies in modern penal theory* (Open University Press, Buckingham, 2003).

various penologists, as at one time there is the use of both reformative and retributive theories.[6]

Lord Denning appearing before the Royal Commission on 'Capital Punishment' expressed the following views:[7]

Punishment is the way in which society expresses its denunciation of wrong doing and in order to maintain respect for law, it is essential that punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of the citizens. For them it is a mistake to consider the object of punishment as being deterrent or reformative or preventive and nothing else. The truth is that some crimes are so outrageous that society insists on adequate punishment because wrong doer deserves it, irrespective of whether it is deterrent or not.

Modern View on Capital Punishment

Capital punishment is a lawful infliction of death as punishment since ancient times. However, in the modern world, many argue that awarding of the death sentence is a cruel and over-rated deterrent and occasionally imposed in fatal error as well and this could call for its abolishment altogether. Many countries like Portugal, Western Europe, Britain have already abolished the death penalty.

In India, although many social reformers and activists argue that capital punishment should be struck down from the Indian Penal Code, the Apex Court recently made some candid observations in *Sushil Kumar Koushal* v. *NAZ Foundation*[8] against considering the western studies and experience as a basis of abolishing the death penalty as their (other countries) social condition and the intellectual level are different from us. The Court said that there has been no large scale study conducted in India with the object of estimating the need of protecting Society against murders and cited the study of the Law Commission of India published in its 35th report in 1967. The Commission in the said

6 Theories of punishment – A Socio-Legal View, *available at http://www.legalserviceindia.com/articles/pun_theo.htm*(last visited on February 19, 2017).

7 Nigel Walker, *Crime and Punishment in Britain* 140 (Aldine Transaction, 2nd edn., 2010).

8 (2014) 1 SCC 1, para 14.

study observed that "the issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention". The Commission finally concluded that considering the level of morality and education, upbringing of its inhabitants, population, need for maintaining the law and order, at present, India cannot afford to abolish the capital punishment and it should be retained.

Theories of Punishment

With change in the social structure the society has witnessed various punishment theories and the radical changes that they have undergone from the traditional to the modern level and the crucial problems relating to them. The general view is that the theories of punishment are so vague and difficult to discuss as such. In the words of Sir John Salmond, "The ends of criminal justice are four in numbers, and in respect to the purposes served by them, punishment can be divided as:

(a) Deterrent
(b) Retributive
(c) Preventive
(d) Reformative

In addition to the above theories, there are many other theories like socio-economic theories, sociological theories which have been propounded with the advancement of the civilization and Society. A blend of all these approaches will be found in all the legal systems the world over though in different proportions and degrees. These approaches are, however, not mutually exclusive. Rather they supplement each other's. All these approaches deal with different facets of criminology and are, as such, necessary for understanding and appreciating criminal jurisprudence, especially, penology in an integrated manner and helps in the formulation of public policy on crimes and punishment by way of prevention and correction.

Now, let's discuss these four theories in detail here and illuminate the pros and cons of each theory and its evolution.

(a) Deterrent Theory:

According to this theory, the object of punishment is not only to prevent the wrongdoer from doing a wrong for the second time but also

to make him an example to others who have criminal tendencies. In order to achieve this purpose, the offender is punished so that he will be held up as an example of what happens to those who violate the law.

It is assumed that an individual who commits crime derive a mental satisfaction or a feeling of enjoyment in the act. In order to avoid this disposition of the mind, punishment inflicts equal quantum of suffering on the offender so that it is no longer attractive for him to carry out such committal of crimes. Pleasure and pain are two physical feelings or sensation that nature has provided to mankind, to enable him to do certain things or to desist from certain things, or to undo wrong things previously done by him. In social life punishment introduces the element of 'pain' to correct the excess action of a person carried out by the impulse (pleasure) of his mind. We all like very much to seize opportunities, but abhor when we face threats. But in reality pain, threat or challenges actually strengthens and purifies a man and so an organization.

J. Bentham, as the founder of this theory, states:[9]

General prevention ought to be the chief end of punishment as its real justification. If we could consider an offence, which has been, committed as an isolated fact, the like of which would never recur, punishment would be useless. It would only be adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent but also to all those who may have the same motives and opportunities for entering upon it, we perceive that punishment inflicted on the individual becomes a source of security for all. That punishment which considered in itself appeared base and repugnant to all generous sentiments is elevated to the first rank of benefits when it is regarded not as an act of wrath or vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety.

9 Dr. Anthony Amatrudo, *Criminology and Political Theory* 72 (Sage Publications, London, 1st edn., 2009).

Bentham's theory was based on a hedonistic (maximum pleasure and pain) conception of man and that man as such would be deterred from crime if punishment were applied swiftly, certainly, and severely. But being aware that punishment is an evil, he says "If the evil of punishment exceeds the evil of the offence, the punishment will be unprofitable; he will have purchased exemption from one evil at the expense of another."

The basic idea of deterrence is to deter both offenders and others from committing a similar offence. But also in Bentham's theory was the idea that punishment would also provide an opportunity for reform.

The term deterrence has two aspects, namely first, in the sense, which is usually intended, that the punishment of the offender will deter others from committing the crime for which he was convicted. If the intending criminals are to be deterred by the threat of punishment, they should be made to realize that, it will be carried out if the offence is committed. Secondly, deterrence means that it deters the person found guilty of an offence from committing further crimes by physically preventing him from doing so. In this sense, deterrence is said to be one of the principal objects of punishment.

During medieval period, England used to follow the deterrent theory and inhuman and barbaric punishments were inflicted even for minor offences like pick-pocketing and stealing etc. The culprits were subjected to the severe punishment of death by stoning and whipping. The deterrent theory was common in India during Mughal period. Penalty of death sentence or mutilation of limbs was imposed even for petty crimes like forgery and stealing etc. Even today, most of the Muslim Countries like Pakistan, Iran, Iraq, and Saudi Arabia follow the deterrent theory as the basis of their penal jurisprudence.

But in spite of all these efforts there are some lacunae in this theory and it has been criticized on the grounds that this theory is unable to deter the activity of the hardcore criminals as the pain inflicted or even the penalties are ineffective. Deterrent punishment is likely to harden the criminal instead of creating in his mind a fear of law. The most mockery

of this theory can be seen when the criminals return to the prisons soon after their release as hardened criminals are not afraid of imprisonment

(b) Retributive Theory:

An eye for an eye would turn the whole world blind- Mahatma Gandhi

In primitive societies the method of punishment was mostly retributive. The sufferer was allowed to take revenge against the offender. The principle of 'an eye for an eye', 'a tooth for a tooth', 'a nail for a nail', 'limb for limb' was the basis of criminal administration.

The retributive theory is considered as the most sever and harsh of all theories. It believes to end the crime in itself. It does not give much weightage on the reformative aspect and highlights the idea of vengeance and revenge rather than that of social welfare and security. Punishment of the offender provides some kind solace to the victim or to the family members of the victim of the crime, who has suffered out of the action of the offender and prevents reprisals from them to the offender or his family. According to Justice Holmes, 'It is commonly known that the early forms of legal procedure were grounded in vengeance'.[10]

The utilitarian theories are forward looking; they are concerned with the consequences of punishment rather than the wrong done, which, being in the past, cannot be altered. A retributive theory, on the other hand, sees the primary justification in the fact that an offence has been committed which deserves the punishment of the offender.

As Kant argues in a famous passage:[11]

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else... He must first of all

10 Krishna Deo Gaur, *The Indian Penal Code* (Universal Law. Delhi, 4th edn., 2009).

11 Jeffrie G. Murphy, *Kant: The Philosophy of Right* (Macmillan and Co. Ltd, London, 1994).

be found to be deserving of punishment before any consideration is given of the utility of this punishment for himself or his fellow citizens.

Kant argues that "retribution is not just a necessary condition for punishment but also a sufficient one. Punishment is an end in itself. Retribution could also be said to be the 'natural' justification", in the sense that man thinks it quite natural and just that a bad person ought to be punished and a good person rewarded.

Giving evidence to the Royal Commission on Capital Punishment, Lord Denning made the following statement:[12]

The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of the citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive or nothing else….The ultimate justification of any punishment is not that it is deterrent, but that it is the emphatic denunciation by the community of crime…

However 'natural' retribution might seem, it can also be seen as Bentham saw it, that is as adding one evil to another, base and repugnant, or as an act of wrath or vengeance.

The consequences of applying the retributive punishment are that it not only enhances the instincts of revenge and retaliation of the victims but also affects the society as a whole. In modern times, the concept of the State holds the responsibility to affect the revenge in place of a private individual.

(c) Preventive Theory:

The prime objective of this theory is totally different from the former theories. Another objective is to prevent the crime rather than avenging it and moreover the criminal who is punished to be made an example to prevent others from repeating the same offence. Looking at punishments from a more humane perspective it rests on the fact that the need of a punishment for a crime arises out of mere social needs i.e. while sending the criminals to the prisons the society is in turn trying to

12 Michael Cavadino and James Dignan, *The Penal System: An Introduction* 46 (Sage Publications, London, 4th edn., 2007).

prevent the offender from doing any other crime and thus protecting the society from any anti-social elements. Paton observes that:[13]

The preventive theory concentrates on the prisoner and seeks to prevent him from offending again in the future. The death penalty and exile serve the same purpose of disabling the offender

Utilitarian such as Bentham have also supported this theory as it has been able to discourage the criminals from doing a wrong and that also without performing any severity on the criminals. The present day prisons are fallout of this theory. The preventive theory can be explained in the context of imprisonment as separating the criminals from the society and thus preventing any further crime by that offender and also by putting certain restrictions on the criminal it would prevent the criminal from committing any offence in the future. Supporters of this theory may also take Capital Punishment to be a part of this theory. A serious and diligent rehabilitation program would succeed in turning a high percentage of criminals away from a life of crime. There are, however, many reasons why rehabilitation programs are not commonly in effect in our prisons. Most politicians and a high proportion of the public do not believe in rehabilitation as a desirable goal. The idea of rehabilitation is considered mollycoddling. What they want is retribution, revenge, punishment and suffering.

Thus one an easily say that preventive theory though aiming at preventing the crime to happen in the future but it still has some aspects which are questioned by the penologists as it contains in its techniques which are quite harsh in nature. The major problem with these types of theories is that they make the criminal more violent rather than changing him to a better individual. The last theory of punishment being the most humane of all looks into this aspect. The general perception about this theory is that it has some adverse effect of hardening the first time offenders by putting them in contact with other hardened criminals in the prison. The situation will get more critical when juvenile offenders get chances of mingling with other hardcore criminals in the jail. Needless

13 Krishna Deo Gaur, *Criminal Law: Case and Materials* 296 (Butterworths, 1999).

to say, these hardcore criminals can influence the mind of juveniles easily and encourage them to commit more heinous crimes. If so happens the very purpose of this theory will go futile.

Reformative Theory:

According to the reformative theory, the object of punishment is the reformation of criminals. This theory focuses in rehabilitation of the offender who admits his fault and wishes to become a law abiding citizen of the society by following its norms and rules. This theory discourages all kinds of corporal punishments. It is maintained that punishment should inspire the criminals to reform and bring about a change in his personality and character so as to make him a useful member of the society. The Supreme Court in *Narotam Singh* v. *Punjab*[14] has taken the view that "Reformative Approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and secure social justice."

In order to reform the criminals, they must be educated and trained some art of craft or industry during his term of imprisonment to enable him to lead a decent life and act as a responsible and respectable citizen in the society after release from the jail.

The Court before arriving at a conclusion should take into consideration the mitigating circumstances like the age and character of the offender, his family background and education and more importantly the circumstances under he committed the offence and the motive which prompted.

The most recent and the most humane of all theories are based on the principle of reforming the legal offenders through individual treatment. Having considered the criminals as human, this theory emphasizes the changing nature of the modern society. The judicial system and the society are now more in favour of putting a theory in place which is not only reforming the offenders but also curbing the crimes effectively. In *Rajiv* v. *State of Rajasthan,*[15]a Division Bench observed that "it is the nature and gravity of the crime but not the

14 AIR 1978 SC 1542.
15 (1996) 2 SCC 175, para 25, hereinafter referred to as Rajiv (1996).

criminal, which are germane for consideration of appropriate punishment in a criminal trial". A fair analysis of criminological jurisprudence would reveal that capital punishment is justifiable only in rarest of rare cases where gravity of culpability is higher and causing danger to the society. The significance of reformative techniques is now at par with the deterrent techniques.

Though this theory works stupendously for the correction of juveniles and first time criminals, but in the case of hardened criminals this theory may not work with the effectiveness. In case of Juvenile Justice (Care and Protection) Act, 2000, there is no imprisonment but the object of the statute being reformation and welfare of the juvenile and a maximum three years is prescribed under the statute as a period of reformation of juvenile in the observation home regardless of the type of offence perpetrated by Juvenile. In these cases the importance of the deterrence theories and the retributive theories will be high. Thus each of these four theories has their own pros and cons and each being important in it, none can be ignored as such.

Theories of Punishment - Ancient India

India's culture is one of the oldest of the world and the socio-economic and political conditions prevailed during the different phases of the history of India influenced its evolution. Accordingly, the objectives of the criminal justice and methods of its administration changed from time to time and from one period of history to another. To suit the changing circumstances the rulers introduced new methods and techniques to enforce law and administer justice.

In early society the victim had himself (as there was no State or other authority) to punish the offender through retaliatory and revengeful methods, this was naturally, governed by chance and personal passion. Even in the advanced Rig-Vedic period there is a mention that punishment of a thief rested with the very person wronged. Gradually, individual revenge gave way to group revenge as the man could not have grown and survived in complete isolation and for his very survival and existence it was necessary to live in groups. Group life necessitated consensus on ideals and the formulation of rules of behavior to be

followed by its members. These rules defined the appropriate behavior and the action that was to be taken when members did not obey the rules. This code of conduct, which governed the affairs of the people, came to be known as Dharma or law. In course of progress man felt that it was more convenient to live in society rather than in small groups. Organizations based upon the principle of blood relationship yielded, to some extent, to larger associations—the societies.

In the very early period of the Indian civilization great importance was attached to Dharma. Everyone was acting according to Dharma and there was no necessity of any authority to compel obedience to the law. The society was free from the evils arising from selfishness and exploitation by the individual. Each member of the society scrupulously respected the rights of his fellow members and infraction of such rights rarely or never took place. The following verse indicates the existence of such an ideal society:[16]

There was neither kingdom nor the King, neither punishment nor the guilty to be punished. People were acting according to Dharma; and thereby protecting one another..

However, this concept did not last long. While the faith in the efficacy and utility of Dharma, belief in God and the God fearing attitude of people continued to dominate the society, the actual state of affairs gradually deteriorated. A situation arose when some persons began to exploit and torment the weaker sections of society for their selfish ends. Tyranny of the strong over the weak reigned unabated. This situation forced the law abiding people to search for a remedy. This resulted in the discovery of the institution of King and establishment of his authority over the society, which came to be known as the State. As the very purpose of establishing the State and the authority of the King was the protection of person and property of the people, the King organized a system to enforce the law and punish those who violated it. This system later came to be known as criminal justice system.[17]

16 Rama Jois, *Legal and Constitutional History of India* 575 (Universal Law, Delhi, 2004).
17 *Id.* at 576.

Although the Indus-valley civilization suggests that an organized society existed during pre-Vedic period in India, traces of the criminal justice system can only be found during the Vedic period when well defined laws had come into existence. The oldest literature available to explain the code of conduct of the people and the rules to be followed by the King are Vedas. Therefore, while discussing the evolution of the criminal justice system the history of India is covered from the Vedic period onwards.

During Vedic period the King was the protection of the people and he was responsible to maintain the law and order. According to the Dharma sutras and the Arthashastra, it was the duty of the King to ensure the security and welfare of the people.

The Hindu legal system was embedded in Dharma as propounded in the Vedas, Puranas, Smritis and other works on the topic. Dharma, i.e. law, constituted the blue print or master-plan for all round development of the individual and different sections of the society. The following verse describes the importance of the Dharma (law):[18]

Those who destroy Dharma get destroyed.

Dharma protects those who protect it.

Therefore Dharma should not be destroyed.

The law was recognized as a mighty instrument necessary for the protection of the individual's rights and liberties. Whenever the right or liberty of an individual was encroached upon by another, the injured individual could seek the protection of the law with the assistance of the King, howsoever powerful the opponent might be. The power of the King to enforce the law or to punish the wrong doer was recognized as the force (sanction) behind the law, which could compel implicit obedience to the law.

Another important source of the Hindu law was the Smritis. The compilation of the Smritis resembles the modern method of codification. All the legal principles scattered in the Vedas and also those included in the Dharmasutras as well as the custom or usage which came to be

18 *Id.*at 8.

practiced and accepted by the society were collected together and arranged subject wise in the Smritis. The Smritis dealt with constitution and gradation of courts, appointment of judges, the procedural law for the enforcement of substantive law, etc. They disclose a well-developed legal and judicial system. The important Smritis are the Manu Smriti, the Yajnavalkya Smriti, the Narada Smriti, the Parashara Smriti and the Katyayana Smriti.

The criminal jurisprudence came into existence in India at the time of Manu. He gave a comprehensive code which contains not only the ordinances relating to law, but is a complete digest of the then prevailing religion, philosophy and customs practised by the people.

Manu has recognised assault, battery, theft, robbery, false evidence, slander, libel, criminal breach of trust, adultery, gambling and homicide as crimes. These are the principal offences against persons and property that occupy a prominent place in the Indian Penal Code. The King used to either dispense justice himself with the help of counsellors, or appoint judges and assesors for the administration of criminal justice.

These precepts are excellent. However, the substantive criminal jurisprudence of Manu is not free from bias. According to him, the gravity of the offence varies with the caste and creed of the criminal and so does the sentence. The protection given to Brahmins was paramount and they were placed above all others. Such discriminatory provisions are against the principles of natural justice. Manu describes four methods of punishments (danda) which are (a) by gentle admonition (b) by severe reproof (c) by fine and (d) by corporal punishment. According to him each punishment is inflicted separately or concurrently subject to the nature and gravity of offence.[19]

Retributive punishment though devoid of human consideration was advocated by Manu as one of the mode of punishment. Deterrent punishment theory was based on the principle of creating terror in the minds of the offenders. E.g. if thief commits theft by his hand, his hand should be chopped off immediately. Similarly the deterrence was carried

19 Umesh Kumar Singh, *Crime and Punishment in Ancient India* (Indian Police Journal, April-June 2003).

out in prescribing inhuman modes of punishments like beheading the criminals on public place, amputation of body parts. Similarly for adultery or those who enjoyed the company of other ladies discarding their own wives, the mode of punishment of letting loose dogs to bite them was one of the severe punishments to curb such offences. Interestingly, the reformative punishment also finds its place in the later part of the period. The main aim of such reformative punishment was to change the culprit into a new man. Such incidents are found the discourse between the King and the Prince Satyavan in Mahabharata where the Prince is seen pleading for inspection of life punishment if the offender confess their guilt and promises not to commit such offences in future. All these theories of punishment had one underpinning that these were based on principles of inequality before law and reflected the preference of cast system and thereby giving immunity to the higher cast. The other way to look is that the Brahmin cast were equated to the status of the State and next to the King as today we have any offence against State we have death penalty probably the same was the position vis-à-vis the brahmins. Also the reformative which cam e subsequently to this period were also for the benefit of this upper cast and not all offenders.

During this period, there was no clear distinction between private and public wrongs. Murders and other homicides were regarded as private wrongs. The right to claim compensation was the rule of the day. A distinction was, however, drawn between casual offenders and hardened criminals. Again he made provisions for exemption from criminal liability, where the act was done without any criminal intention or by mistake of fact or by consent or was the result of accident much on the lines provided in Chapter IV of the Indian Penal Code. The right of private defence was fully developed.

Mohammadan Criminal Law

Manu's code diminished with the establishment of Mohammadan Rule in India and consequently people followed the jurisprudence of Muslims. The Muslim legal system had its origin in the Koran, which is

said to have been revealed by God to the Prophet Mohammad. In Muslim law, the concept of sin, crime, religion, moral and social obligation is blended in the concept of duty, which varied according to the relative importance of the subject matter. The administration of criminal justice was entrusted in the hands of Kazis. The punishment varied according to the nature of the crime. Broadly speaking, the punishment was fourfold, namely, Qisas or retaliation, Diyat or blood money, Hadd or fixed punishment; and Tazir or Syasa, discretionary or exemplary punishment. However, the notions of Kazis about crime were not fixed and differed according to the purse and power of the culprits. As a result, there was no uniformity in the administration of criminal justice during the Muslim rule in India and it was in a most chaotic state.[20]

Theories of Punishment – Modern India

To study the theories of punishment under the above heading we have to study it under two broad headings, first Indian Penal Code (IPC) and second under Special and Local Laws (SLL). Under the IPC there are specific offences which are broadly divided into six categories. They are as follows:

(a) Offences affecting the State
(b) Offences affecting common well being
(c) Offences affecting Human Body
(d) Offences affecting Property (corporeal or incorporeal)
(e) Offences Relating to Marriage
(f) Offences affecting Reputation

Also there are enumerable special laws, out of which, we will be examining the theory of punishment which is restricted to three enactments.

i. Food Safety and Standards Act, 2006
ii. Prevention of Corruption Act, 1988
iii. Narcotic Drugs and Psychotropic Substances Act, 1985

20 *Supra* note 13 at 6.

Before we embark on the detailed examination of various offences and punishments, it is important to mention here the Chapter III of the IPC which defines punishment and its various types.

This paper does not attempt to study the various modes of sentencing as prescribed under IPC and hence it will be suffice to suggest at this stage that the punishment to which offenders are liable under the provisions of IPC under Section 53 are (i) death (ii) imprisonment for life (iii) imprisonment which is of either description (rigorous or simple), (v) forfeiture of property (vi) fine.

(a) Influence of Individual Philosophies on Punishment

At the outset, one needs to understand that there is no uniform sentencing policy in the code (IPC) nor is there a specific theory which is adopted for any of the specific offences as listed above. Much of these sentencing policies are determined and dictated by the individual philosophy of the judges and this is appropriately exhibited by none other than Krishna Iyer J. who has emphasized in a series of pronouncements as to what should be the theory of punishment to be adopted. Commenting on the vagaries of sentencing, Krishna Iyer J. in *Rajendra Prasad* v. State of UP[21] though talked in the context of the death sentence, did mention as to what factors influenced the punishment vis-à-vis offences.

Justice Krishna Iyer observed that:[22]

Law must be honest to itself. It is not true that some judges count the number of fatal wounds, some the nature of the weapon used, others count the number of corpses or the degree of horror and yet others look at the age or sex of the offender… with some judges, motives, provocations, primary or constructive guilt, mental disturbance and old feuds, the savagery of the murderous moment or the plan which has preceded the killing, the social milieu, the sublimated class complex and other odd factors enter the sentencing calculus… A big margin of subjectivism, a preference for old English precedents, theories of modern

21 AIR 1979 SC 916.
22 *Id.* para 20.

penology, behaviors emphasis or social antecedent, judicial hubris or human rights perspectives, criminological literacy or fanatical reverence for outworn social philosophers buried in the debris of time except as part of history – this plurality of offences plays a part in swinging the pendulum of sentencing justice erratically.

It is important for us to distinguish at this stage the two terms which are interchangeably used i.e. "punishment" and "sentencing". It is to be understood that the concept of punishment deals with a substantive aspect of penal policy while the concept of sentencing on the other hand relates to procedural facets of the penal policy. The purpose of punishment includes retribution, deterrence, restoration and rehabilitation which has been dealt in the previous section of this paper whereas the types of sentences may include imprisonment, death, fines etc., although both are two sides of the same coin. The Courts have from time to time echoed on what should be the appropriate theory of punishment in a given circumstance and that becomes the guiding force of the theory of punishment, which one understands and is being meted out for meeting the justice.

The issue of theory of punishment was considered in *State of Gujarat* v. *Hon'ble High Court of Gujarat* by Thomas J. who said[23] reformation should be the dominant object of a punishment and during incarceration every effort should be made to recreate the good man out of convicted prisoners. An assurance to him that his hard labour would eventually snowball into a saving for his own rehabilitation would help him to get stripped for the moroseness and desperation in his mind while toiling with the rigorous of hard labour during the period of his jail life. Reformation and rehabilitation of a prisoner are of great public policy. Hence they serve a public purpose……

The approaches of the various theories of punishment have received different perspectives by the Courts like in the above said judgment. There was a word of caution by Wadhwa J. in the same judgment that

23 AIR 1998 SC 3164, para 32.

'too much stress should not be placed on reformative theory and the emphasis should be more on the rights of the victim'.

Since the inception of the Indian Penal Code (IPC) many of the views on punishment have undergone a sea change. What we had in ancient India, as we saw in the previous heading, continued in the initial phase i.e. retributive theory of justice in the sense of satisfying the feeling of revenge of the victim. The retributive theory no longer holds fort as society became more progressive and civilized but at the same time, it cannot be said that it is completely out of the list as killing of any mass leader (political or religious) automatically brings back a sharp focus by society on a retributive angle. Examples of this can be seen in the aftermath of killing of Indira Gandhi and Rajiv Gandhi.

(b) Transformation in the objectives of Punishment

The principle objective of punishment today is more protection of society by reforming the criminal and by preventing him and others from committing the crime in future. Depending upon the nature of crime, the approach of the court in awarding the punishment goes on changing from time to time and it has always been a combination of deterrence, reformation and justice. A new outlook of punishment has been brought about by a new dimension i.e. humanitarian forces and theories of individualization of punishment. This theory has gained ground and express that the law should look at a criminal and not merely the crime for inflicting the punishment. The Supreme Court of India has been giving emphasis on reformation in contrast to its earlier times on adhering to retribution as said earlier. Here again, its approach has not been uniform and it has varied depending not only on offence and offender but also the statute. Supreme Court laid a great emphasis on reformation in *Sunil Batra* v. *Delhi Administration.*[24]

While dealing with offences relating to sex offenders and juvenile offenders, the theory of punishment which is propounded by the court is that the theory in case of lesser criminality cannot meet the objective by simply avoiding a long sentence as sometimes the remedy aggravates the

24 AIR 1980 SC 1579.

malady. Similarly in case of juvenile offenders the theory which is always advocated is that of human nourishment as opposed to harsh punishments.[25]In other words, the theory of reformative form of punishment is always looked at by the courts. When it comes to serious crimes like homicides, rape, the court is keen to award severe punishment and less importance is given to mitigating factors.[26]

In the gravest form of sexual offences case as said earlier, the retributive theory of punishment is still resorted to. In the case of *Dhananjay Chaterjee* v. *State of West Bengal*[27] the Supreme Court stressed the need of retributive aspect of punishment and the Court said "justice demands that the court should impose punishment befitting the crime so that the court reflects public abhorrence of the crime". This dictum was also followed by the Court subsequently in the case of *Rajiv*.[28]The underpinning philosophy seems to be that if the large number of criminals go unpunished this will make the justice system week hence the theory of deterrence is always resorted to in case of heinous crimes of murder perpetrated in a brutal manner without any provocation. Similarly the other category of offence where the theory of deterrence is followed is the case of dowry death. In cases of sexual offences, the theory of punishment which is taken into account by the court is both of deterrence and reformation. It is interesting that the acceptance of retributive theory makes it obligatory to fix punishment in proportion to the crime, whereas in the theory of reformation, it is for the courts to decide the limits. The flexibility given to the courts in fixing the punishment which decides not only based on the crime but also the personality of the offender and the other circumstances surrounding the offence making the theory of punishment more a combination of multiple theories rather than a solo one.

It is important to state that the theory of punishment which has been adopted for the protection of society and has always remained at the

25 *Kailesh* v.*State of Haryana,*2004 Cri LJ 310.
26 *Bhupinder Sharma* v. *State of Himachal Pradesh,* AIR 2003 SC 4684.
27 (1994) 2 SCC 220.
28 Rajiv (1996).

center stage itself depends on the purposes and objective of some of the penal statutes. The Juvenile Justice Act, Abolition of Whipping Act, Repeal Of Criminal Tribes Act are the examples of changing outlook of theory of punishment versus the change in outlook of society. The underlying principle which emerges is that punishment must not be a reaction against the crime itself but also prevent the offender from committing future crimes.

In dealing with a case of death of a patient by quack doctor (*Dr. Jacob George* v. *State of Kerala)*[29]the Court observed that the purpose of punishment to be achieved is four in numbers. (i) Retribution which is essentially to protect the society from dangerous persons. This form of protection may receive the approval of the society in our present state.(ii) Deterrence is another objective which punishment is required to achieve. By upholding the conviction of the quack doctor, it would deter others to desist from indulging in illegal act like the one at hand. (iii) As regards Reformation, the court felt that two months imprisonment behind bars would have brought the accused to understand the need for changing the type of practice he has been doing. The reformative aspect of punishment has achieved this purpose keeping the appellant inside the prison boundaries so that in the future he does not indulge in such acts which would put him in prison. (iv)Another area which is resorted to is the ability of the offender to make compensation in lieu of imprisonment which does not fit into any of the theory of punishment but occasionally resorted to by the Courts. It has been severely criticized and is certainly not a good trend, particularly in cases of punishment in respect of offences like bigamy.[30]

(c) Death Sentence as punishment

One of the sentencing policies which is adopted to partially meet the theory of retributive punishment is capital punishment. Under the Indian Penal Code there are six categories of offences which are punishable as death sentence.

29 (1994) 3 SCC 430.
30 *Laxmi Devi* v. *Satya Narayana* (1994) SCC 1566.

(a) Treason, as in waging war against the Government of India (S. 121) or abetment of mutiny (S. 132)

(b) Perjury resulting in the conviction and death of an innocent person (S. 194)

(c) Murder (S. 302)

(d) Abetment of suicide of child or insane person (S. 305)

(e) Attempted murder by a life convict (S. 307(2)

(f) Dacoity with murder (S. 396)

It is to be noted that only in the above mentioned categories of offences does the death sentence set the upper limit of punishment. There is not a single offence in IPC that is punishable with mandatory sentence of death (the Supreme Court declared section 303 of IPC providing for mandatory death sentence for murder by a life convict, as unconstitutional)[31]. Out of the six specific offences which we saw in our opening paragraph it is clear that capital punishment is awarded only in two specific offences, namely offences affecting the state and murder. The purpose of restricting the death sentence as one of the alternate forms of punishment to these two type of offences (treason and murder) seems to suggest that the draftsmen of the code kept such degree of offences with highest culpability and wanted to give a choice to the Court of death sentence as the upper limit of punishment as this takes into account both the theories of punishment, that is theory of retributive as any action against the state needs to be dealt in most severity so that the secessionist mind set of such offenders are curbed and dealt appropriately and it acts as a deterrent for all other cases of murder more in the form of deterrence so that the message is passed on to society that it does not help one to take part in such offences.

When it comes to imprisonment which is an alternate form of sentencing in almost all six categories of offences in some form or the other is divided into two parts:

For offences of a serious nature a short term imprisonment does not seem to have an impact of a reformative influence. However, for

31 Mithu v. State of Punjab, AIR 1983 SC 473.

offences which are of a political nature or other agitation are concerned, it may be more appropriate to have a short imprisonment. The reformation theory which is gaining ground in the last few decades stems from the principles of individualization of punishment which means that punishment should suit the offender rather than the offence. However, the acceptance of these principles raises some challenges as to is it an appropriate method to be adopted to achieve the goals of justice? There are legislatures who cannot comprehend the character of the offender nor the circumstances surrounding the criminal act hence it leaves the discretion to the court. As pointed out by Gour in his book 'Penal Law of British India', states "there are about nine aggravations of hurt, six aggravations of wrongful confinement, five aggravations of kidnapping, fourteen aggravations of mischief and eighteen aggravations of criminal trespass".[32] In other words the court contains a large number of sections to deal essentially with the same conduct, which by addition of certain factors raises the maximum. In case of offences committed by juvenile, even if it is a case of homicide the theory always advocated by the courts is of reformation and correction. In *Inder Singh* v. *State*[33] the Supreme Court issued the directions to the State Govt. to see that the young accused are not given any degrading work. Similarly in *Ram Chandra Rai* v. *State of Bihar,*[34]the Supreme Court said the sentence should neither be too lenient nor disproportionately sever as the former loses its deterrent effects and the later has the tendency to tempt the offender to commit a more serious offence. The Court in choosing the theory of punishment has to draw a proper balance between the deterrence and reformation. A prison sentence has the effect of hardening the convicted person with other hardened criminals and thereby diminishes the opportunity of reforming the person. Hence, in the theory of punishment an evolution is being witnessed in particular to the first time offenders or youthful offenders being released subject to their good behaviour. This

32 Sri Hari Singh Gour, *The Penal Law of British India* 330 (Calcutta, 4th edn., 1925).
33 AIR 1978 SC 1091.
34 (1970) 3 SCC 786.

presupposes that the imposition of the sentence should be considered in relation to its effect both on the criminal and on society.

(d) Theory of Punishment – The Role of Offenders

The Malimath Committee[35] has recommended that offenders also to be classified as a casual offender, an offender who casually commits a crime, a habitual offender and a professional offender like gangsters, terrorist or one who belongs to Mafia. There should be different kinds of punishments so far as the type of offenders are concerned.

The decision of the State of the offender and type of crime which is decided by the Courts also dictates the theory of punishment. The courts inspite of inhumane, cruel and dastardly acts are to ask question to themselves as to whether the accused are a menace to society considering their past records and whether the accused can be reformed or rehabilitated. Based on the response to these two questions the Court to choose between deterrence and reformative sentence. This can be studied in the case of *Ram Anup Singh* v. *State of Bihar.*[36] In fact in furtherance of the reformative theory, Malimath Committee (supra) has observed that different kinds of punishment are the need of the hour and punishment in prison needs to be substituted with different kinds of punishment particularly in cases of offences relating to marriage and affecting reputation and in particular offences affecting the common wellbeing like disqualification from holding public office, removal from the community etc.[37] An example in India under the Motor Vehicle Act, the disqualification of holding a license is part of punishment for violation of Motor Vehicle Act. Similarly, dismissal of a public servant from service for criminal misappropriation and breach of trust is a mode of punishment encompassing retributive and preventive measures. Such measures are more in the category of theory of preventive measures of punishment. Similar is the case under the Representation of Peoples Act. It proposes disqualification in the event of proved electoral malpractices or on account of conviction.

35 Malimath Committee Report, 2003.
36 (2002) 6 SCC 686.
37 *Supra* note 35.

The Indian Penal System is more tuned towards the prison. In according punishment, the courts have not taken into account the long term effect on the psyche of the offender. The discourse is whether the function of criminal law is restricted to deterrence or extends to reform. As said earlier, our penal system does not take into account the theory of reformation except in a few specific statutes (Juvenile Justice Act) and it is only concerned with the deterrence and it is for the court to adopt this reformative theory as a context while awarding punishments. Malimath Committee[38] recommended that it should be decided whether for each of the offences the accused should be inflicted punishment of fine or imprisonment, whether the accused should be arrested or not, whether the arrest should be with or without the order of the court, or whether the offence should be bailable or not and whether the offence should be compoundable or not and if compoundable, whether with or without the order of the Court. As is done in some countries it may be considered to classify the offences into three Codes namely (1) The Social Welfare Offence Code (2) The Correctional Offence Code, (3) The Criminal Offences Code and (4) The Economic and other Offences Code. Reformation of the offender is sought so far as it is compatible with public protection.

(e) Restorative Justice – A New Force

The Courts in India always have had a diverse view on the application of the reformative theory of punishment. As observed in *M.H. Hoskot* v. *State of Maharashtra*[39] "a court should not confuse the correctional approach with prison treatment and nominal punishment verging on discrimination for social and economic offences."The Supreme Court in the case of *State of MP* vs. *Bhola Bhairon Prasad Raghuvanshi*[40] observed that the reform should accompany punishment and the main object of the punishment is to make him repent. The other theory which does not fit into the formal and well known theories of punishment and one which is gaining ground is termed as Restorative

38 *Ibid.*
39 AIR 1978 SC 1548.
40 AIR 2003 SC 1191.

Justice. This provides for classification of victims or some kind of satisfaction. The Indian Probations of Offenders Act, 1958 accept the principles and Section 5 of the said Act provides that when an offender is left with admonishment or put on probation, the Court may at the same time further orders directing him to pay such compensation as the Court thinks as reasonable. In fact the Indian Criminal Jurisprudence says that victims of the crime do not attract as much attention as that of an accused. Although there are provisions in criminal procedure code for compensation to the victim yet, we are long way from meeting the true spirit of restorative justice. Even in murder cases, the courts are of the view that true justice will be rendered only when proper compensation is provided to the dependents of the deceased.[41]

There are other acts and offences where the courts have resorted to restorative justice i.e. Fatal Accident Act, 1985, Motor Vehicle Act, 1988, Probation of Offenders Act, 1958 as also offences where the Supreme Court has awarded compensation to the victim in case of sexual assault[42]and Human Rights Violations.[43] Restitutive penalty thus has a reformative side also besides retribution in the modern sense and deterrence.

(f) Influence of Multiple Theories

Before we conclude our analysis on the theories of punishment and sentencing policy under the IPC, it will be useful to have a glimpse of instances where the Courts under influence of multiple theories exercised its discretion in awarding disproportionate sentences for the offences committed especially in the absence of minimum sentence prescribed.

Sushil Ansal v. *State through CBI*[44]*(Uphaar Tragedy)*:In this case, conviction was under 304A[45]. Trial Court awarded two years and HC

41 *Saran Singh* v. *State of Punjab*, (1978) 4 SCC 111.
42 *Bodi Satwa Gautam* v. *Subrato Chakrabarthy*, (1996) 1 SCC 490.
43 *Chairman, Railway Board* v. *Chandrima Das*, (2000) 1 SCC 465.
44 Crl. (A) No. 597 /2010.
45 Section 304A-Causing death by negligence-whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

reduced to one year and Supreme Court upheld trial court conviction for two years but considering the age, it restricted the imprisonment to one year and for the balance one year, instead of serving the sentence, Court directed the convicts to pay 100 crores.

State Tr. P.S. Lodhi Colony, New Delhi v. *Sanjeev Nanda*[46]: Trial Court convicted him under 304 Part II[47] but High Court converted it to 304A and sentenced him to 2 years imprisonment. SC restored the Trial Court order and convicted him under 304 Part II. SC did not increase the sentence beyond two years and instead imposed a fine of 50 lakhs for the victim and two years of community service.

Sudhir Shanti Lal Mehta v.*CBI*[48]: Convicted under Section 409[49]: All the accused were bank officials involved in the security scam and the Special Court convicted them by sentencing from 15 days to 6 months along with fine. The SC further reduced the sentence but increase the fine on some of the accused.

The change in outlook in the matter of punishment with emphasis shifted from the offence to the offender leads to deciding the theory of punishment to be pursued and as seen there is no water tight compartment. Depending on the type of offence or the offender, following and pursuing a particular theory of punishment is a combination of multiple theories which come into play by the Courts. In conclusion, the Malimath Committee recommendation shows that the present punishment policy seems to be sometimes inadequate and ineffective and above all it does not take into account the human rights angle and does not provide adequate balance between the preventive and deterrence theories to the new forms of crimes which have changed with the advancement of society and hence a statutory committee should be

46 (2012) 8 SCC 450.

47 304 Part II- Punishment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

48 (2009) 8 SCC 1.

49 Section 409-Criminal breach of trust by public servant or by banker, merchant or agent: Imprisonment for life or imprisonment for 10 years and fine.

formed to stipulate sentencing guidelines which takes into account the changed scenario of society and its crimes.

Special Local Laws (SLL):

The socio-economic crime also called as white collar crime as has been explained by Sutherland.[50] He wrote that the difference in implementation of criminal law and socio-economic crimes arises because of the difference in the social status of offenders between the two categories. In other words, in while collar crime, the offenders are well educated and commit crime in a well-planned manner to avoid any detection. In most cases, the victims of socio-economic crimes are the common people in the Society like consumer, investors and stockholders who are not only unorganized but also lack the technical knowledge to protect themselves from the onslaught of such white collar crimes.

As submitted in the beginning, there are several Special Local Laws(SLL) but for the purpose of our examination we will be dealing with the following three special laws:

(a) General
(b) Food Safety and Standards Act, 2006 (FSS Act)
(c) Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act)
(d) Prevention of Corruption Act, 1988

(a) General

Broadly, most of the special penal laws are particularly concerned with socio-economic offences. The above three enactments are in that category. The way these socio-economic crimes are viewed as opposed to the offences under IPC is that the socio-economic offences have two very important aspects i.e. gravity of the harm caused to the society and the nature of offences. Another point is that the gravity of harm is not very easily apparent, when it comes to the nature of offence as it is well planned and well executed in secrecy by shrewd persons with sophisticated means. The public welfare is the biggest victim in such economic offences and its detection is quite challenging.

50 Sutherland, *White-collar Criminality*, (American Sociological Review, 1940).

The socio-economic offence affects the health and wealth of the entire community and hence the theory of punishment has to be much harsher and heavy and if required, new methods of punishment should be adopted. In other words, the weapons which are required for fighting socio-economic crimes are different from fighting ordinary crimes. The damages and repercussions caused by these crimes forced the legislation to treat it differently from conventional crimes. One of the main objectives of dwelling on the theory of punishments for such socio-economic offences is to increase the punishment so as to represent the social disapproval of such crimes and in order to achieve the varied gradation of punishment which is found in the conventional crimes. Too many scales and variations in the quantum of punishment lead to a failure of dealing with such socio-economic crimes. The legislation in this context is always putting the maximum punishment and makes such offences cognizable and non bailable.

(b) Food Safety and Standards Act, 2006

The Food Safety and Standards Act (FSSA), 2006 has been introduced by the Government by incorporating salient provisions of the Prevention of Foods Adulteration Act, 1954 for the wellbeing of the society. With the implementation of this Act, the other existing food laws and Act in the Country got repealed. The new Act integrates eight different food related statutes to establish a single reference point for all matters related to food safety and standards by moving from multi-level, multi-departmental control to a single line of command. It prohibits advertisements which mislead the society and bars unfair trade practices and also imposes certain liabilities on the manufacturers, packers, wholesalers, distributors and sellers if an article of food fails to meet the requirements as stipulated in the Act.

The Chapter IX of the FSSA Act, 2006 deals with the offences and penalties under various provisions. Under the Act, the theory of punishment seems to be more of preventive except in the case of sale, storage or distribution or import of any article of food for human consumption which is unsafe, the punishment would be depending on the consequence of contravention or failure. The punishment ranges

from 6 months to life imprisonment if the contravention has resulted in death. This Act also recommends exorbitant fines ranging from1 lakh to 10 lakhs. Some of the sentencing policies followed in this Act are clearly deterrent like cancellation of license in case of repeated offences. It has a component of compensatory sentencing as well. In the case of injury or death of the consumer, compensation is accorded to the victims' family. Also Law Commission's 47th report recommends public censure as one of the modes of punishment under this Act.

Also the rules for construction of such special penal statutes are brought out in the judgment of *Muralidhar Meghraj Loya* v. *State of Maharashtra*.[51]Herein, although the legislation has taken a very stricter punishment, the Courts have again reacted in varied circumstances by prescribing a minimum sentence and minimum fine for a first offence. The mode of punishment for such socio-economic offences is by and large deterrent in nature, owing to their effect on public health, morality and economy of the country.

Regarding socio-economic offences, the Supreme Court has warned against showing any leniency while awarding punishments to such offender. In *Eknath Mukhawar* v. *State of Maharashtra,*[52] while dealing with a case of prevention of food adulteration, the court observed that such offences cannot be treated in light hearted manner. The Court has to give due recognition to the intent of the legislature in awarding proper sentence including the minimum sentence in appropriate case as described under the Act.

(c) Prevention of Corruption Act, 1988

The Prevention of Corruption Act, 1988 has been introduced with an intention to eradicate the corruption from society. The society grades a person depending on his wealth without questioning the conduct by which the man accumulates the wealth leads to corruption. Most of the offences covered under the Prevention of Corruption Act are meant for public offices as the discretionary power given for its administration led to corruption in a galloping manner. Though the IPC does have

51 (1978) 3 SCC 684.
52 (1977) 3 SCC 25.

provisions to deal with punishment for offences for bribery and corruption, its inadequacies and insufficiency forced the legislature to bring about an independent socio-economic legislation under the title of Prevention of Corruption Act, 1988.The Act fixed a minimum sentence of imprisonment for giving a deterrent impact on the public servants who are prone to corrupt practices and accordingly, the sentence was fixed as seven years as maximum and minimum one year. The primary role of this enactment was to give signals of deterrence and it is one of the important features of sentencing a corrupt public servant. Apart from the punishment, the approach of the judiciary has been reflected in its decisions like speedy disposal of corruption cases, stringent measures of punishment, natural justice. The evidences have been encouraged and adhered to while construing the law relating to corruption and interpreting the interrelations between the provisions of law as contained in IPC, Cr. PC and the Act of 1947 and 1988 on prevention of corruption. The courts while dealing with cases under the Prevention of Corruption Act set strong principles for eradicating the menace of corruption and preventing the offender from getting any protection which is always sought to be given by the State. Any lenient sentence for such offence will defeat the very object of the Act. With the introduction of the Lokpal and Lokayuktas Act, 2013, there has been corresponding amendment in the Prevention of Corruption (Amended) Act, 2013 where the quantum of punishment has been enhanced from 6 months to seven years for various offence committed by the public servants. Also the Lokpal Act and Lokayuktas Act, 2013 prescribes forfeiture of property as one of the modes for causing loss to the national exchequer by the public servant.

The NDPS Act which deals with drug peddlers and drug addicts was formulated with a stringent punishment of mandatory minimum 10 years of rigorous imprisonment. Post which, there was an amendment which brought drastic changes in the sentencing policy and the punishment was based on three categories based on the quantity and the type of drugs. Pre-amendment there was no legislative distinction if the offender was involved in petty offences or big offences but post

amendment, the categories involved based on the quantity i.e. small quantity, quantity lesser than the commercial quantity but greater than the small quantity and commercial quantity has been brought about in the amendment Act of 2001. Based on this gradation the punishments have changed. The object of this amendment and the change in the sentencing policy seems to suggest that the focus is more on the drug peddlers in terms of deterrence hence higher punishment for commercial quantity and a reformative and preventive mechanism for drug users of smaller quantity.

In the case of *AS Krishna* v. *State of Kerala,*[53] the Court observed that the new socio-economic crimes do not call for any leniency or undue sympathy and such crimes deserves deterrent punishment in the larger interest of the society. Similarly, in *Vajja Srinivasu* v. *State of A.P.,*[54] the Court held that "the disability that the provisions of probation of offenders Act, 1958 are inapplicable to the offence under NDPS Act cannot preclude the accused from pleading that lesser sentence be awarded in particularly in view of age factor of the accused who was only 21 years old.

Thus the mode of punishment in most of the socio-economic offences is deterrent in nature in view of its consequences on the public health and the economy of the country. There is no scope of any reformation / rehabilitation of those wronged who are charged under such socio-economic offences but at the same in socio-economic offences like immoral traffic of human and girls and practicing bonded labour, the rehabilitation and reformation have been adopted as the main theories of punishment. The other specific features of the mode of punishment followed in the socio-economic offences in order to create the deterrence impact on the offender are loss of employment, forfeiture of license, forfeiture of articles of food, forfeiture of property.

53 2004 Cri LJ 2833 (SC).
54 (2002) 9 SCC 620.

Conclusion

The inevitable conclusions which one can deduce after going through the various theories of punishment adopted by the courts for various offences (including socio-economic offences) are as follows:

Since the ancient time in India, retributive theory seems to be the main theory of punishment and all other theories are only a development to address the developing needs of the society and also the growth of civilization which necessitated into reformative and restorative theory of justice. The contemporary theories seem to be of restorative justice, which takes into account victim's perspective while determining the punishment and sentencing. On special laws i.e. socio-economic offences, the objective seems to be deterrence and preventive only. Compensatory mechanism seems to be resorted to depending on the gravity and the consequence of the offence.

There seems to be a great disparity and distinction while dealing with heinous crimes by the courts particularly where the offences committed in similar circumstances. The court seems to be considering or in other words exploring a rather reformative approach than its deterrent approach. As regarding the socio-economic offences, the courts although have reiterated that the theory of punishment must be deterrent to the extent possible, in reality it does not seem to be the case. In many cases, it ends up in awarding a minimum punishment or a mere fine on the offender which leaves the Special Penal Law virtually ineffective.

In the garb of restorative justice, the courts seem to be resorting to compensatory substitution in place of deterrence in order to meet the end of justice. There are striking incidents particularly in socio-economic offences and heinous crimes where the courts have prescribed heavy fines as the offender has the ability to pay and that in their view meet the ends of justice.[55]

Above all, to a large extent, these theories of punishment are just a theoretical and academic discourse and finally it is the courts to decide as to what theory of punishment meets the end of justice based on the

55 *Rajiv Kumar v Union of India* 63 (1996) DLT 183.

nature of offender, type of offence and the circumstances which lead to the offence. As mentioned earlier, considering some of the glaring instances where judicial discretion defeats the rational of according minimal punishment, it appears that legislature may soon come up with a minimum sentencing policy to remove the discretion available to the courts. Latest example is Section 376 where the pre-amendment Act had both the minimum and maximum punishment but yet there was a proviso which gives discretion to the Court that for adequate and special reason to be mentioned in the judgment the Court may impose a lesser sentence. The said discretion has been deleted from Section 376 of The Criminal Law (Amendment) Act, 2013.

Suggestions:

Following are the broad suggestions which may be taken into account:

1. The whole provisions relating to punishment need to be revisited and rectified as they are inadequate and sometimes in effective to address the ever changing scenario of the crimes and the offender

2. Capital punishment needs to be abolished as it has been proved since the time the Supreme Court prescribed the doctrine of rarest of rare case it has not really served the purpose from the penal statutes.

3. Wherever fines are imposed without specifying the amount of fine it is high time there should be some guidelines drawn on the basis of which the court are to determine the fines. And those where the amounts of fines are specified, they need to be increased where the statutory fines fixed under the IPC to be revised by 50 times (a suggestion by Malimath Committee)[56]

In view of the growing enactment of socio-economic offences in particular which directly cripples and impacts the economy there has to be a stringent and deterrent punishment meted out subject to the principles of natural justice and rule of law.

56 Malimath Committee Report, 2003.

Environmental Protection during Armed Conflict: A Critical Assessment of International Humanitarian Law

Iftikhar Hussain Bhat*

Abstract

Although since its very beginning the purpose of International Humanitarian Law was to make war more humane, the international community is increasingly concerned with the protection of objects that are not directly related with human suffering. An important anxiety in terms of international humanitarian law and its application concerns the preservation of environment in times of armed conflict. Throughout history the environment has been the casualty of deliberate damage as a strategy of war, for example, through pollution of water resources or scorched earth policies. The potential for harm has increased over the years, as advancements in science and technology have provided weapons of mass destruction such as biological and nuclear warfare which can have devastating impacts on natural resources and the environment. Despite the protection afforded by several important legal instruments, the environment continues to be the silent victim of armed conflicts worldwide. The armed conflict causes significant harm to the environment and the communities that depend on natural resources. Direct and indirect environmental damage, coupled with the collapse of institutions, lead to environmental risks that can threaten people's health, livelihoods and security, and ultimately undermine post-conflict peace building. The existing international legal framework contains many provisions that either directly or indirectly protect the environment or govern the use of natural resources during armed conflict. This article attempts to provide a critical assessment of the protection afforded to the environment during armed conflict by international humanitarian law.

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Introductory

Environmental destruction has become an inevitable result of modern warfare and military tactics. The nuclear, chemical, and biological weapons that emerged during the late twentieth century present threats to life itself; but short of that apocalypse, modern weapons can cause or hasten a host of environmental disasters, such as deforestation and erosion, global warming, desertification, or holes in the ozone layer. Military operations can affect land, air, wildlife, and water resources. The devastating effects of military weapons on the environment is reflected throughout the history of the twentieth century, in World War I, World War II, the Korean and Vietnam wars, the Cambodian civil war, Gulf wars I and II, the Afghan civil war, and the Kosovo conflict. It is evident that the effects of armed conflict are not only felt by the combatants themselves but, necessarily, also affect the environment in which the hostilities take place. The Rio Declaration 1992 reflects the opposition between war and conservation by stating:[1]

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.

Since the environment and natural resources are crucial for building and consolidating peace, it is urgent that their protection in times of armed conflict be strengthened. There can be no durable peace if the natural resources that sustain livelihoods are damaged or destroyed. Despite the protection afforded by several important legal instruments, the environment continues to be the silent victim of armed conflicts worldwide. The armed conflict causes significant harm to the

1 The Rio Declaration on Environment and Development 1992, at Principle 24.

environment and the communities that depend on natural resources. The existing international legal framework contains many provisions that either directly or indirectly protect the environment or govern the use of natural resources during armed conflict. This paper provides a critical assessment of international humanitarian law, particularly the law of armed conflict (*jus in bello*) in regard to environmental protection, and identifies the areas in which the current regime does not adequately address environmental degradation attendant to international and internal armed conflict. It will analyse international humanitarian law in relation to four categories: treaty laws which provide direct protection to the environment; those which indirectly provide environmental protection during times of armed conflict; customary international humanitarian law and the general principles of international humanitarian law that are applicable to the environment.

Environmental protection under International Humanitarian Law

The corpus of international humanitarian law plays an important role in relation to the protection of the environment in times of armed conflict. This is addressed by the law of war and armed conflict, or *jus in bello*, which focuses on the protection of people who are not, or are no longer, taking part in armed conflict as well as limiting the methods and means of warfare available to States.[2] The rules of international humanitarian law were largely developed to protect human beings and their property; and therefore only a few provisions afford direct protection to the environment during times of war and armed conflict.[3] Protection of natural resources is usually inferred from the rules regulating the means and methods of warfare as well as from the protection afforded to civilian objects and property. It is further

2 Sands, P., and Peel, J., *Principles of International Environmental Law* (Cambridge University Press, 2012) at 792-793.

3 *Ibid*., at 793.

important to note that the rules of international humanitarian law were developed at a time when international conflicts were common. However, today, the overwhelming majority of conflicts are internal in nature. Therefore, many laws within the international humanitarian law regulatory framework are inapplicable or restrictive with regard to internal armed conflict.

Treaty Law

Hague Convention IV 1907

International treaty law has been slow to recognise that the natural environment requires the protection of specific legal rules. The concept of the "natural environment" did not appear in an instrument of international humanitarian law until 1977.[4] Notwithstanding, the 1907 Hague Regulations (Convention Respecting the Laws and Customs of War on Land) are relevant for the purpose of regulating methods and means of warfare to protect the natural environment.[5] Article 22 of the Regulations states that the right of belligerents to adopt means of injuring the enemy is not unlimited.[6] The Regulations also provide indirect protection for the natural environment by prohibiting the useless destruction of property in terms of Article 23(g). It prohibits the destruction and seizure of enemy property, unless it is imperatively demanded by the necessities of war. This formulation is criticised as deficient for the protection of the environment because there are forms of environmental damage which do not fit neatly into the scope of "destruction of property."[7] Such forms of damage include atmospheric

4 Gasser, H.P., "For Better Protection of the Natural Environment in Armed Conflict: A Proposal for Action." *The American Journal of International Law* 89, no. 3 (1995): 637-644, at 638.

5 1907 Regulations attached to the 1907 Convention (IV) Respecting the Laws and Customs of War on Land, (Hague); opened for signature 18 October 1907, in force 26 January 1910; (1910) UKTS 9, Cd.5030 (hereinafter Hague Regulations).

6 Hague Regulations, at Article 22.

7 Liebler, A., "Deliberate Wartime Environmental Damage: New Challenges for International Law,' 23 *California Western International*

pollution, ozone depletion or even weather modification. It is also arguable that the exception made in the case of "necessities of war" introduces a problem of uncertainty. When is it necessary to cause damage to the environment in the course of military activity? The general principles of proportionality and military necessity in international humanitarian law – discussed herein – may provide direction in this regard. Nevertheless, Article 23(g) does provide protection for the environment in extreme cases where the damage is clearly beyond what is necessitated by war, and impacts upon property.

1976 UN Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)

The ENMOD Convention was the first treaty to establish specific rules for the protection of the environment during armed conflict.[8] Established in the aftermath of the Vietnam War, it was aimed at regulating large-scale environmental modification techniques in which the environment could be used as a weapon of war. Examples given of such environmental modification techniques have included the use of nuclear explosions to induce earthquakes or volcanic eruptions;[9] the seeding of clouds with lead iodide to create flooding;[10] and creating drought conditions to starve enemy combatants. Article 1 of the ENMOD Convention prohibits any military or any other hostile use of environmental modification techniques having wide-spread, long-lasting or severe effects as the means of destruction, damage or injury.[11] The

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Law Journal (1993), 69-70, at 67.

8 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, in force 18 May 1978 (1977) 16 ILM 88-94 (hereinafter The ENMOD Convention).

9 Fauteux, P., "The Gulf War, the ENMOD Convention and the Review Conference" (1992) 18 *UNIDIR Newsl*. 6.

10 The US attempted the technique of cloud-seeding during the Vietnam war to flood the Ho Chi Minh Trail.

11 The ENMOD Convention, at Article 1.

threshold of damage in the Convention is relatively high, albeit requiring an alternative standard – damage to the natural environment is prohibited where it is widespread, long-lasting or severe.[12] It must be noted that a Review Conference in 1992 declared that the "military or any other hostile use of herbicides" is an environmental modification technique falling within the scope of the ENMOD Convention.[13] Despite this, ENMOD is considered to be of limited value in protecting the environment in armed conflict.[14] It does not outlaw environmental damage as such, but prohibits the use of elements of the environment as weapons in armed conflict. The ENMOD Convention protects the environment from what has been termed "geophysical warfare"[15] – a highly destructive, and yet also unlikely, category of military actions. For this reason, it has been regarded as belonging to an era of science fiction.

1977 Additional Protocol I to the 1949 Geneva Conventions

The 1949 Geneva Conventions regulate, *inter alia*, the protection of civilians and their property during armed conflict; and natural resources have generally been considered as part of civilian property.[16] Shortly

12 The *travaux preparatoires* of the United Nations Committee of the Conference on Disarmament (CCD) indicate how to interpret the terms. "Widespread" is defined as "encompassing an area on the scale of several hundred square kilometres"; whereas "long-lasting" is defined as "a period of months or approximately a season" and "severe" means "involving serious or significant disruption or harm to human life, natural and economic resources or other assets." *See* Understanding Relating to Article 1 of ENMOD, 31 GAOR Supp. No. 27 (A/31/27), Annex 1.

13 Final Declaration, Second Review Conference of the ENMOD Parties, 17 *Disarmament Yearbook (*1992) 242, Article II, at Para 3.

14 Boelaert-Suominen, Sonja AJ., *International Environmental Law and Naval War: The Effect of Marine Safety and Pollution Conventions during International Armed Conflict*, NAVAL WAR COLL NEWPORT RI CENTER FOR NAVAL WARFARE STUDIES, 2000, at 59.

15 Hulme, K., *War Torn Environment: Interpreting the Legal Threshold*, (Martinus Nijhoff Publishers, 2004), at 73.

16 Geneva Convention Relative to the Protection of Civilian Persons in Time

after ENMOD was concluded in 1977, the Diplomatic Conference on the Reaffirmation and Development on International Humanitarian Law Applicable in Armed Conflicts (CDDH) adopted two Additional Protocols to the Geneva Conventions.[17] Additional Protocol I relates to the protection of victims in international armed conflict, whilst Additional Protocol II is specific to non-international armed conflicts.

Additional Protocol I contains provisions which protect the environment during armed conflict, indirectly and specifically. Article 48 of Additional Protocol I establishes the basic principle of distinction. It states that parties to armed conflict must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives; and must accordingly direct all their operations only against military objectives.[18] In this way, civilians and their property are protected and thus Article 48 provides indirect protection to the natural environment as part of civilian property. Article 52 reiterates the principle that hostilities may only be directed at military objectives. Military objectives are "all objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization ... offers a definite military advantage."[19] Therefore, natural resources may be attacked if they make an effective contribution to military action. It is all too easy to identify examples in which the environment can become a military objective. For instance, during the Vietnam conflict, dense

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of War, 12 August 1949; *opened for signature* 12 August 1949, in force 21 October 1950; (1950) 75 UNTS, 287-417.

17 1977 Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Geneva); *opened for signature* 12 Dec 1977, *in force* 7 Dec 1978 (1977) 16 ILM 1391-1441 (hereinafter Additional Protocol I); Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Geneva),1977 16 ILM 1442-9 (hereinafter Additional Protocol II).

18 Additional Protocol I, at Article 48.

19 Additional Protocol I, at Article 52.

forests which provided cover for the enemy became a military objective, and their defoliation with the use of herbicides constituted a definite military advantage for the US. It seems that under Article 52, environmentally destructive activities such as large-scale deforestation or poisoning of ground water may be justified as destruction which offers a military advantage. This presents a weakness in the environmental protection afforded by Article 52 – elements of the environment which are likely to become military objectives too easily lose their protection.

Article 54(2) also indirectly protects the environment by prohibiting attacks against objects which are "indispensable to the survival of the civilian population."[20] Such objects have been defined as objects which are of basic importance to the civilian population's livelihood.[21] Therefore, natural resources such as land, forests, ground water and cattle could fall under this definition. Article 54(3) (b) goes further to prohibit actions against these objects which "may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement."[22] This provision effectively excludes recourse to military actions such as scorched-earth policies which destroy the environment, as these tactics amount to actions which could be expected to leave the civilian population with such inadequate food as to cause starvation or force migration.

Specific protection of the natural environment in times of international armed conflict is provided by Articles 35(3) and 55. Article 35(3) states that it is prohibited to employ methods and means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.[23] This prohibition applies

20 Additional Protocol I, at Article 54(2).
21 International Committee of the Red Cross (ICRC) Commentary on Additional Protocol I to the Geneva Conventions, available at: http://www.icrc.org/ihl.nsf/COM.
22 Additional Protocol I, at Article 54(3) b.
23 Additional Protocol I, at Article 35(3).

exclusively to international armed conflict and only binds State parties to Additional Protocol I.[24] According to the International Committee of the Red Cross (ICRC) Commentary on the Additional Protocols, the prohibition in Article 35(3) is not limited to the environment of the enemy, but rather extends to the global environment. The use of the means and methods of warfare must be intended or expected to cause damage to the environment above a specified threshold.

Article 55 entitled "Protection of the Natural Environment" provides that care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare, which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.[25] It establishes two related provisions – the obligation of care to protect the environment and the prohibition included therein. The first sentence of Article 55 lays down a general norm, which is then particularised in the second sentence.[26] Care must be taken in warfare to protect the environment generally whereas the prohibition applies in particular circumstance, i.e. when there is a foreseeable form of damage to the environment and thereby to human health or survival.[27] Article 55 is positioned under the Chapter of Protocol I entitled "Civilian Objects" which speaks of the protection of civilian objects both generally and when used by the military. Notably, Article 54 provides protection for objects indispensable to the survival of the civilian population,[28] and Article 56 governs the protection of works and installations containing

24 The ICJ expressly stated that Articles 35(3) and 55 were 'powerful constraints for all the States having subscribed to these provisions'. *See* ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons,* 8 July 1996, [1996] I.C.J. Rep., at Para. 30.

25 Additional Protocol I, at Article 55.

26 Report to the Third Committee on the Work of the Working Group, Committee III, 3 April 1975, O.R. Vol. XV, CDDH/III/275, at 4.

27 *See* Hulme, *Supra* note 15, at 80.

28 Additional Protocol I, at Article 54.

dangerous forces.[29] Viewed in this context, the environment should be regarded as *prima facie* a civilian object. Indeed, it is argued that the "care obligation" in Sentence 1 of Article 55(1) values the environment intrinsically as a civilian object which requires protection of its own accord.[30]

Protocol I does not elaborate on what this obligation of "care" entails. The obligatory word "shall" means that this is conduct which the parties to Protocol I must undertake. The duty has been phrased as one of "taking steps to protect the environment" which is also known as due diligence.[31] The obligation imposed by Article 55(1) is a positive duty – States parties must take positive steps to protect the environment from damage. Some practical examples that have been given include conducting environmental assessments of the effects of the means of warfare to be used; or altering or calling off an attack to avoid potential environmental harm.[32] Article 55(1) is criticised for its lack of clarity as to whether the party to armed conflict must intend to cause damage to the environment as well as intend to cause human harm as a consequence; or it is enough to intend only the first element.[33] It is unclear whether Article 55(1) requires that the health or survival of human beings must be prejudiced before the provision can be violated. The inclusion of "thereby" suggests that the prohibition will only apply where environmental damage has a potential consequence of causing harm to human beings. However, read together with the care obligation in the first part of Article 55 (1) it may be argued that the care obligation may be breached even where environmental harm was intended but it did not occur and consequently did not result in harm to human health.[34] It is

29 Additional Protocol I, at Article 56.
30 Hulme, K., "Taking Care to Protect the Environment Against Damage: A Meaningless Obligation?" *International Review of the Red Cross* (2010) Vol.92 No. 879, 675-691, at 677-678.
31 *See* Hulme, *Supra* note 15, at 80-88.
32 *See* Hulme, *Supra* note 30, at 681.
33 *See* Hulme, *Supra* note 15, at 75.
34 *Ibid.,* at 77.

submitted that this interpretation provides a higher standard of protection for the environment and for humans, and accords with the intrinsic value of the environment recognised in Sentence 1 of Article 55(1); and is therefore favourable.

Another point of contention in both Articles 35(3) and 55(1) is the standard of harm contained therein. Unlike the similar criteria in ENMOD, the three conditions of "widespread, long-term and severe damage" in Additional Protocol I are cumulative – all three criteria must be met for the prohibition to apply. This is a rather high threshold of damage and it would seem that the provisions were intended to cover more than incidental damage to the environment arising from conventional warfare.[35] This restriction makes them of marginal relevance in most conflicts, from an environmental point of view.[36] The effectiveness of the obligation of care in Article 55(1) is reduced by this high threshold as it would seem that States must take steps to protect the natural environment from damage only where that damage is widespread, long-term and severe.

Notwithstanding this threshold, it is submitted that the obligation to take care of the environment in Article 55(1) still shines like a beacon as it requires States parties to, at the very least; give consideration to the environmental damage which might be caused by their military activities.

Despite the precautionary language employed in Articles 35(3) and 55, the criteria for damage are excessively restrictive and the prohibition's exact scope is ambiguous. Thus, the two provisions of Additional Protocol I which ought to provide direct protection for the

35 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts,* (Geneva 1974-77)Vol. XV, Doc. CDDH/215/Rev.1, para. 27, at 268.

36 Okowa, P.N., "Natural Resources in Situations of Armed Conflict: Is there a Coherent Framework for Protection?" *International Community Law Review* 9, No. 3 (2007): 237-262, at 250.

natural environment in armed conflict are difficult to apply in conventional warfare and only provide limited protection.

1977 Additional Protocol II to the 1949 Geneva Conventions

Additional Protocol II, relating to the protection of victims of non-international armed conflict develops Article 3 common to the 1949 Geneva Conventions.[37] Article 3 lays down provisions applicable to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties". Additional Protocol II however, is not identical in its scope to Article 3. It applies in non-international armed conflicts which have reached a certain level of intensity.[38] Additional Protocol II is much briefer than its counterpart regulating international armed conflict. The reason for this was the concern that Protocol II might affect State sovereignty and be invoked to justify outside intervention – which resulted in the decision of the Diplomatic Conference to adopt only 28 of the proposed 47 Articles.[39]

This Protocol could potentially have provided adequate protection for the natural environment in situations of internal armed conflict, but it is a lot less substantive than Additional Protocol I. It particularly lacks the basic principle of distinction enunciated in Article 48 of the first Additional Protocol. Notwithstanding, it contains certain provisions which may provide indirect protection for the environment during armed conflict. Article 13 states that the civilian population shall enjoy protection against the dangers arising from military activities;[40] and

37 Geneva Convention relative to the Protection of Civilian Persons in Time of War 75 UNTS 287, at Article 3.

38 Additional Protocol II, at Article 1.

39 *See* Junod, S., "Additional Protocol II: History and Scope" 33 *American University Law Review,* (1983), 32-4; ICRC Commentary to the Additional Protocol II (1987), at Para 4414, available at: http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&documentId=0F47AE2F6A509689C12563CD004399DF&action=openDocument.

40 Additional Protocol II, at Article 13.

Article 14 follows on to prohibit starvation of the population caused by any attack, destruction, removal, or rendering useless of objects indispensable to the survival of the population.[41] According to the ICRC Commentary, the words "attack, destroy, remove or render useless" are used to cover all eventualities which may result in starvation, including pollution of water supplies by chemical agents or destroying a harvest by defoliants. It can be inferred from this that Article 14 of Protocol II indirectly protects the natural environment in so far as it is indispensable to the survival of the population. The examples listed in Article 14 include foodstuffs, crops, livestock and drinking water installations.

Additional Protocol II makes no mention of protecting the environment from exploitative activities such as the extraction of minerals, logging of timber or poaching of wildlife, which are common military activities in recent internal armed conflicts. However, the list in Article 14 is not exhaustive and any act or omission by which starvation of the civilian population may be brought about would be prohibited under this Article.[42] Clearly, Article 14 operates to protect the civilian population from starvation. In other words, it is prohibited to attack or destroy objects with the aim of starving out civilians. But what happens where objects indispensable to the population's survival hinder the enemy in observation or attack? The example given in the ICRC Commentary is where agricultural crops are very tall and suitable for concealment in a combat zone.[43] If the objects are used for military purposes by the adversary, they may become a military objective and prone to attack, unless such action would reduce the civilian population to starvation.

41 Additional Protocol II, at Article 14.
42 ICRC Commentary to Additional Protocol II, *Supra* note 39, at Para 4800.
43 *Ibid*. at Para 4807.

The Rome Statute of the International Criminal Court

Article 8 (2)(b)(iv) of the Rome Statute of the International Criminal Court makes it a war crime to intentionally launch an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[44] Prior to Article 8(2)(b)(iv), there was no explicit environmental war crime in international law. The inclusion of this Article in the Rome Statute marks a significant step in the protection of the environment during armed conflict. What is remarkable about Article 8(2)(b)(iv) is that individual criminal responsibility for damage to the environment is not tied to damage to civilians or their property – the use of the disjunctive "or" indicates that environmental damage alone can raise criminal responsibility, making it a truly eco-centric war crime.[45] Further, Article 8(2)(b)(iv) goes beyond the reach of other international agreements which bind States parties, to potentially prosecute war crimes that are committed anywhere in the world. Article 12 of the Rome Statute allows non-State parties to consent to ICC jurisdiction over specific situations.[46]

For all its novelty, however, Article 8(2)(b)(iv) has been the subject of some criticism. It prohibits "widespread, long-term and severe damage to the natural environment" but neither the Rome Statute nor its Elements of Crimes provide any definition for these terms.[47] This uncertainty goes against the principle of legality and makes it difficult to apply the provision. It is believed that the drafters of Article 8(2)(b)(iv) intended to borrow from Protocol I to the Geneva Convention, as

44 The Rome Statute of International Criminal Court 1998, at Article 8(2)(b)(iv).

45 Lawrence J. C., & Heller, K. J., "The first eco-centric environmental war crime: The limits of Article 8(2)(b)(iv) of the Rome Statute" (2008) 20 *Geo. Int'l Envtl. L. Rev.* 61, at 71.

46 The Rome Statute of International Criminal Court 1998, at Article 12(3).

47 *See* Lawrence & Heller, *Supra* note 45, at 72.

evidenced primarily by the cumulative requirement – "widespread, long-term and severe damage" which mirrors Protocol I.[48] If the Article does borrow from Protocol I then it encounters the problems associated with the incredibly high threshold for application, as discussed herein. The Protocol I threshold has been described as "nearly impossible to meet in all but the most egregious circumstances."[49] Additional Protocol I requires that the environmental damage must last "a scale of decades, twenty or thirty years as being a minimum" in order to qualify as long-term damage.[50] Widespread damage is not elaborated under Additional Protocol I, but the general understanding is that it extends beyond the "several hundred square kilometers" required by ENMOD;[51] and it must "prejudice the health or survival of the population" to be severe damage.[52] An act by a party to an armed conflict must meet all three requirements. Even if the act is "clearly excessive in relation to the concrete and direct overall military advantage anticipated", it will not be prohibited under Article 8(2)(b)(iv) unless it meets the threshold. The requirement of "severe" damage is particularly problematic as its definition is anthropocentric in nature – environmental damage will not be regarded as severe unless it prejudices the health or survival of a population. If this definition is to be followed, it would detract from a key strength of Article 8(2)(b)(iv) – that the prosecution of

48 Dormann, K., Elements *of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary*, (Cambridge University Press, 2003), at 166.

49 Schmitt, M. N., "Green War: An Assessment of the Environmental Law of International Armed Conflict" 22 *Yale Journal of International Law* (1997), at 71.

50 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts,* (Geneva 1974-77)Vol. XV, Doc. CDDH/215/Rev.I, at Para 27

51 *See* Hulme, *Supra* note 15, at 91-3.

52 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts,* (Geneva 1974-77)Vol. XV, Doc. CDDH/215/Rev.I, para. 27.

environmental war crimes is not tied to damage to civilians or their property.[53]

Another shortcoming of Article 8(2)(b)(iv) is that it prohibits "intentionally launching an attack in the knowledge that such attack will cause... widespread, long-term and severe environmental damage if it would be clearly excessive to the concrete and direct overall military advantage anticipated."[54] This means that the prohibition against damage is tied to the condition that the damage must clearly outweigh the overall military advantage to be gained. It is submitted that this proportionality standard is too heavy. It is argued that the term "clearly excessive" is unprecedented in international humanitarian law and only serves to raise the threshold and introduce greater uncertainty into the law in this area.[55] Further, Article 8(2)(b)(iv) requires that the perpetrator acts with intention, in the knowledge that the attack will cause the prohibited harm. The necessary *mens rea* is one of actual knowledge. The Statute defines knowledge as an "awareness that a circumstance exists or a consequence will occur in the ordinary course of events."[56] The ambiguity surrounding the threshold of "widespread, long-term and severe damage" makes it difficult for a Court to conclude that the actor knew that such damage would occur. Second, even if the meaning of the terms were clear, there is still an uncertainty inherent in predicting environmental damage on such a large scale.[57] Article 8(2)(b)(iv) does not apply to non-international armed conflicts.[58] Although the Rome Statute does prohibit "destroying or seizing the property of an

53 *See* Lawrence & Heller, *Supra* note 45, at 73.
54 The Rome Statute of International Criminal Court 1998, at Article 8(2)(b)(iv)(emphasis added).
55 Cryer, R. "Of Customs, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study" 11 *Journal of Conflict and Security Law* (2006), 239-263 at 260.
56 The Rome Statute of International Criminal Court 1998, at Article 30(3).
57 *See* Lawrence & Heller, *Supra* note 45, at 80.
58 Article 8(2)(b) of the Rome Statute states that it only applies to international armed conflicts.

adversary" during internal armed conflicts,[59] it still leaves all un-owned land and natural resources without protection in the case of internal armed conflict.[60]

Customary International Humanitarian Law

International customary humanitarian law helps with two main disadvantages we have faced when examining treaty obligations. Treaties only apply to states that have ratified them; consequently, it narrows down the geographical scope of application. Customary law rules are applicable to all parties to the conflict, despite its nature, or whether parties have ratified certain documents or not.[61] It, therefore, fills up some gaps in the regulation of non-international armed conflicts. A significant study of International Customary Humanitarian Law by the International Committee of the Red Cross in 2005, containing 161 rules deduced from State practice, principles and treaty laws, have brought some clarity in what rules exactly can be held as part of it. Customary law study *per se* does not impose any obligations based on customary law. Nonetheless, the ICRC being quite an authoritative body, it has been rendering the recognition of international community. Of these rules, the Chapter dealing with 'The Natural Environment' is relevant for the purposes of this paper. Rule 42 of the Customary Law Study contains duty of particular care when launching an attack against works and installations containing dangerous forces. According to the study, this norm is applicable in both international and non-international armed conflicts.[62] It does not impose a complete prohibition, but obligation of

59 The Rome Statute of International Criminal Court 1998, at Article 8(2)(e)(xii).

60 *See* Lawrence & Heller, *Supra* note 45, at 85.

61 Hampson, F. J., "The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body," *International Review of Red Cross.* 2008, (90): 549-572.

62 Henckaerts, J. M. and Doswald-Beck, L., *Customary International Humanitarian Law*, International Committee of the Red Cross, Vol. I, Rules. New York: Cambridge University Press, 2009, at 139.

care is always to be considered before the attack. Rule 43 prohibits attacks on the natural environment in the non-international armed conflicts as well as in the international armed conflicts unless it is justified by a military necessity or elements of the environment become a military object.[63] Normally, natural environment is considered to be a civilian object.[64] Hostilities, however, can change its use or purpose and then general principles of the IHL come in use. The Customary Law Study also makes the link between environmental protection and protection of the property in Rule 50.[65] This prohibition of the destruction of property, not justified by the military necessity, is applicable in internal armed conflicts, as well.

However, as for the Rule 44 and the Rule 45, there is a lack of state practice to establish undisputable rule of customary law, but enough of state practice to determine the movement towards this direction. The former rule regulates use of means and methods of warfare. The latter prohibits the use and means of weapons intended to cause widespread, long-term and severe damage to the natural environment. The Rule 44 applies in the non-international armed conflict undoubtedly only if "there ARE effects in another state. (Emphasis added)[66] The emphasis suggests that a negative impact on the environment is already present. This is only *post factum* application of the rule. It is not meant to protect, more to establish the responsibility.

Soft Law: General Principles of International Humanitarian Law

The general principles of IHL are often referred to as a source of law on their own.14 They complement and underpin the various IHL

63 *Ibid.,* at 143.
64 Henckaerts, J. M. "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict," *International Review of the Red Cross,* 2005, (87): 175–212, at 191.
65 *See* Henckaerts, *Supra* note 62, at 175.
66 *Ibid.,* at 148.

instruments and apply to all countries. It is evident from the above discussion that despite remarkable progress, the direct and indirect protection of the environment by the substantive law of armed conflict seems rather unsatisfactory. But if the specific provisions of the law of war remain fragmented, the question arises if the gaps could be filled in by using the general clauses governing the international law of armed conflict. This thought underlies the fundamental Martens Clause, but even the general principles could offer some input for the protection of the environment in times of armed conflict.

Martens Clause

Martens Clause refers to "the principles of humanity" and "the dictates of public conscience".[67] First proposed during The Hague Peace Conference in 1899, it is from its author, Russian jurist F.F. de Martens, that the Clause takes its name. The Martens Clause is driven by the premise that the law on the conduct of hostilities should be shaped 'by reference not to existing law but to more compelling considerations of humanity, of the survival of civilisation, and of the sanctity of the individual human being.'[68] Gaps in positive law are not sufficient excuse for immoral and inhuman acts, even in wartime, and even in the direst military necessity. Until treaty-based or customary law develops to contribute a more permanent and direct environmental rule to the laws of non-international armed conflict, the Martens Clause may be used to identify emerging prohibitions on methods and means of warfare. Martens clause can be found in the preamble of Hague Convention IV and it reads:

Until a more complete code of laws of war has been issued, the High Contracting Parties, deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the

67 Dinstein, Y., *The Conduct of Hostilities under the Law of International Armed Conflict*, (Cambridge University Press 2010), at 9.

68 Lauterpacht, H. "The Problem of the Revision of the Law of War" 29 *British Year Book of International Law* (1952) 360, at 379.

belligerents remain under the protection and the rules of the principles of the law of nations, as they result from the usage established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

The Clause is also introduced in the Art 1(2) of Additional Protocol I to the 1949 Geneva Conventions. Certain conduct can still be prohibited even if it is not explicitly prohibited by law. Such a case would be if the conduct were not compatible with the principle of humanity.[69] The Marten Clause is basically there to fill in the gaps of International Humanitarian Law. It is important especially when means and methods of waging war are constantly developing and where new technology and science are being introduced. The expansion of Marten Clause to include environmental considerations is not impossible, as it has been suggested by the International Union for Conservation of Nature (IUNC).[70] They further find that the Clause gives International Humanitarian Law a dynamic dimension not limited by time and fundamental principles beyond written law. In today's context of environmental concerns and climate change issues, environment has become a part of the "dictates of public conscience".[71] This can include some protection to the environment if, by environmental destruction, civilians would be submitted to unnecessary suffering. The limitations of "unnecessary suffering" can be said to also apply to the environment.[72]

Indeed, why should unnecessary suffering only refer to human beings? The entire ecosystem can suffer from means and methods of warfare under specific circumstances. Giving this much importance to

69 Kolb, R., and Hyde R., *An Introduction to the International Law of Armed Conflicts*, (Hart Publishing, 2008), at 63.

70 Mrema, E., Bruch, C.E. and Diamond, J., *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, (UNEP/Earthprint, 2009), at 13.

71 Desgagne, R., "The Prevention of Environmental Damage in Time of Armed Conflict: Proportionality and Precautionary Measures," *Yearbook of International Humanitarian Law*, Volume 3, 2000, at 114.

72 *See* Hulme, *Supra* note 15, at 78.

the natural environment in times of armed conflicts could perhaps be considered provocative to some scholars and military personnel but one could also be provoked by the idea that unnecessary suffering is something imperatively reserved for human kind and excludes everything else. The "dictates of public conscience" should be interpreted so as to include the requirement of avoiding (at least unnecessary) damage to the environment, by reference to today´s widespread awareness and concern through society. Environmental protection during armed conflicts includes only a few principles and is in process of constant development. The Clause can serve to fill in even those gaps. It invites States to apply international minimum standard from principles of international law such as the duty to prevent environmental harm and respect the precautionary principle. If modern weaponry development and new military strategies pose a new emerging threat to the natural environment, the Clause can serve to address this rapid evolution of military technology. Indeed, taking precautionary steps would suggest less possibility for provoking unnecessary suffering and superfluous injury to humans and environment.[73] In such way, the Clause invites States to adjust their conduct during hostilities to ensure human survival against the environmental consequences of destructive human activities.[74]

The Principle of Proportionality

The principle of proportionality is codified in Article 57 of Additional Protocol I which provides that disproportionate attacks are attacks in which the "collateral damage" would be regarded as excessive in comparison to the anticipated direct military advantage gained. For example, burning an entire forest or a significant part thereof to reach a

73 McDonald, A., Kleffner, J.K., and Toebes, B., *Depleted Uranium Weapons and International Law - A Precautionary Approach*, (Cambridge University Press, 2008), at 121.

74 Shelton, D., and Alexandre Kiss. "Martens Clause for Environmental Protection" *Envtl. Pol'y & L.* 30 (2000), at 286.

single minor target would be considered as disproportionate. One of the uncertainties regarding proportionality is determining the legal yardstick thereof. Proportionality is difficult to determine in the case of environmental damage, especially long-term damage.[75] In situations where an element of the environment is attacked because it constitutes a military objective (as per Article 52), there might be long-term environmental damage beyond actual destruction, i.e. collateral damage. It is not clear whether or not Articles 35 and 55 are subject to the principle of proportionality in International Humanitarian Law. There is also a general lack of clarity around the practical issues of proportionality where environmental damage is collateral damage caused by attacks against military objectives.

The Principle of Military Necessity

The principle of military necessity prohibits destructive acts that are unnecessary to secure a military advantage.[76] It was articulated in the International Military Tribunal following the Second World War in an oft cited passage from the Hostage Case:

[Military necessity] does not permit the killing inhabitants for the purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of enemy forces.[77]

This principle against the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" has been codified in The Hague Regulations, the Geneva

75 Bothe, M., Bruch, C., et al. "International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities,' 92 *International Review of the Red Cross* (2010), 569 – 592, at 578.

76 Schmitt, M., "Green War: An Assessment of the Environmental Law of International Armed Conflict" 22 *Yale Journal of International Law* (1997), 1-109, at 54.

77 Hostage (*U.S. v List*) 11 TWC 759, (1950), at 1253-54.

Conventions and the Rome Statute of the ICC.[78] This principle has been criticised by some commentators as going against the purposes of the law of armed conflict.[79] However, some scholars argue that the principle of military necessity does not justify or authorize illegal activity, but rather limits it.[80] The principle remains an integral part of the law of armed conflict.

The Principle of Humanity

The principle of humanity prohibits methods and means of warfare which are inhumane.[81] While this principle is clearly anthropocentric in nature, it is obvious that environmental destruction can easily violate the interests of humanity, and the principle of humanity. Therefore, a party to armed conflict may not use starvation as a method of warfare, or poison drinking water, or attack, destroy or render useless objects which are indispensable to the survival of the civilian population. The inherent autonomy of the principle is not to be sought in the effect of the act in question, but rather in its nature, and is usually expressed in specific restrictions on methods and means of warfare. Thus, these are restrictions found on weaponry ranging from poison to chemical, biological, and blinding weapons.

Conclusion

As long as armed conflicts are fought within the natural environment, it will undoubtedly suffer the effects of military activity. However, in the interests of protecting the environment from significant damage, realistic and reasonable measures should exist in international law to ensure such protection. The international humanitarian law

78 *See* Article 23(g) Hague Regulations; Article 50 First Geneva Convention; Article 51 Second Geneva Convention; Article 147 Fourth Geneva Convention; Article 8(2)(b)(xiii) Rome Statute.

79 Falk, R., *Revitalising International Law* (Ames, Iowa State University Press, 1989), at 168.

80 *See* Schmitt, *Supra* note 76, at 55.

81 This principle is articulated in Article 23(e) 1907 Hague Regulations; Articles 51, 52 and 55 Additional Protocol I 1977.

framework on the protection of the natural environment during armed conflict is extensive, including treaty law, customary law and principles that have developed over many decades. However there are several significant gaps and deficiencies which exist within this framework. A majority of the more recent and ongoing armed conflicts are internal in nature, yet the body of International Humanitarian Law is inadequate in addressing internal armed conflict. Currently no treaty norm explicitly addresses the issue of environmental damage in non-international armed conflict. The ENMOD Convention protects the environment from "geophysical warfare" through environmental modification techniques. It prohibits military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects. ENMOD is criticised as being limited in its value as it protects the environment from a highly unlikely category of military actions.

Additional Protocol I to the Geneva Conventions distinguishes between civilian objects and military objects; and allows for hostilities to be directed at military objects. This distinction leaves room for the destruction or degradation of elements of the environment, so long as they offer a definite military advantage. This problem only emphasizes the need for clearer and more appropriate definitions for those laws which directly and indirectly protect the environment. The two Articles within Additional Protocol I which directly protect the natural environment are rendered largely irrelevant to conventional warfare because of an incredibly high threshold for their operation. The cumulative requirement that the damage must be "widespread, long-term and severe" in order for it to be prohibited has proven to be too restrictive to be of much relevance in protecting the environment during armed conflict. Further, the terms widespread, long-term and severe have not been conclusively defined in the Protocol or its *travaux preparatoires*. As such, it is not clear what the precise extent of the prohibited damage is. Even where the terms have been defined, the scale of damage required is rather high – long-term has been defined as a scale

of decades; severe has been defined as damage having a prejudicial effect on the civilian population. Seemingly, these definitions fail to protect the natural environment in itself; only when environmental damage prejudices civilians in armed combat would the damage be considered severe. The criteria of "widespread, long-term and severe damage" is ambiguous and difficult to meet - and consequently to enforce. In regard to environmental damage in non-international armed conflict, Additional Protocol II is not very substantive in detailing the means and methods of warfare applicable to internal armed conflicts. It provides some indirect protection for the environment by prohibiting starvation of the population caused by any attack, destruction, removal, or rendering useless of objects indispensable to the survival of the population. These indispensable objects include elements of the environment such as crops, water installations and livestock. However, it makes no mention of protecting the environment from exploitative activities such as the extraction of minerals, logging of timber or poaching of wildlife, which are common military activities in recent internal armed conflicts.

The Customary International Humanitarian Law Study undertaken by the International Committee of the Red Cross asserts that the customary law rules on the conduct of hostilities applicable to the natural environment relating to international and non-international armed conflict equally. However, it remains unclear which provisions of International Humanitarian Law protecting the environment (directly or indirectly) have entered into customary law through State practice and may, therefore, be applicable to non-international armed conflicts. Thus, the protection afforded by IHL is deficient in four important aspects: an incredibly high threshold for environmental damage, an ambiguous definition of the provisions which expressly address environmental damage; inadequate protection of elements of the environment as civilian objects; and the unsophisticated development of rules concerning non-international armed conflicts. So it is evident that quite a

lot of environmental destruction remains unregulated and that the law of war provisions relating to the environment are therefore in urgent need of improvement. Absent stringent and comprehensive regulation, environmental protection will remain at the mercy of the belligerent parties' good faith.

Patenting of Drugs and Pharmaceuticals: An Indian Perspective

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Abstract

Patent is one of the major forms of Intellectual Property Rights (IPRs) used in the pharmaceutical industry. Significant changes like provision of product patents and increase in the term of patent to 20 years were introduced in the Indian patent law, after India signed TRIPS Agreement in 1995. As a result the pro-industry approach adopted at the international level was slowly but surely introduced in India. This approach has raised many issues like access to cheap and affordable medicines to the poor and marginal sections of the society. Though its rigours were streamlined at the Doha Declaration to which India was a party, but the prevalence of patented drugs is still controlled by MNCs. The introduction of generic drugs in India might have some positive results but it does not seem to be quite visible. Criteria of patentability and different types of pharmaceutical patents currently being granted in India are described with the aim to provide the knowledge trend the pharmaceutical patenting are being granted. In this research paper an attempt is made to study the impact of pharmaceutical patenting in India in the post Doha Declaration scenario.

Keywords: *Product Patent, TRIPS, Doha declaration, public health, patentable drugs.*

1. Introduction

Intellectual Property (IP) is a kind of intangible property created with the efforts of human mind or intellect giving rise to multiple intellectual Property Rights recognised under law[1]. These rights are

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conferred upon the creator (inventor, author etc.) of these properties. It should be noted that although the intellectual property is intangible but the material form of the intellectual property which is tangible can only be protected through IP rights. Like any other property, intellectual property is also an asset, which can be bought, sold, mortgaged, licensed, exchanged or gifted to others[2]. The patenting of drugs and pharmaceuticals has given rise to many issues including right to access affordable prices and protections of investment in innovation. India has undertaken a major step to comply with the TRIPS executed at the international level especially her role in the Doha Declaration.

2. Development of Patent Law In India

Patent, trade mark, industrial design, geographical indication and copyright are some of the major forms of Intellectual Property Rights available in India[3]. The principal law for patenting system in India is the Patents Act, 1970[4]. Initially, according to the provisions of this law no product patent but only process patents could be granted for inventions relating to food, drugs and chemicals. However, since 2005 product patenting is allowed in India[5]. TRIPS prescribed the minimum standards of IP laws to be followed by each of its member countries. India being a signatory of the TRIPS agreement was under a contractual obligation to

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1 Cornish W.R. Intellectual Property Rights and Allied Rights, see for meaning of Intellectual property : www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450

2 See for details:www.wipo.int/edocs/pubdocs/en/intproperty/ 489/wipopub 489. pdf

3 Mathur V., Intellectual property rights and their Significance in Biomedical Research, Int J Bio Res 2012; 3(2): 74-78.

4 History of Indian Patent System | Intellectual Property India, Feb 14, 2017 , Intellectual Property India, www.ipindia.nic.in/history-of-indian-patent-system.htm

5 India being a member country of World Trade Organization (WTO) signed TRIPS (Trade Related Aspects of Intellectual Property Rights) Agreement in 1995.

amend its Patents law to make it compliant with the provisions of the agreement. The first amendment in this series was in the form of the Patents (Amendment) Act, 1999 to give a pipeline protection[6] till the country starts giving product patents. It laid down the provisions for filing of applications for product patents in the field of drugs and agrochemicals with effect from 1st January 1995 as mailbox applications and introduced the grant of Exclusive Marketing Rights (EMRs) on those patents[7]. To comply with the second set of TRIPS obligations India further amended the Patents Act, 1970 by the Patents (Amendment) Act, 2002[8]. Through this amendment product patent regime was introduced in India. Mere discovery of new form, new property or new use of a known substance was made patentable under certain conditions, provisions related to pre grant and post grant oppositions were modified and provision for the grant of compulsory license for export of patented pharmaceutical products in certain conditions was introduced[9].

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6 Pipeline Patent is an important concept instituted by the 1996' Industrial Property Law intended to remedy the absence of patent protection for invention in certain areas in the previous Law (Law 5,772/1971), namely chemicals, pharmaceutical processes and food purposes patents. See www.dannemann.com.br/dsbim/uploads/imgFCKUpload/file/Pipeline_patent.pdf

7 Shamnad Basheer , first mailbox opposition (gleevec) decided in India, de-coding Indian intellectual property law, see also Claudia Jurberg, Brazilian Generic Drug Registration Sets Standard For 'Pipeline' Patents , 13/05/2010 by for intellectual property watch.

8 Through this amendment provision of 20 years uniform term of patent for all categories of invention was introduced. This amendment also made other changes in the principal Act like definition of the term "invention" was made consistent with TRIPS agreement and provision for reversal of burden of proof in case of infringement suit on process patent was added in the Act. The third set of amendments in the patent law was introduced as the Patents (Amendment) Act, 20058.

9 Mathur V. Intellectual property rights and their significance in biomedical research. Int J Bio Res 2012; 3(2): 74-78.

3. Types of Pharmaceutical Patents In India

The Pharma industry is one of the most intense "knowledge driven" sectors. Outcome of the research can be in the form of a new, inventive and useful product or process. In this highly competitive market, it is imperative for the pharmaceutical companies to protect their inventions from any unauthorized commercial use by acquiring patent rights over the invented product or process. This classification is based on the list of Pharma patents provided by the Indian patent office on its website[10]. Pharmaceutical patents in India can be classified under following categories:

i. Drug Compound patents

These patents claim a drug compound by its chemical structure per se. These patent claims are usually referred as Markush type claims[11]. Drug compound patents provide the broadest possible protection to the company's product, since other companies are not allowed to prepare such drug by any route of synthesis or produce/ sell any formulation comprising this drug before the expiry of said patent.

ii. Formulation/ Composition Patents

These patents claim a specific technology to prepare a formulation and/or quantity of its key ingredients[12]. For example, an ayurvedic anti-retroviral composition for treatment of Acquired Immuno Deficiency

10 Over 20,000 registered pharmaceutical manufacturers exist in the country. The market share of multinational companies has fallen from 75% in 1971 to around 35% in the Indian pharmaceuticals market, while the share of Indian companies has increased from 20% in 1971 to nearly 65%. http://www.indiapharmachem.com see : Nilesh Zacharias and Sandeep Farias , Patents and the Indian Pharmaceutical Industry, BUSINESS BRIEFING: PHARMATECH 2002 at 42

11 A Markush claim is a claim with multiple "functionally equivalent" chemical entities allowed in one or more parts of the drug compound.

12 See 2106- **Patent** Subject Matter Eligibility available at: https://www.uspto.gov/ web/offices/ pac/ m pep/ s2106.html.

Syndrome was claimed in the India,[13] like, Guduchi or Giloe (cordifolium), Panash or Kathal (jack fruit), Tulsi or Krishna Tulsi (Holy Basil), *Bhui Amla or Bahu Patra* (Gooseberries) in combination with pharmaceutical acceptable excipients.

iii. Synergistic Combination Patents

Drug synergy occurs when two or more drugs interact with each other in such a way that it enhances or magnifies one or more effects of those drugs. Patents can be obtained on new synergistic combinations of the drugs.

iv. Technology Patents

These patents are based on the techniques used to solve specific technology related problems like stabilization, taste masking, increase in the solubility etc.

v. Polymorph Patents

Polymorphs are different physical forms or crystal structure of an already known compound. Polymorphs are usually prepared to reduce impurities or increase stability of the compounds. For example, Indian patent no. 237261 claims the crystalline form B4 of atorvastatin magnesium characterized by X-ray powder diffraction pattern[14] . Said crystalline form shows purity greater than 98%.

vi. Role of Section 3(d) in polymorph patenting

Grant of polymorph patents in India is mainly governed by the section 3(d) of the Patents Act, 1970. This section was amended under the Patents (Amendment) Act, 2005[15]. The section 3(d) aims to prevent

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13 patent no. 203986

14 Becourt, P, Chauvin J, Schwab D. , A pharmaceutical composition having a marked taste and method for the production thereof. Indian Patent IN 227933, 2009

15 The section 2(d) states:
...the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or

the "ever greening of patents" by providing that only those pharmaceutical derivatives that demonstrate significantly enhanced "efficacy" can be patented.

The section 3(d) ensures that the new forms can be patented only if they are really meritorious, and thus patents shall not be granted for trivial inventions. It throws light on the Indian government's policy of rewarding the inventors/ researchers on their true intellectual efforts and at the same time preserving the public interest and making them available essential commodities such as drugs at affordable prices.

vii. Biotechnology patents

Biotechnology involves the use of living organisms or biological materials in the preparation of pharmaceutical products. Biotechnology patents cover a wide range of diagnostic, therapeutic and immunological products. Indian patent no. 234072 was the first product patent granted by the Indian Patent office after the enactment of product patent regime in 2005. The patent is owned by F. Hoffmann-La Roche Ltd., Switzerland.

viii. Process patents

A process patent does not claim the product per se; rather it only covers a new and inventive process to produce a particular product. For

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the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant. Explanation - For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.

example, Indian patent no. 206678 claims a process to synthesize L-lactone of formula 3,6- dialkyl-5,6-dihydro-4-hydroxy-2h-pyran-2-one[16].

4. The Doha Declaration and Public Health: Global View

The adoption by Ministers on 14 November 2001, in Doha, of the Ministerial Declaration on the TRIPS Agreement and Public Health marked a turning point in political and legal relations at the WTO. Developing country Members sent a clear signal that they would take steps to protect and advance their essential interests. These Members demonstrated that by establishing a coalition, and maintaining it throughout a negotiating process, they could prevent themselves from being outmanoeuvred by the EU-US block.[17] The Doha Declaration represents a significant victory for developing countries in the arena of multilateral trade negotiations. It is a result of an initiative by developing countries, representing an important political statement and having significant legal implications, particularly for the interpretation of the TRIPS agreement[18]. In the context of WTO, as a product of the Doha Ministerial meeting, the Doha Declaration is in effect a "decision" of the Members under Art IV(1) and is consistent, being a product of consensus, with Articles IX(1) and (2) of the WTO Agreement[19]. This

16 Gunter G, Terzo S, Kumar SK. Patenting of pharmaceutical : An Indian Perspective, international journal of Drug Development and Research , 2012 p.27-34

17 Abbott, Frederick M., the Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO (March 31, 2002). Journal of International Economic Law, Vol. 5, p. 469, 2002. Available at SSRN: https://ssrn.com/abstract=1493725

18 DOHA WTO MINISTERIAL 2001: TRIPS, WT/MIN(01)/DEC/2 20 November 2001: Declaration on the TRIPS agreement and public health

19 This characterization is strengthened by the decision of the General Council of 30 August 2003 (pre-Cancun Agreement) which is explicitly framed as a decision made in terms of Paragraph 2 of Article IV of the WTO Agreement i.e. the General Council conducting the function of a Ministerial Conference in the interval between meetings.

latter decision, made explicitly in response to a request contained in Paragraph. 6 of the Doha Declaration, leaves no doubt as to the legal status and effect of the Doha Declaration. The developing countries affirmed:

We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.[20]

At the minimum the Doha Declaration, in elaborating on the relationship between TRIPS and public health, is clarifying the meaning of Article 8 of the TRIPS agreement, i.e. that there are cases in which private interests in intellectual property rights are subordinate to more compelling public interests; and that patent protection should not be used as a means of merely extracting high rates of return on pharmaceutical investments, rather then as a means to encourage the development of new medicines. While the Doha Declaration reaffirms the members' commitment to the TRIPS Agreement. It is important to recognize that it is also a response to dramatically changed circumstances—the HIV/AIDS pandemic—which would independently justify a readjustment of prior treaty commitments[21].

The TRIPS Agreement is a flexible legal instrument, and the decision of Ministers will prove significant in supporting interpretations

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20 See Haochen Sun, Reshaping the TRIPS Agreement concerning Public Health ---- Two Critical Issues clearer. see at: www.cid.harvard.edu/cidtrade/Papers/haochensun.pd

21 The origins of the Doha Declaration may be found in a number of developments in the period which followed the initial adoption of the TRIPS agreement.

that promote the protection of public health. While the Declaration does not resolve developing country concerns regarding access to medicines and TRIPS, it is a significant milestone[22].

5. Doha and Beyond

Despite the pre-Cancun decision there remain many areas of contention and possible dispute, particularly with respect to the interpretation of the conditions imposed in the Decision. In addition to conditions, the Decision imposes both bureaucratic and substantive obstacles to the use of this mechanism. The greatest impact seems to be the response of the brand-name industry which is now granting licenses to enable generic production in countries such as South Africa. The global pharmaceutical market and continuing TRIPS-plus negotiations including the inclusion of provisions preventing governments from using their bargaining power to negotiate for cheaper prices[23]

The questions of innovation, R&D and diseases effecting developing countries remains unresolved, as does the broader question of the relationship between TRIPS and the future of generic pharmaceutical production.

6. Doha Declaration and Public Health: National View

An expert on patents [24] classified countries according to their level of pharmaceutical development into five categories[25]:

22 See supra note 16

23 See PATENTS AND INNOVATION: TRENDS AND POLICY CHALLENGES, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, https://www.oecd.org/sti/sci-tech/24508541.pdf.

24 Balance et al (1992)

25 Countries with sophisticated pharmaceutical industry and research base 2. Countries with innovative capabilities. 3. Countries with reproductive capabilities: active ingredients and finished products. 4. Countries with reproductive capabilities-finished products from imported ingredients only. 5. Countries with no pharmaceutical capability.

The Doha Declaration has special significance for the countries having no pharmaceutical capability and hence vulnerable to the rigours of TRIPs Agreement. It is important to understand the structure, function and scale of the pharmaceutical business to fully appreciate the Doha Declaration and its effects. Only 10% of global health research (private and public combined) is devoted to diseases that account for 90% of the world's disease burden. Globally, of the 1393 new drugs approved for sale between 1975 and 1999, only 16 (a little over 1%) targeted tropical diseases and tuberculosis, which between them account for 11.4% of the global disease burden. The majority of these were developed outside the research laboratories of big pharmaceutical companies[26].

The transnational corporations represented by IFPMA issued a statement indicating agreement with the Declaration that "intellectual property protection is vital to trade access and innovation"[27]. WHO welcomed the ministers' conclusion "that the TRIPs agreement can and should be interpreted in a manner supportive of WTO members' right to protect public health and in particular promote access to medicines for all"[28]. Soon after, Doha Declaration backtracking was started by developed countries on the promises and commitments made in the Declaration on one pretext or another. The backtracking actually started

26 Patent filings by all the developing countries together in 2002 were 4.7%. The remaining 95.3% were filed by industrialized countries

27 The Doha Declaration on the TRIPS Agreement and Public Health, Essential Medicines and Health Products, World Health Organisation Publication. WHO 2017

28 World Trade Organization WT/Min (01)/DEC/W/2 14 November 2001 (01-5770) MINISTERIAL CONFERENCE, A joint statement by several major nongovernmental organizations including MSF, Oxfam and Health Action International indicated that they "would have liked to see stronger wordings" and that "now it is up to governments to use these powers to bring down the cost of medicines and increase access to life-saving treatments". NCE Fourth Session Doha, 9 - 14 November 2001

undermining the flexibilities already provided in the TRIPS agreement[29]. Effective use of compulsory licensing by countries not having manufacturing capacity emerged as a big debate. Then came the idea of "list of diseases[30]". The Director-General of the World Health Organization, Dr Gro Harlem Brundtland insisted on 14 January 2003 that one should be careful about excluding some diseases from the scope of the Doha Declaration on TRIPS and Public Health, and not limit the scope (for compulsory licensing and imports) to a few very prominent ones like HIV/AIDS, tuberculosis or malaria[31].

This agreement was received with relief by most stakeholders, though some still remained concerned, sceptically waiting for outcomes of the test of time to validate its applicability in real life[32].

7. Transfer of The Patent Rights

Since patent is a form of property, the rights vested with it can be transferred from the patentee to any other person through assignment or grant of license? The Indian Patent Act requires that an assignment or

29 Implications Of The Doha Declaration On The Trips Agreement And Public Health Carlos M. Correa University of Buenos Aires June 2002

30 The European Union, United States of America, Japan and Canada came up with the list of 22 diseases.

31 After many failed attempts and meetings came the decision of the TRIPS Council on implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, on 30 August 2003 (WT/L/540). This decision comprised 11 elaborately worded Articles, 9 footnotes and an annex, and is supplemented with a GC Chairperson's statement, to which "Best practices" guidelines are attached.

32 In this connection, certain relevant case studies including Canada's C54 patent bill, the United States' HR2427 bill regarding importation, and Egypt's and India's EMR and PTD litigations will be brought to discussion.

license of a patent must be in writing, clearly specifying all the terms and conditions governing the rights and obligations of the parties[33] .

I. Patent assignment

Assignment in general, is the act of transferring to another the ownership of one's property, means the interest and rights to the property. Assignment of patent rights is defined as a transfer by the patentee of all or part of its right, title and interest in a patent or patent application to any other person. The person to whom the right in patent is assigned is called the assignee and the person who assigns the right is called the assignor.

II. Patent licenses

A patentee may, by a license, permit others to make, use, or exercise, the invention which otherwise would not be allowed. Licensing of a patent transfers a bundle of rights which are limited as to time, geographical area, or field of use. A patent license may be a voluntary license or compulsory license.

III. **Voluntary license**

When the patentee at his/ her own wish, empowers another person to make, use or exercise the patented invention by a written agreement, it is called a voluntary license. The Indian patent office and the central government do not have any role in such license.

IV. **Compulsory license u/s 84:**

A compulsory license is a statutory license which can be granted to a third party by the Controller of Patents under certain conditions. Compulsory license under the Patent system is an involuntary contract between a willing buyer and an unwilling seller imposed and enforced

33 Harrington PJ, Hodges LM, Puentener K, Scalone M. Synthesis of 3,6-Dialkyl-5,6-Dihydro-4- Hydroxy-2h-Pyran-2-One. Indian Patent IN 206678, 2007.

by the government. Under compulsory license the government allows someone else to produce the patented product or process without the consent of the patent owner. Compulsory license may be granted on the following grounds mentioned under section 84 of the Patents Act, 1970 viz. (i) the reasonable requirements of the public with respect to the patented invention have not been satisfied, or (ii) the patented invention is not available to the public at a reasonably affordable price, or (iii) the patented invention is not worked in the territory of India[34]. However, compulsory license can be granted only after the expiration of three years from the date of the grant of a patent.

8. Natco Pharma Ltd., India v. Bayer Corporation, USA

In a land mark decision on 9th March 2012, Mr. P. H. Kurian, the then Controller of Patents issued the order of grant of first compulsory license for patents in India[35]. The compulsory license was issued to Natco Pharma Ltd., wherein M/S Bayer Corporation was holding the patent[36].

After getting this compulsory license Natco could manufacture and sell a generic version of Nexavar in RCC and HCC. Natco will have to pay a 6% royalty on the net sales to Bayer at the end of each quarter. Further, it cannot charge more than Rs 8800 for a monthly dose of 120 tablets of the drug. Natco has also committed to donate free supplies of the medicines to 600 needy patients each year as a condition of the compulsory license agreement[37].

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34 Section 68 of the Patents (Amendment) Act, 2005, No. 15 of 2005 (April 4, 2005).

35 Mansi Sood, *Natco Pharma Ltd. V. Bayer Corporation And The Compulsory Licensing Regime In India,* 6 NUJS L. Rev. 99 (2013)

36 This patent relates to drug Sorafenib tosylate sold under the brand name Nexavar by Bayer. Nexavar is indicated in Renal Cell Carcinoma - RCC (kidney cancer) and Hepatocellular Carcinoma – HCC (liver cancer).

37 Above decision was based on the grounds for the grant of compulsory license mentioned under section 84 of the Patents Act, 1970.

In the instant case Controller found that the reasonable requirements of the public with respect to the patented invention had not been satisfied since only 2% of the total kidney and liver cancer patients were able to access the Bayer's drug. The Controller determined that the patented invention was not available to the public at a reasonably affordable price because Bayer was charging about Rs 2.8 lakh for a therapy of one month of the drug. The Controller also found that the patented invention was not worked in the territory of India since Bayer was not manufacturing the product in India rather it was importing it from outside India[38].

9. Compulsory License For Export of Patented Pharmaceutical Products

Section 92A of the Patents Act, 1970 states that compulsory license may be issued for manufacture and export of patented pharmaceutical products to any country having insufficient or no manufacturing capacity in the pharmaceutical sector for the concerned product to address public health problems, provided that such country has granted compulsory license or allowed the importation of patented pharmaceutical products from India[39].

This provision addresses the public health concerns of the countries having insufficient or no manufacturing capacity in the pharmaceutical sector to implement the decision of the TRIPS council on Para 6 of the Doha Declaration on TRIPS Agreement and Public Health[40].

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38 Some analyses, particularly by the pharmaceutical industry, have stressed that access to drugs is fundamentally determined by non-IPR factors, such as health infrastructure and medical services. See, e.g., IIPI See also the US submission to the Council of TRIPS (IP/C/W/340, 14 March 2002

39 Natco Pharma Ltd., India v. Bayer Corporation, USA. C.L.A No. 1 of 2011. March 9, 2012. P. H. Kurian, Controller of Patents, Mumbai. Available from

40 As per this provision the compulsory license is available only for (a) the patented pharmaceutical product (b) manufacture and export to any

10. TRIPS and Access to Medicines For All

The Doha declaration emphasised on the concept of medicine for all as a war cry to secure health and human security. Reference was also made to Para 4, Doha Declaration on TRIPS and Public Health, where the concept of Medicine for All was emphasized:

We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all. In this connection, we reaffirm the right of WTO Members to use, to the full, the provision in the TRIPS Agreement, which provide flexibility for this purpose[41].

11. TRIPS and Drug Access: Local Industry Perspective

The WTO era should be appreciated on both political and economic lines. From a political angle, it must be understood that in the current unipolar world, policies are almost dictated across the board. This era is also characterized by new and political definitions of terrorism and international legitimacy; national feelings are fading and geography is no longer a defining element. Social rest or unrest is to be closely watched in the wake of these characteristics of the era. In economic terms, the world is moving towards fewer tariffs, i.e. fewer obstacles to trade.

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country having insufficient or no manufacturing capacity in the pharmaceutical sector and (c) the product addressing the public health problems in such country.

41 Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health Decision of the General Council of 30 August 2003: GENERAL COUNCIL WT/L/540 and Corr.1 1 September 2003

Quality is being given primary importance, and in this phenomenon there is no concept of nationality[42].

A comparison was made of the distribution of personnel in an American versus Jordanian generic pharmaceutical company. In the American company, more people worked on the side of production and packaging, and quality and regulatory affairs. In the Jordanian company, relatively more human resources were engaged in R&D, marketing and sales, administration and finance, warehouse and storing, and maintenance. Trends towards enlarging the business organization are on the rise, as seen in the growing number of mergers and acquisitions. In the name of more competition actually more unfair competition, unfair competition is escalating. Global dispute forums are also being made available; however, WTO is an organization influenced by political parties even in the presence of dispute resolving mechanism.[43]

Multinational companies now seem to want a total monopoly. They also want control over all the marketing steps ranging from patented drugs, generic versions and all the distribution channels. Against this backdrop, the future of local industry in developing countries is either to group into larger organizations or stays small, with gradual erosion of profit margins[44].

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42 GATT Article XX: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ... (b)necessary to protect human, animal or plant life or health;"

43 The "necessity" test, central to those provisions, is not mentioned in the Doha Declaration. On the application of such test in GATT/WTO jurisprudence, see e.g., Correa (2000)

44 Multinationals and Monopolies., Pharmaceutical Industry in India after TRIPS (Working Paper Series - WPS No. 685/November 2011) (2011; 39 pages)

Various deliberate strategies and techniques are used by the multinational companies to keep hold on patents and to extend the patent protection term of their products[45]. Strategies used by the multinational companies to extend the life of their patented products include composition patents; new use patents; process patents; and environment-friendly composition patents[46].

12. Conclusion

Medicines without social justice are unacceptable. Patents are not the gift for drug companies to exercise power without responsibility.However, the concerns of pharmaceutical companies cannot be altogether given away. How will the drug companies survive to do further research and go on producing life saving drugs of the future if they sell their drugs at a loss? human life is sacred and cannot be measured out by twenty year monopolies for huge financial gain. Human life is a right and a right for everyone, not just the rich. Poor people have the right to good health, and therefore to medicines for the treatment of poverty-related diseases. It is quite true that a huge amount of money and valuable resources including time are spent in medical research, but then shouldn't the benefits filter down to those people who really need the fruits of medical research? After all human beings are not machines, they are individuals with feelings, aspirations, hopes and the will to live.

The India patent law is an exemplary piece of patent legislation that is aimed to balance the interests of both the common man and the inventors. After the introduction of product patent regime a wide range of pharmaceutical products can be patented in India. Organizations such

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45 *THE GLOBAL POLITICS OF PHARMACEUTICAL MONOPOLY POWER* Drug patents, access, innovation and the application of the WTO Doha Declaration on TRIPS and Public Health Ellen F.M. 't Hoen, AMB 2009

46 Sudip Chaudhuri, Multinationals and Monopolies Pharmaceutical Industry in India after TRIPS, 2011

as academic institutions and universities not having sufficient manufacturing or marketing capacities can use patents as an effective tool for the technology transfer. These organizations can outsource their patented products/ processes to third parties and in return they can earn revenues to recoup the investments made in the development of such products/ processes. Compulsory license provide an opportunity to market the patented products under certain conditions.

There is need to carry on a forecasting study on the possible contents and changes in the Essential List of Drugs during the coming years. More in-depth studies should be carried out on the real cost of drug research and development as well as drug pricing policy. Developing countries should be supported to use all possible cost containment strategies to ensure access to medicine for all. It is important to develop a sustainable system for drug financing through an appropriate social health insurance system.

Constitutional Protection of Special Laws: A Historical Retrospect

Shazia Ahad Bhat*

Abstract

The relationship between violence, power and the law is especially evident to those committed to democratic values. There is an overwhelming play of violence as power and Power as violence, sometimes in breach of the law and sometimes as a tool for its enforcement. If violence in society is perceived as a breach of the law, the law itself is equally violent and in fact has an even more debilitating effect because of its systematic and thorough ruthlessness backed by official sanction. In the present research paper, an attempt has been made by the author to deeply analyze the provisions of various special laws so as to perceive their true nature and their effects when implemented practically.

Keywords: *Democratic Values, Violence, Power, Debilitating Effect, Special Laws.*

I. Introduction

While declaring India a Sovereign, Socialist, Secular, Democratic and Republic, the Constitution of India, in its preamble, identifies, justice, liberty, equality and fraternity as the foundational principles of the Indian State. To give effect to these goals, the Constitution incorporates a Bill of Rights entitled "Fundamental Rights" in Part III and "Directive Principles" of State Policy in Part IV . The Rights have their origins in many sources, including England's Bill of rights, the United States Bill of Rights and France's Declaration of the Rights of Man. Fundamental Rights guaranteed under the Constitution include the right to equality, freedom and personal liberty, the right to religion, the right to Constitutional remedies and the right against exploitation. The Directive Principles include non-enforceable socio-economic rights to supplement enforceable civil and political rights contained in the

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fundamental rights chapter. Also termed fundamental obligations,[1] Directive Principles are to be used as yardsticks to measure the Government's performance. The chapters on Fundamental rights and Directive Principles are said to form the "Conscience of the Constitution". The Fundamental Rights are defined as:

"*Basic human freedoms which every Indian citizen has the right to enjoy for a proper and harmonious development of personality. These rights universally apply to all citizens, irrespective of race, place of birth, religion, caste, creed, colour or gender".*

It is equally the duty of the union and the states to not only respect the fundamental rights conferred upon the citizens of India by part III of the Constitution of India, they are also under an obligation to ensure the conditions wherein the citizens can enjoy and avail of the fundamental and other rights available to the citizens.[2] In case of fundamental rights, personal liberty is the most important of all fundamental rights. Articles 19 to 22 deal with different aspects of this basic right. Taken together these four articles form a chapter on personal liberties which provides the backbone of the chapter on fundamental rights. The foremost amongst these are the six fundamental rights in the nature of the freedoms which are guaranteed to the citizens by Art.19 of the Constitution. The six fundamental rights recognized by the Constitution are:

1. Right to equality, including equality before law, prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, and equality of opportunity in matters of employment, abolition of untouchability[3] and abolition of titles[4].

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1 AsmitaBasu, "Routinizationof the Extraordinary: A Mapping of Security Laws in India" 4. *Available at*: http://www.southasianrights.org/wp-content/uploads/2009/10/IND-Security-Laws-Report.pdf. (last visited on Mar. 24, 2013).

2. Y. Premananda Singh, 'The Armed Forces Special Powers Act, 1958: Legal and Human Rights Issues' *Chotanagpur Law Journal*, vol.3, no.3, 99(2010-11).

3. Article 17 of the Constitution abolishes the practice of untouchability. Practice of untouchability is an offence and anyone doing so is punishable

2. Right to freedom which includes speech and expression, assembly, association or union or cooperatives, movement, residence, and the right to practice any profession or occupation. Right to life and liberty, right to education, protection in respect to conviction in offences and protection against arrest and detention in certain cases[5].

3. Right against exploitation, prohibiting all forms of forced labour, child labour and traffic in human beings[6].

4. Right to freedom of religion, including freedom of conscience and free profession, practice, and propagation of religion, freedom to manage religious affairs, freedom from certain taxes and freedom from religious instructions in certain educational institutes[7].

5. Cultural and Educational rights preserving right of any section of citizens to conserve their culture, language or script, and right of minorities to establish and administer educational institutions of their choice[8].

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by law. The Untouchability Offences Act of 1955 (renamed to Protection of Civil Rights Act in 1976) provided penalties for preventing a person from entering a place of worship or from taking water from a tank or well.

4 Article 18 of the Constitution prohibits the State from conferring any titles. Citizens of India cannot accept titles from a foreign State.

5 The Constitution of India contains the right to freedom, given in Articles 19, 20, 21 and 22, with the view of guaranteeing individual rights that were considered vital by the framers of the Constitution. It is a cluster of four main laws.

6 The right against exploitation, given in Articles 23 and 24, provides for two provisions, namely the abolition of trafficking in human beings and Begar (forced labour), and abolition of employment of children below the age of 14 years in dangerous jobs like factories and mines.

7 Right to freedom of religion, covered in Articles 25, 26, 27 and 28, provides religious freedom to all citizens of India. The objective of this right is to sustain the principle of secularism in India. According to the Constitution, all religions are equal before the State and no religion shall be given preference over the other.

8 As India is a country of many languages, religions, and cultures; the Constitution provides special measures, in Articles 29 and 30, to protect the rights of the minorities. Any community which has a language and a script of its own has the right to conserve and develop it. No citizen can be discriminated against for admission in State or State aided institutions

6. Right to Constitutional remedies for enforcement of fundamental rights[9].

7. Right to property[10] was originally a fundamental right, but is now a legal right.

The writers of the Constitution regarded democracy of no avail if civil liberties, like were not recognized and protected by the State[11]. According to them, "Democracy" is, in essence, a government by the opinion and therefore, the means of formulating public opinion should be secured to the people of a democratic nation. For this purpose, the Constitution guaranteed to all the citizens of India various freedoms in the form of the fundamental rights. These fundamental rights help not only protection but also the prevention of gross violations of human rights. They emphasize on the fundamental unity of India by guaranteeing to all citizens the access and use of the same facilities, irrespective of background.

II. Fundamental Freedoms: Reasonable Restrictions

The right of the state and the right of man in the jurisprudence of the new world order and the rule of law must be compatible. Unrestrained liberty would lead to anarchy and disorder. Man can enjoy rights, as long as there exists order in the society[12]. The freedoms

9 Right to Constitutional remedies empowers the citizens to move a court of law in case of any denial of the fundamental rights the courts can issue various kinds of writs. These writs are habeas corpus, mandamus, prohibition, quo warranto and certiorari.

10 Art 19(f) guaranteed to the Indian citizens a right to acquire, hold and dispose of property. Art 19(5) however, permitted the state to impose by law reasonable restrictions on this right in the interests of the general public or for the protection of the interests of any schedule tribe. Arts 19(1)(f) and 19(5) have been repealed by the Constitution 44th amendment act, 1979. The right to property continues to be a fundamental right in the State of J&K because 44th amendment has not been extended to the State.

11 The term "State" includes all authorities within the territory of India. It includes the Government of India, the Parliament of India, the Government and legislature of the states of India. It also includes all local or other authorities such as Municipal Corporations, Municipal Boards, District Boards, and Panchayats etc.

12 See Ed, M. Shabir, *Human rights in the 21st century: Challenges Ahead,* Rawat publications New Delhi, 328(2008).

guaranteed by Article 19 (1) are not absolute as no right can be. Each of these rights is liable to be controlled, curtailed and regulated to some extent by laws made by Parliament or the State Legislatures. Accordingly, clauses (2) to (6) of article 19 lays down the grounds and the purposes for which a legislature can impose 'reasonable restriction[13]' on the rights guaranteed by Article 19[14]. Hence a restriction to be constitutionally valid must satisfy the following two tests:

(i) The restriction must be for the purposes mentioned in clauses 2 to 6 of Art. 19.

(ii) The restriction must be a reasonable restriction.

It means every, legislation is set with the aim of achieving an objective. In achieving those objects, the legislations should not arbitrarily invade upon the rights of a citizen. The restriction should look at the set objects that the legislation seeks to achieve and it should establish a close link with such object of the legislation i.e. a balance between the freedoms guaranteed under Art. 19 (1) (a) to (g) and the social control permitted by clauses (2) to (6) of Art. 19. It is the substance of legislation and not its appearance or form which is to be taken into consideration while assessing its validity. Clause (2) of Article 19 specifies the grounds on which the freedom of speech and expression may be restricted. It enables the legislature to impose reasonable restrictions on the right to free speech "in the interests of" or "in relation to" the following:

1. Sovereignty and integrity of India[15].

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13 The phrase "reasonable restriction" connotes that the limitation imposed upon a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interest of the public. The word reasonable implies intelligent care and deliberation that is the choice of a course which reason dictates.

14 Romit Raja Srivastava, "*Test to Determine Reasonable Restrictions under Article 19 of The Constitution of India*" 3 (2012).*Available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2135681(last visited on Feb. 21, 2013)..

15 *Zameer Ahmed Latifur Rehman* v. *State of Maharashtra,* AIR 2010 SC 2633:2010(5) SCC 246; *Mr. Dharambir Khattar* v. *CBI,* on 21 Jun. 2011(Central Information Commission).

2. Security of the State[16].
3. Friendly relations with foreign states[17].
4. Public Order[18].
5. Decency and Morality[19].
6. Contempt of Court[20].
7. Defamation[21].
8. Incitement to an offence[22].

However, reasonable restrictions under these heads can be imposed only by an enacted law and not by an executive action[23].

III. Reasonable Restriction: Justification

Reasonable ground of restriction on the individuals fundamental rights, find a place in almost all the Constitutions of the world including the Indian Constitution. Like, individual every state has the inherent right of self defence. This right is available to the state when its existence is threatened. That is why the state may exercise abnormal powers during an emergency and deviate from its normal obligation to protect and enforce human rights of its citizens. But as rights and fundamental freedoms are not absolute, the right of derogation of the state is not an absolute one. There are certain rights, which must remain unaffected, even during public emergencies. Emergency or no emergency, these rights cannot be suspended. The state can exercise the right of derogation to meet the threat to national security. But there have been numerous assaults on people's rights and liberties in the name of national security. Such assaults include arbitrary search and seizure,

16 *Romesh Thappar* v. *State of Madras,* AIR 1950 SC 124.
17 *Jagan Nath* v. *Union of India*, AIR 1960 SC 675: (1960)2 SCR 942.
18 *Supdt., Central Prison* v. *Ram Manohar Lohia,* AIR 1960 SC 633.
19 *Ranjit Udeshi* v. *State of Maharashtra,* AIR 1976 SC 881.
20 *L.R. Frey* v. *R. Prasad,* AIR 1958 Punjab 377; *Narmada Bachao Andolan* v. *union of India,* AIR 1999 SC 3345, 3347.
21 *Tata Sons Limited* v. *Greenpeace International & Anr,* on 28 Jan. 2011, Del.; *S. Gurusamy Reddiar* v. *R. Purushothama Reddiar,* on 10 Jul. 2012, Mad.
22 *State of Bihar* v. *Shaila Bala Devi,* AIR 1952 SC 329.
23 *Express Newspapers (P) Ltd.* v. *Union of India*, (1986) 1 SCC 133; *Bijoe Emmanuel* v. *State of Kerala,* (1986)3 SCC 615.

arbitrary arrests and detention, denial of the appeal to the judiciary, resort to torture and even liquidation of suspects/accused in custody, so on and so forth. Thus, it looks that there exists antagonism between right of man and national security but in fact, there is a close relationship between them. The question is how far individual's right can be sacrificed to promote national security when human rights cannot be exercised without national security. This question cannot be answered unless the concept of national security can be properly understood, and is distinguished from security of regime/individual.

The international commission of jurists rightly notes[24]

"Having dismantled the legal machinery for the protection of the citizens, they (individuals/ and regimes) frequently permit their security forces to abuse the non- derogable rights including the right to life or freedom from the torture or other cruel, inhuman or degrading treatment or punishment[25]. Therefore, one should be cautious. Individual interest should not be confused with national interest. We need to identify the real agenda behind the use of force. Is it personal vendetta or is it designed to restore and maintain order, so that the citizens not challenging the state can continue a peaceful life. However, under no circumstances, the national security shall be set up as a plea for repudiation of basic and non derogable rights such as the right to life and freedom from torture by the state machinery".

24 R.S.Saini: *Custodial Torture In Law And Practice With Reference To India. Available at:*http://14.139.60.114:8080/jspui/bitstream/123456789/17566/1/007_Custodial%20Torture%20in%20Law%20and%20Practice%20with%20Reference%20to%20India%20%28166-192%29.pdf (last visited on Aug. 12, 2017).

25 United Nations Convention against Torture is an international human rights instrument, under the review of the United Nations that aims to prevent torture and cruel, inhuman degrading treatment or punishment around the world. As of May 2013, the Convention has 153 state parties. India has signed the convention on 14 Oct. 1997 and is yet to ratify it.

IV. Need for Special Law

India is facing multifarious challenges in the management of its internal security[26]. The internal security environment has deteriorated in various parts of the country since long due to ongoing low intensity conflict operations in their various forms. Insurgency, militancy and terrorism are the result of some of the peculiar socio political situations, some of which are also engineered and abetted by our adversaries[27]. There is an upsurge of terrorist activities, intensification of cross border terrorist activities and insurgent groups in different parts of the country. Terrorism has immensely affected India. The reasons for terrorism in India may vary vastly from religious cause and other things like poverty, unemployment and under-development etc. The Supreme Court took a note of it in *Kartar Singh* v. *State of Punjab*[28].Where it observed:

The country has been in the firm grip of spiraling terrorist violence and is caught between deadly pangs of disruptive activities.

Terrorism has now acquired global dimensions and has become the challenge for the whole world. The reach and methods adopted by terrorist groups and organization take advantage of modern means of communication and technology using high tech facilities available in the form of communication system, transport, sophisticated arms and various other means. Terrorism, organized crime, autonomy, and public disorder are amongst the harms these special laws seek to prevent and punish. In addition to national laws, many Indian states have state laws simultaneously regulating these harms. These "special laws" operate alongside India's ordinary substantive and procedural criminal codes. Governments advocating special laws argue that ordinary criminal law

26 Acharya: *Anti-terrorism laws in India*: *Distinguishing Myth & Reality* (Oct. 11, 2010). *Available at:*http://www.legalservicesindia.com/article/article/anti&-8208-terrorism-laws-in-india-382-1.html ISBN No: 978-93-82417-01-9, (last visited on Jan. 15, 2013).

27 Human rights and Indian armed forces in low intensity, *Available at:* http://www.ukessays.com/essays/human-rights/human-rights-and-indian.php. (Last visited on Dec, 12. 2012).

28 (1994) 3 SCC 569.

cannot address certain dangers, and therefore these particularly serious dangers require a tailored response.

V. Special Laws: Constitutional Protection

Violence created by human being only can be regulated and controlled by rule of law. In reference to violence in North-eastern states of India are facing disturbance and unrest in their life. State administration tried to maintain its internal disturbance under draconian laws. After application of these laws, debate arose in the society for protection of human rights of general people. Reasonability and fairness is the proper test of the law for the protection of human rights, for the purpose, it requires application of law with complete intelligence of human being, because law is always tool for regulating, controlling, and maintaining peace and order in the society[29]. Violence perceived to threaten national security and public order may be broadly categorized into two.

In the first category are armed struggles for secession in Punjab and Jammu and Kashmir and insurgency in the North East. In the second category are terrorism, organized crime, violence based on communal and caste conflicts, and armed resistance emanating from the denial of basic rights and entitlements. In the latter category, terrorism features prominently".

There are broad categories of Security laws:

- *First,* Special national laws that apply in non-emergency situations such as preventive detention laws of the past aimed towards preventing an individual from acting in a manner prejudicial to the defence or security of the country to the current Unlawful Activities Prevention Act[30], which was amended in 2008 to curb, *inter alia*, terrorist activities.

29 S.D. Sharma, '*Draconian Laws for Curbing Terrorism within the Gamut of Human Rights'*, p. 320; In Civil and Military Law Journal (Vol. 48, No. 4, October-December 2012.*Available at*: http://shodhganga.inflibnet.ac.in/bitstream/10603/90365/8/08_chapter%203.pdf(last visited on Aug.12, 2017).

30 Act No.37 of 1967.Provide for the more effective prevention of certain unlawful activities of individuals and associations and for matters

- *Second,* the areas of specific Central laws enacted by the Central Government, these laws are applied to select areas to deal with insurgencies and militancy. The earliest enactment is the Armed Forces Special Powers Act, 1958[31] that covers the North East and was later extended to the state of Jammu and Kashmir[32] this law continues to be in force.

- *Third,* Special laws enacted by State Governments to deal with public order and organized crime. Examples being the Chhattisgarh Special Public Security Act, 2005[33], the Jammu and Kashmir Public Safety Act, 1978[34], the Maharashtra Control of Organized Crimes Act, 1999[35].

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connected therewith. Be it enacted by Parliament in the eighteenth Year of the Republic of India.

31 Act No. 28 of 1958.It was initially known as armed forces (Assam and Manipur) special powers act, 1958. The present act was because of the amendment act 7 of special powers ordinance, 1958 promulgated by the President of India on 25-5-1958.

32 Act No. 21 of 1990. Provide certain special powers to be conferred upon members of the armed forces in the disturbed areas in the state of Jammu and Kashmir. Be it enacted by Parliament in the forty first year of the republic of India W.e.f 5th, July, 1990.

33 Chhattisgarh Special Public Security Act, 2005 is a law in the state of Chhattisgarh passed by the Chhattisgarh assembly in Dec. 2005. The Bill received the assent of the President of India and was brought into effect by notification issued on 12 Apr. 2006.This Act was ostensibly meant to combat growing Maoist violence. The CSPSA provides provisions authorize the police to detain a person for committing acts, which among other things, show a "tendency to pose an obstacle to the administration of law."

34 Act No. 6 of 1978.This is a State Act which applicable to Jammu and Kashmir State only it is enacted by the Jammu and Kashmir State Legislature in the Twenty-ninth Year of the Republic of India.

35 Act No. 30 of 1999.MCOCA is law enacted by Maharashtra state in India in 1999 to combat organized crime and terrorism. The preamble to MCOCA says that "the existing legal framework, i.e. the penal and procedural laws and the adjudicatory system, are found to be rather inadequate to curb or control the menace of organized crime. Government has, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of organized crime."It is hereby enacted in the Fiftieth Year of the Republic of India W.e.f 24th Feb 1999.

Before embarking on an analysis of these laws a preliminary and perhaps obvious point to be made is that the state has the power to enact laws to safeguard 'public order' and protect its citizens from violent attacks. However the question is whether the exercise of this power has been within reasonable limits and not to the "abandonment of governance and civilized conduct on part of the state". The question of reasonableness arises not only with regard to the power to enact laws but also vis-à-vis the manner in which such laws are enforced. The standard of reasonableness to which such laws should be held is laid down in constitutionally guaranteed human rights that act to limit state power and prevent unreasonable intrusion into personal liberty and fundamental freedoms.

VI. Special Laws: An Analysis

The provision of preventive detention had existed in India even before the adoption of the Constitution in 1950. *Bengal Regulation* 111 of 1818 (the Bengal State prisoners Regulation)[36]provided that there can be no limitation upon the powers of the government to detain our Indian native on the grounds of mere suspicion. Another such draconian provision was Rule 26 of the rules framed under the *Defence of India Act,* 1939[37], which authorized the British government in India to detain a person whenever it was satisfied with respect to that particular person that such detention was necessary to prevent him from action in any manner prejudicial to the defence and safety of the country and the like[38]. After independence in 1947, preventive detention was continued in India as an instrument to suppress apprehended breach of public order, public safety and the like[39]. The first national law on preventive detention was the draconian *Preventive Detention Act,* 1950[40], which was brought into force within weeks of adopting the Constitution.

36 *Birpal Singh* v. *King Emperor,* (1946) 48 Bom LR 493.
37 *Tahersssssally Mahomedally Kajiji* v. *Chanabasappa Mallappa Warad,* (1943) 45 Bom LR 422.
38 *Emp*. v. *Sibnath*, A. 1945 P.C 156.
39 Basu D.D, *Introduction to the Constitution of India* 112(Nagpur: Wadhwa & Company, 2002).
40 *A.K Gopalan* v.*State of Madras* ,AIR 1950 SCR 88.

Although this law lapsed in 1969, *the Maintenance of Security Act*[41], enacted in 1971, brought back many of its provisions on preventive detention. In 1974, Parliament passed the *Conservation of Foreign Exchange and Prevention of Smuggling Activities Act*[42]. It was intended as an economic adjunct of the MISA. MISA was repealed in 1978. *The National Security Act*[43]passed in 1978. It was meant to strengthen the central and state governments to maintain public order and to uphold the unity and integrity of the country. The National Security Act, 1980, which continues to be in force today, retains some of the PDA and MISA provisions and allows preventive detention for a maximum period of 1 year[44]. With the rise of terrorism-related activities in Punjab and elsewhere, the Union Government passed the *Terrorist and Disruptive Activities Prevention Act*[45] in 1985 Other than national laws; State Governments too, have enacted State laws with provisions on preventive detention[46]. Some important Special laws are discussed as follows:

i. Maintenance of Internal Security Act, 1971

The Maintenance of Internal Security Act was a controversial law passed by the Indian Parliament in 1971 giving the administration of

41 *Khudiram Das* v.*State Of West Bengal,* 1975 SCR (2) 832.

42 The "Conservation of Foreign Exchange and Prevention of Smuggling Activities Act" is an Indian law passed in 1974 trying to retain foreign currency and prevent smuggling"; see *Ichhu Devi Choraria* v. *Union of India,* AIR 1980 SC 1983:(1980)SCC 531.

43 Act No. 65 of 1980. Provide for preventive detention in certain cases and for matters connected therewith. Be it enacted by Parliament in the thirty-first Year of the Republic of India.

44 See s. 13 of the National Security Act, 1978.

45 "Terrorist and Disruptive Activities Prevention Act", commonly known as TADA, was an anti-terrorism law which was in force between 1985 and 1995 (modified in 1987) under the background of Punjab insurgency and was applied to whole of India. It came into effect on 23 May 1985.It was renewed in 1989, 1991 and 1993 before being allowed to lapse in 1995 due to increasing unpopularity due to widespread allegations of abuse. It was the first anti-terrorism law legislated by the Government to define and counter terrorist activities.

46 State Governments have the power to enact such laws under Entry 3 of List III, i.e. the "Concurrent List", that allows Parliament and state legislatures to pass preventive detention laws in times of peace for "the maintenance of public order or maintenance of supply and services essential to the community."

Prime Minister Mrs. Indira Gandhi and Indian law enforcement agencies super powers like, indefinite "preventive" detention of individuals, search and seizure of property without warrants, telephone and wiretapping, and x ray vision - in the quelling of civil and political disorder in India, as well as countering foreign inspired sabotage, terrorism, subterfuge and threats to national security. The legislation gained infamy for its disregard of legal and Constitutional safeguards of civil rights, especially when "going all the way down" on the competition, and during the period of national emergency as thousands of innocent people were believed to have been arbitrarily arrested, tortured and in some cases, forcibly sterilized[47].

ii. Unlawful Activities Prevention Act, 1967

The National Integration Council[48] appointed a Committee on National Integration and Regionalization to look into, *inter alia*, the aspect of putting reasonable restrictions in the interests of the sovereignty and integrity of India. Pursuant to the acceptance of the recommendations of the Committee, the Constitution Sixteenth Amendment Act, 1963 was enacted to impose, by law, reasonable restrictions in the interests of the sovereignty and integrity of India, on the freedom of speech and expression, right to assemble peaceably and without arms and right to form associations or unions. In order to implement the provisions of the 1963 Act, the Unlawful Activities Prevention Bill was introduced in the Parliament. The object of this Bill was to make powers available for dealing with activities directed against the Integrity and Sovereignty of India. The Bill was passed by both the Houses of Parliament and received the assent of the President on 30th

47 Background Information on Repressive Laws in India, *Indian Social Action Forum (INSAF)* Compiled by: Aagney Sail, Law Graduate, Delhi University, 5 (Sep. 2007). *Available at:*http://www.binayaksen.net/wp-content/uploads/indian_repressive_laws.pdf.(Last visited on Mar.. 12, 2016).

48. The "National Integration Council" is a group of senior politicians and public figures in India that looks for ways to address the problems of communalism, casteism and regionalism .The NIC met for the first time in June 1962. The fourteenth meeting was held in New Delhi on 13 Oct. 2008. The latest fifteenth meeting was held on 10 Sep. 2011 in New Delhi.

Dec. 1967. This law[49] accords the power to declare "any association that engages in activities that support any secession claims" or "disclaims, questions, disrupts" the Sovereignty and territorial Integrity of India or causes disaffection against India. Once an association is declared unlawful, the Central Government has broad powers to restrict its activities and criminalize individual involvement with such associations. The UAPA was designed to deal with associations and activities that questioned the territorial integrity of India. The ambit of the act was strictly limited to meeting the challenge to the territorial integrity of India. The Act was a self-contained code of provisions for declaring secessionist associations as unlawful, adjudication by a tribunal, control of funds and places of work of unlawful associations, penalties for their members etc. The Act has all along been working holistically as such and is completely within the purview of the Central list in the 7th Schedule of the Constitution.

In its definition of 'terrorist act" the UAPA includes any act with the intent to threaten or likely to threaten the Unity, Integrity, Security or Sovereignty of India or likely to strike terror in the people in India or any foreign country. The definition then enumerates the means that may be used in perpetrating the terrorist act such as bomb making, using firearms or biological weapons or any other means of whatever nature. The latter is a catchall phrase that may be expansively interpreted. The possibility of indiscriminate use of Special laws is compounded by the fact that these laws allow departures from regular Criminal Procedural laws, which afford the police significant procedural advantage. Under the UAPA, officers of designated authorities may search any person or property, seize any property or arrest any person if there is a "reason to believe" that an offence has been committed[50]. This is a deviation from the standard of arrest on "reasonable suspicion" and searches on

49. This law was amended twice in 2004 and 2008 to include counter terrorism provisions, some of which were contained in previous anti-terror laws ,namely the Terrorist and Disruptive Activities Act, 1987 and the Prevention of Terrorism Act, 2002.
50. See s. 43A of Unlawful Activities Prevention Act.

"reasonable grounds" laid down in the Code of Criminal Procedure. Another deviation from the Code of Criminal Procedure is that the UAPA requires the police to inform an individual of the grounds of arrest "as soon as may be" instead of "forthwith" of the "full particulars of the offence for which he is arrested[51]". In the absence of a clear time stipulation there is a high chance of the detenu being kept in the dark regarding the grounds of his/her arrest for considerable periods, which, in turn, undermines his/her ability to take appropriate remedial action. This is clearly violative of fair trial norms.

iii. Terrorism and Disruptive Activities Prevention Act, 1987

Commonly known as TADA, was enacted shortly after the then Prime Minister Indira Gandhi's assassination in 1985, the TADA was specifically aimed at penalizing "terrorist acts" the Act was the first and the only legislative effort by the Union Government to define and counter terrorist activities. It was formulated in the backdrop of growing terrorist violence in Punjab which had its violent effects in other parts of the country too, including capital New Delhi. This law granted broad ranging powers to law enforcement agencies that went well beyond those prescribed under the Code of Criminal Procedure and the Indian Evidence Act. To illustrate, in a marked departure from established notions of fair trial, confessions of detainees in police custody were made admissible as evidence in legal proceedings, a practice that is expressly prohibited under the IEA. TADA was used more as a preventive detention law and tool of misuse by the police rather than an effective counter-terrorism strategy. This Act had much more stringent provisions than the UAPA and it was specifically designed to deal with terrorist activities in India. When TADA was enacted it came to be challenged before the Apex Court of the country as being unconstitutional. The Supreme Court of India upheld its Constitutional validity on the assumption that those entrusted with such draconic statutory powers would act in good faith and for the public good in the

51. See ss. 418 & 165 of the Code of Criminal Procedure.

case of *Kartar Singh v. State of Punjab*[52] . However, there were many instances of misuse of power for collateral purposes. The Act, which was criticized on various counts by human rights organizations and political parties, was permitted to lapse in May 1995 though cases initiated, while it was in force continue to hold legal validity. In Feb. 2011, in an appeal against a conviction under TADA, the Supreme Court held that "mere membership of a banned organization will not make a person Criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence[53].

In case of *Ashraf khan* v. *State of Gujarat*[54] it was held that:

While resorting to TADA, the safeguards provided therein must scrupulously be followed. The gravity of the evil to the community from terrorism furnishes an adequate reason for invading the personal liberty except in accordance with the procedure established by the Constitution and the laws.

iv: Prevention of Terrorist Act, 2002

In 2002 March session of the Indian parliament the Prevention of Terrorist Activities Act (POTA) was introduced. It was termed as Indian version of U.S Patriot Act. It was nothing more than the reincarnation of TADA with largely cosmetic changes. In the case of *People's Union for Civil Liberties vs. Union of India (UOI)*[55] the constitutional validity of the Prevention of Terrorism Act, 2002 was discussed. The court observed :

Parliament possesses power under Article 248 and entry 97 of list I of the Seventh Schedule of the Constitution of India to legislate the Act. Need for the Act is a matter of policy and the court cannot go into the same. Once legislation is passed, the govt. has an obligation to exercise all available options to prevent terrorism within the bounds of the

52. (1994)3 SCC 569. In this case the Supreme Court upheld all TADA provisions even while noting the law's potential for misuse. However, it set down procedural guidelines to minimize misuse and mandated the setting up of review committees.
53. *Arup Bhuyan* v. *State of Assam,* AIR 2011 SC 957: (2011)3 SCC 377.
54. AIR 2013 SC 217(G).
55 (2004) 9 SCC 580

constitution. Mere possibility of abuse cannot be a ground for denying the vesting of powers or for declaring a statute unconstitutionally. Court upheld the constitutional validity of the various provisions of the Act.

The Act was considered as a draconian piece of legislation as it curtailed various rights of a citizen which were recognized since long and were contrary to Article 21 of the Constitution. It was repealed in 2004 with Unlawful Activities (Prevention) Amendment Act, 2004.

v: Unlawful Activities Prevention Act: The Present Trend

Closely following the repeal of the POTA, the UAPA was amended in 2004 to bring back a number of provisions from the POTA.[56] The difference between POTA and UAPA is substantial even as a lot of provisions are in common. The provisions of anti-terrorism legislation violated the fundamental right given by the Constitution. It violated the basic human right of a human being. The UAPA was further amended in 2008 in the aftermath of the 26/11 terror attacks in Mumbai.[57] Although the amended UAPA deleted provisions allowing confessions in police custody to be used as evidence, it brought back many of the provisions of the POTA. Some of the salient features of the UAPA post 2008 are as follows:

- *Retains the Central Government's power to designate "terrorist organizations" and criminalize membership or any form of association with such organization.*
- *Provides a broad definition of "terrorist act" to include any act done to overawe or kidnap Constitutional authorities and public functionaries.*
- *Addition of new offences for organizing terrorist training camps or recruiting terrorists and stricter provisions on raising funds or financially aiding terrorists and terrorist organizations.*
- *Presumption of guilt if arms are recovered from the accused or if his/her fingerprints are found on or any other evidence connects him/her to weapons used in committing terrorist acts.*

56 Times of India dated: Dec 17, 2008.

57 *Available at* https://indiapoliticalprisoners.wordpress.com/draconian-laws/unlawful-activities-prevention-act-uapa. last visited on 18.08.2017.

- *Provisions allowing for a pre-trial detention period up to 180 days, denial of bail to foreigners and in cases where a prima facie case exists. Also, the inclusion of other provisions allowing for warrantless arrests, search and seizure authorizations by the authorities designated by either the Central or State Government*
- *Provisions making the obligation to disclose information considered relevant by the investigating officer mandatory. Provision admitting "evidence collected through the interception of wire, electronic or oral communication under the provisions. Provision of the Indian Telegraph Act, 1885*[58] *or the Information Technology Act, 2000*[59]**.**

In addition to central laws, several states have laws with provisions that mirror Central anti-terror laws both repealed and current. Of the different kinds of State laws that are used to address terrorism, some are aimed at addressing organized crimes and while others are aimed at maintaining public order and protecting public safety.

vi: Jammu and Kashmir Public Safety Act, 1978

Some states have exercised their power to legislate on matters of public order by enacting legislations to protect public safety and deal with unlawful activities. Tracing its origins from the Defence of India Act promulgated under colonial rule, the Jammu and Kashmir Public Safety Act, 1978 empowers the state to restrict movement to certain areas by declaring it to be a "prohibited place" or a "protected area", and to maintain communal and regional harmony by prohibiting the circulation of documents considered prejudicial and detaining persons to prevent them from acting in a manner that is prejudicial to the" security of the state" or "the maintenance of public order". Under these broad powers, a person may be detained without trial for up to two years. Other

58. The"Indian Telegraph Act", 1885 is a law in India that governs the use of telegraphy, phones, communication, radio, telex and fax in India. It gives the Government of India exclusive privileges of establishing, maintaining and working telegraphs. It also authorizes the Government to tap phone lines under appropriate conditions. The latest amendment was done in 2003.
59. The "Information Technology Act" 2000 also known as ITA 2000 or the IT Act is an Act of the Indian Parliament, No 21 of 2000 notified on Oct. 17, 2000.

than this glaring inconsistency with fair trial norms, this law also protects actions done in "good faith" by state officials. Under sub section (1) of section 13 of the Act, when a person is detained in pursuance of the detention order, the authority making the detention order shall not later than five days communicate to him the grounds on which the order has been made.

However, in Jan. 1990, the Governor of the State of Jammu & Kashmir amended the section 13, removing this particular requirement. Now under Section 13 (2) the duty to inform the detainee of the grounds for his detention does not "require the authority to disclose facts which it considers to be against the public interest to disclose. A recent Amnesty International[60] report has found that State officials often implement this law in an arbitrary and abusive manner and even if detainees approach the High Court to quash detention orders "J&K authorities consistently thwart the High Court's orders for release by re-detaining individuals under Criminal charges and/or issuing further detention orders, thereby securing their continued incarceration[61]". The JKPSA not only allows detention for up to two years, but also allows for repeat detention orders on the same facts if an earlier order "is not legal on account of any technical defect[62]". The use of these laws, therefore, brings preventive detention in, through the backdoor without adherence to Constitutional

60. "Amnesty International" commonly known as Amnesty is a non-governmental organization focused on human rights with over 3 million members and supporters around the world. The objective of the organization is to conduct research and generate action to prevent and end grave abuses of human rights, and to demand justice for those whose rights have been violated.
61. Amnesty International, "A Lawless Law- Detentions under the Jammu and Kashmir Public Safety Act" *London Available at*: https://www.amnesty.org/en/documents/ASA20/001/2011/en/ (last visited, Apr.12, 2017).
62. S. 19(2) of the JKPSA provides that there "shall be no bar to making a fresh order of detention against a person on the same facts as an earlier order of detention" when the earlier order of detention "is not legal on account of any technical defect" or when the order "has been revoked by reason of any apprehension, for avoiding any challenge that such order or its continuance is not legal on account of any technical defect.

safeguards under Article 22.Anti-terrorism laws[63] in India have always been a subject of much controversy. One of the arguments is that these laws stand in the way of fundamental rights of citizens guaranteed by Part III of the Constitution. The anti-terrorist laws have been enacted before by the legislature and upheld by the judiciary though not without reluctance. The intention was to enact these statutes and bring them into force till the situation improves. The intention was not to make these drastic measures a permanent feature of the law of the land. But because of continuing terrorist activities, the statutes have been reintroduced with requisite modifications. The States have invoked the notion of extraordinary times to enact and re enact Special laws to strengthen the hands of security forces. The *National Human Rights Commission*[64] has noted that:

Anti-terrorism laws are justified as it is difficult to secure convictions under the Criminal justice system and that trials are delayed under regular Courts. Hence it is acceptable to take certain offences out of the ambit of general Criminal law[65].

The enactment of these laws marks a "tendency towards 'the routinizing of the extraordinary 'through the institutionalization of emergency powers during non-emergency times and without a formal derogation from human rights obligations". Enacted or re-enacted without adequate public discussion and an assessment of the impact of existing or similar laws/provisions, these laws have rarely met the

63. In post anti terrorism laws in India, protagonists have, however, hailed the legislation on the ground that it has been effective in ensuring the speedy trial of those accused of indulging in or abet terrorism. But after some time these laws have been break down in view of human right.
64. The "National Human Rights Commission" of India is an autonomous public body constituted on 12 Oct. 1993 under the Protection of Human Rights Ordinance of 28 Sep. 1993. It was given a statutory basis by the Protection of Human Rights Act, 1993. The NHRC is the national human rights institution, responsible for the protection and promotion of human rights, defined by the Act as "rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants."
65. Usha Ramanathan, "*Extraordinary Laws and Human Rights Insecurities*" Asia rights, Issue One (Jul. 2004).

objectives with which they are enacted to secure national security, ensure the safety and prevent harassment of innocent civilians. All these laws deviate from criminal procedures used in "non-extraordinary" times, such as powers of arrest, pre-trial detention, powers on the use of force vested particularly on armed forces, to name a few. Instead, despite supposedly inbuilt safeguards in such laws, as well as safeguards prescribed in several court decisions, practice reveals that there has been flagrant misuse.

vii. Armed Forces Special Powers Act, 1958

Coming to the second area of specific Central laws enacted by the Central Government, these laws are applied to select areas to deal with insurgencies and militancy. The earliest enactment is the *Armed Forces Special Powers Act,* 1958. The Act was first passed by the Parliament of India in 1958 to apply to the North East of the country, and later extended to Punjab 1983[66] and Jammu & Kashmir 1990. AFSPA is based on a British ordinance of 1942 aimed at containing the Indian independence movement during the Second World War[67]. The Act was originally intended as a short-term measure to allow army deployment to counter an armed separatist movement in the Naga Hills. However, it has remained in force for over five decades This Act is considered necessary to deal with serious terrorist and insurgency/militancy situation arising in certain parts of the country. It provides necessary powers, legal support and protection to the armed forces for carrying out proactive operations against the terrorists in a highly hostile environment. There is no gainsaying the fact that political necessity drives deployment of the security forces for internal security duties. The forces are aware that they cannot afford to fail when called upon to safeguard the country's integrity. Hence, they require the minimum legislation that is essential to ensure efficient utilization of combat capability. This includes safeguarding from legal harassment and empowerment of its officers to decide on employment of the minimum force that they consider

66. The Act no longer applies to Punjab.
67. The Armed Forces Special Powers Ordinance, 1942.

essential. The absence of such a legal statute would adversely affect organizational flexibility and the utilization of the security capacity of the state. This would render the security forces incapable of fulfilling their assigned role. In brief, it would imply that a soldier cannot fire upon a terrorist, take necessary action to destroy a hideout, arrest a suspect when in doubt, and lastly search any premises to recover arms and ammunition. Consequentially, the security forces have a right to seek legal provisions to undertake operations for three fundamental reasons:

- *One, a soldier unlike a policeman is not empowered by the law to use force.*
- *Next, while operating in far flung areas, it is simply not possible to requisition the support of magistrates every now and then.*
- *Lastly, their employment is an instrument of last resort when all other options have been exhausted.*

With the Act coming into force, the armed forces have been able to effectively counter terrorism in the state and establish stability. An analysis of the ground realities vis-à-vis the situation in 1990, shows that the violence levels and the fighting ability of terrorists have reduced over the years. Nevertheless, they still possess sophisticated weapons and modern communication equipment and the terrorist infrastructure across the borders is still active. The terrorists continue to intimidate to gain the support of the public, if it is not given willingly. The positive changes in the situation may lead to the misperception that normalcy is returning to the North Eastern States and that perhaps AFSPA can be withdrawn. This is not borne out by ground realities. So long as deployment of the armed forces is required to maintain peace and normalcy, AFSPA powers are required. In a land mark case of *Naga People's Movement of Human Rights, etc.* v. *Union of India*[68]. In 1997, a five-member bench headed by Chief Justice *J.S. Verma* finally ruled on the petitions challenging the Act. The judgment delivered in Nov. 1997 upheld the Act and all its provisions as constitutional.

68. 1998(2) SCC 109.

VII. Theory of Collective Conscience

In 1945, when the Japanese General Tomoyuki Yamashita was prosecuted by US Supreme Court in connection with the atrocities committed by his troops under his command in Philippines, command responsibility was invoked de jure. The Yamashita principle that marked the beginning of new world order and advent of liberal democracies should thus have been a standard operating mechanism for the prosecution of people involved in attacks. India however seems to follow the reverse of Yamashita principle with its judiciary and military-police nexus unable to nab the perpetrators of what it terms as "proxy war", resorts to hanging or persecution of ruminants quotably "to satisfy the collective conscience"[69]

The theory of **Collective Conscience** was laid down by the Supreme Court in Afzal Guru's case. The verdict of the court is as under:

"The gravity of the crime… is something which cannot be described in words. The incident, which resulted in heavy casualties, had shaken the entire nation and the collective conscience of the society will only be satisfied if the capital punishment is awarded to the offender. The challenge to the unity, integrity and sovereignty of India… can only be compensated by giving the maximum punishment… The appellant, who is a surrendered militant and who was bent upon repeating the acts of treason against the nation, is a menace to the society and his life should become extinct. Accordingly, we uphold the death sentence."[70]

VIII. Conclusion

The lack of accountability of security personnel poses a serious challenge to human rights norms. Section 58 of the POTA had allowed for the penalization of police officers exercising "their powers corruptly

69. *Available at* :http://www.dailyo.in/politics/yakub-memon-1993-mumbai-blasts-collective-conscience-tiger-memon-afzal-guru-jkslf/story/1/5238.html(last visited on Aug. 7, 2017).
70. *Available at* : http://indianexpress.com/article/explained/parliament-attack-2001-what-sc-said-when-it-upheld-death-for-afzal-guru/(last visited on Aug. 10,2017)

or maliciously knowing that there are no reasonable grounds for proceeding under this Act". This provision has been dropped from the UAPA. Instead Section 49 provides protection for actions taken in good faith. This makes holding police officers accountable for misusing UAPA provisions nearly impossible. Although extraordinary laws allow for deviations from normal Criminal Procedural laws, to enhance powers of state officials, there is no corresponding deviation from ordinary criminal law provisions granting immunity to hold State authorities accountable for misusing their expanded powers. Further, although security laws are enacted to deal with emergencies, none of the laws provide for adequate review of implementation or contain sunset clauses to limit the time period of their application to cover the emergency and not continue interminably. The Supreme Court in its judgment in *NPMHR case* directed the government to review the AFSPA on a periodic basis, but this has not been effective in preventing its misuse. Thus, it is evident from the above study that the repressive laws have a tendency to alienate more and more people of a particular area, thereby expanding the support base of the insurgency, thus becoming counterproductive. The protection and promotion of Human Rights under the rule of law is essential in the prevention of insurgency. If human rights are violated in the process of combating insurgency, it will be self- defeating. As lack of hope for justice can also provides breeding grounds for insurgency. The threat is really. The remedy requires mature response. At the macro level, the human security component has to be built in every Special law. All such laws should be passed only after careful scrutiny and intense debate. Accountability is the core of the rule of law and governance and must be a part of any Special law before putting into force. The formulation of Security laws must be accompanied by a hyper-vigilance about human rights and the potential for their violation.

Parliament versus Judiciary, A Battle For Supremacy; An Excursion Into Indian Constitutional System

Syed Shahid Rashid*

Abstract

Legislature and Judiciary stands as the fundamental pillars of any democratic State. One frames the law, the other interprets it. The relationship between these two important Constitutional institutions of the State holds a significant place in any democratic setup. The Constitution of India on one hand, guarantees the representative character as the repository of the will of the people to the Parliament, and on the other hand invests judiciary with the power of interpreting the grundnorm, and to decide the validity of laws made. The founding fathers of the Constitution tried to strike a balance between parliamentary supremacy as prevalent in UK and judicial supremacy as prevalent in US and arrived at middle course. However, ever since the Constitutional and legislative journey started in India, the nature of amendments which were brought to the Constitution and other legislations by Parliament on one hand, and the approach of Supreme Court in interpreting the laws on the other side shows that how the two important players of the State have been fighting it out on the Constitutional pitch over the years since the working of the Constitution. This paper is a humble attempt to deliberate upon this issue and its impact on the administration of Justice.

Keywords: *Amendment, Judicial review, NJAC, Collegiums, President's rule.*

Introduction

There is no denying of the fact that on umpteen numbers of occasions no judicial pronouncement has been palatable to the governments and the legislatures in India. The stand of Judiciary has at times generated controversies and tensions between the courts, the executive and the legislature. The judicial pronouncements in the area of

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property rights, on constitutional amendments, appointments of Judges, are the glaring examples of this tussle between the law making and law declaring institutions of the Country. Starting from *Shankri Prasad* case, it has been the long battle between Parliament and Judiciary in India to maintain their respective supremacy. Reading through the lines one can easily understand that there was long tussle going on between the two tendencies, the capitalistic and the socialistic in which ultimately socialistic goals to some extent were achieved, thanks to Part IV of the Constitution. From the inception of Independent India the successive governments were committed to social justice, in furtherance of which they implemented various social welfare polices, which included distribution of land from among the mighty land-lords. The distribution of land from among the landless tillers however became very controversial from the commencements of the constitution, right from the first instance of challenging the validly of amendments to the constitution when it was brought for judicial consideration in Shankari Prasad v Union of India, thus started logger heading between the two important stakeholders of constitutional democratic system. Parliament's authority to amend the Constitution, particularly the chapter on the fundamental rights of citizens, was challenged as early as in 1951. After independence, several laws were enacted in the states with the aim of reforming land ownership and tenancy structures. This was in keeping with the ruling Congress party's electoral promise of implementing the socialistic goals of the Constitution contained in Article 39 (b) and (c) of the Directive Principles of State Policy that required equitable distribution of resources of production among all citizens and prevention of concentration of wealth in the hands of a few. Property owners -- adversely affected by these laws -- petitioned the Courts. The Courts struck down the land reforms laws saying that they transgressed the fundamental right to property guaranteed by the Constitution[1].

1 Constitution of India (Act of 1949) w.e.f. 26 January, 1950.

Parliamentary Maneuvering

Parliament placed these laws in the Ninth Schedule[2] of the Constitution through the *First and Fourth amendments* (1951 and 1952 respectively), thereby effectively removing them from the scope of judicial review. Under the provisions of Article 31, which themselves were amended several times later, laws placed in the Ninth Schedule -- pertaining to acquisition of private property and compensation payable for such acquisition -- cannot be challenged in a court of law on the ground that they violated the fundamental rights of citizens. This protective umbrella covers more than 250 laws passed by state legislatures with the aim of regulating the size of land holdings and abolishing various tenancy systems. The Ninth Schedule was created with the primary objective of preventing the judiciary from any interference.

Property Owners again challenged the constitutional amendments which placed land reforms laws in the Ninth Schedule before the Supreme Court, saying that they violated Article 13 (2) of the Constitution. Article 13(2) provides for the protection of the fundamental rights of the citizen. Article 13 is the key provision as it gives teeth to the Fundamental Rights and makes them justifiable. It makes the judiciary the guardian, protector and interpreter of the fundamental rights. It confers power as well as imposes an obligation on the courts to declare a law void if it is inconsistent with fundamental rights. This is a power of great consequence for the Courts.

Article 13(1) declared that all pre constitutional laws shall be void to the extent of their inconsistence with the fundament rights. Article 13(1) is prospective and not retrospective, thus it gives rise to the

2 The 9th Schedule which was introduced through Art. 31-B by the 1st Constitution Amendment Act, 1951 aimed to save land reform laws enacted by various states from judicial review. Later on however it becomes an omnibus and every kind of law whether it is related to elections, mines and minerals, industrial relations, requisition of property, monopolies etc. were included in it.

doctrine of eclipse, where law remains dormant for the time being and not altogether dead. Article 13(2) says the state shall not make any law which takes away or abridges the Fundamental Rights and a law contravening a fundament rights, to the extent of contravention is void. It is the crucial constitutional provision which deals with the post constitutional laws.

The doctrine of eclipse does not apply to post constitutional laws. Post constitutional laws which are inconsistent shall be void *ab initio*. Article 13(2) was given over riding effect over Article 368 in Gopalan's case which raised its importance as well as impact. Parliament and the State legislatures are clearly prohibited from making laws that may take away or abridge the fundamental rights guaranteed to the citizen. The argument was that any amendment to the Constitution had the status of a 'law' as understood by Article 13 (2).

In *Shankari Prasad Singh Deo v. Union of India,* AIR 1951 SC 458[3] the Court held that rules of the constitutional and legislative procedure were one of and hence there was no lapse in the procedure in the First Amendment to the Constitution. Nevertheless, the Court added that there was clear demarcation between the exercise of constituent power and exercise of legislative power and the fundamental rights could be abridged by the former though not by the latter. The court held:[4]

> *No doubt our constitution makers, following the American model, have incorporated certain fundamental rights in part III and made them immune from interference by laws made by the State. We find it however difficult in the absence of a clear indication to the contrary, to suppose that they also intended to make those rights immune form constitutional amendment. The terms of Article 368 are perfectly general and empower*

3 First Amendment Act 1951 was challenged in this case. P 461-462
4 AIR 1951 SC 458 , at p. 463

> *Parliament to amend the Constitution without any exception whatever. Had it been intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intention clear by adding a provision to that effect.*

In *Sajjan Singh v. State of Rajasthan* AIR 1965 SC 845 the Court considered the constitutionality of the Constitution (17th Amendment Act), 1964 by which certain enactments were included into the 9th schedule of the Constitution affecting the fundamental rights of the petitioners. The main contention of the petitioner was that power to amend did not include power to abridge fundamental rights. The Court reiterated the Shankari Prasad case and rejected this contention in the following words:

It is true that the dictionary meaning of word "amend is to correct a fault or reform but in context, reliance on the dictionary meaning of the word is singularly inappropriate, because what Art. 368 authorizes to be done is the amendment of the provisions of the Constitution. It is well known that the amendment of law may in proper case including the deletion of any one or more of the provisions. Similarly, an amendment of the constitution which is subject matter of the power conferred by Art. 368, may include modification which or change of the provisions or even an amendment which makes the said provisions inapplicable in certain cases.[5]

Declaring that Constituent power is used to amend the Constitution the Court said:

It is true that Art. 13(2) refers to any law in general, and literally construed , the word "law" may take in a law made in exercise of the Constituent power conferred on Parliament; but having regard to the fact that a specific unqualified and unambiguous power to amend the constitution is conferred on Parliament. It would be unreasonable to

5 At p.854

hold that the word "law" in Article 13(2) takes in Constitution Amendment Acts passed under Article 368.[6]

Therefore, the Court justified that Article 368 does not merely prescribe the procedure, but it also contains that substantive power of Parliament also, which therefore, means amendment of all the provisions of the Constitution. Article 368 of the Constitution gives the impression that Parliament's amending powers are absolute and encompass all parts of the document. But the Supreme Court has acted as a brake to the legislative enthusiasm of Parliament ever since independence.

The Supreme Court of India first struck down a constitutional amendment in 1967, in the case of *Golakh Nath v. State of Punjab*[7]. An amendment was struck down on the basis that it violated Art. 13 of the constitution. The term "law" in this article was interpreted as including a constitutional amendment. The eleven-judge bench of the Supreme Court in this case reversed its earlier position. Delivering its 6:5 majority judgments in the *Golaknath v. State of Punjab*[8] case Chief Justice Subba Rao put forth the curious position that "*Article 368 did not confer upon Parliament the power to amend the Constitution, but merely procedure."* The amending power (constituent power) of Parliament arose from other provisions contained in the Constitution (Articles 245, 246, 248) which gave it the power to make laws (plenary legislative power). Thus, the Apex court held that *the amending power and legislative powers of Parliament were essentially the same. Therefore, any amendment of the Constitution under Art. 368 must be deemed law as understood in Article 13 (2).*[9] The majority *in Golaknath case* invoked the concept *of implied limitations on Parliament's power to amend the Constitution.* This view held that the Constitution gives a place of permanence to the fundamental freedoms of the citizen. In giving the Constitution to them, the people had reserved the fundamental

6 At p.857
7 AIR 1967 SC 1643
8 ibid
9 Id at p.1663-1664

rights for themselves. *Article 13, according to the majority view,*[10] *expressed this limitation on the powers of Parliament. In other words, the apex court held that some features of the Constitution lay at its core and required much more than the usual procedures to change them as there is no difference between constituent and legislative powers.*

Post Keshvananda Bharati Scenario

To undo the effect of Golaknath verdict, Parliament made 24th and 25th Amendment in the Constitution. The 24th amendment introduced certain modifications in Art. 13 and Art.368 and empowered Parliament to amend any provision of the Constitution including fundamental rights and further to make Art. 13 of the Constitution in-applicable to an amendment of the Constitution under Art.368. The 25th amendment proposed amendment in Art. 31 and insertion of Article 31-C. The aim was to restrict property rights and compensation in case the State takes away the private property. The matter was brought before the Honorable Supreme Court in *Kesavananda Bharti*[11] Case which was heard by a bench consisting of all the 13 Judges of the Court because the decision of Golaknath given by 11 judges was under review. Wide ranging arguments were advanced before the Court for over 60 days both for and against the validity of the Amendments. Eleven opinions were delivered by the Judges on 24th Aril, 1973[12]whereby Supreme Court for the first time propounded what is called '*basic structure of the Constitution*.

Basic Structure of the Constitution

The phrase 'basic structure' itself cannot be found in the Constitution. However Supreme Court recognized this concept for the first time in the historic Kesavananda Bharati case in1973. In this case

10 Concurring the view of the majority, Hidaytullah J. observed that Parliament was not the constituent body, but only the co0nstituted body which must bear true allegiance to the Indian Constitution. Therefore it cannot increase the power vested upon it and thereby do something indirectly which it cannot do directly. At page 1705.

11 Kesavananda Bharti v. State Of Kerala AIR 1973 SC 1461

12 ibid

the Supreme Court ruled that amendments of the Constitution must respect the "basic structure" of the Constitution. This doctrine states that certain fundamental features of the Constitution cannot be altered by amendment. The Court through majority held that the power of Parliament to amend the Constitution was derived from within the Constitution. *Though the judges agreed that the constituent power of parliament would reach each and every provision, the same however did not mean to alter every aspect of constitution.* The Court rightly observed that it would not encompass the Parliament to destroy,[13] repeal,[14] or abrogate[15] the Constitution or to destroy its identity [16]or to frame a new one.[17] There were certain limitations implied on the power through basic structure theory.

As Per Justice Ray, "the Constitution is a touch stone and the constituent power is sui generis. The power under Art. 368 is a constituent power to change the fundamental law, i.e. Constitution and is distinct from ordinary legislative power". As Per Diwedi J, "there is distinction between "constitution" and "law". Ordinary a constitution signifies a politico-legal document. On the other hand, in its ordinary sense law signifies a statue or a legislative enactment. Constitution prescribes the paramount norm or norms, while as law prescribes derivative norms. They are derived from the paramount norms.[18]

Ingredients of Basic Structure Theory

A constitutional amendment (law) which offends the basic structure of the Constitution is ultra vires. This, therefore, means that while parliament can amend any constitutional provisions by virtue of Article 368, however such a power is not absolute and unlimited and is subject to fundamental or basic features of the Constitution as laid down by the

13 Id at p. 481 per Hegde J.
14 Id at p. 320 per Sikri C..J, Id at p. 680 per Palejkar J
15 Id at p. 767 per Khanna J. , Id at p. 632 per Ray J. and id at p.897 per Mathew J.
16 Id at p. 767 per Khanna J.
17 Id at p. 432 per Shetal J.
18 id at p. 1913

Supreme Court in various cases. In *Kesavananda Bharti* case, the Supreme Court regarded Supremacy of the Constitution, Republican and democratic form of Government, Secular character of the Constitution, Separation of powers between Legislature, Executive and the Judiciary, Federal Character of the Constitution as the "basic foundation and structure" of the Constitution.

The Supreme Court thereafter in subsequent cases added many features to the basic structure theory like Rule of Law, Judicial Review,[19] Democracy[20] which implies free and fair election, limited power of Parliament to amend the Constitution[21], harmony and balance between fundamental rights and directive principles,[22] independence of Judiciary.[23]

Challenge to Basic Structure Theory

Parliament attempted to remove Kesavnanda limitation by enacting the Constitution (Forty Second Amendment) Act, 1976, which was surely an attempt of the Parliament to affirm its supermacy over the Judiciary in many respects. It was enacted when the country was clamped with two year long National Emergency and was the most controversial and debatable piece of constitutional amendment ever. Section 55 of the Amendment Act confers an unlimited constituent power on Parliament beyond the pale of judicial review.[24] The validity of the amendment came up for the consideration of the Court in *Minerva*

19 L. Chandra Kumar v. Union of India AIR 1997SC 1125
20 Indira Gandhi v. Raj Narian, AIR 1975 SC2299
21 Minerva Mills v. Union of India AIR1980 SC1789.
22 ibid
23 Shri Kumar Padma Prasad v Union of India, (1992) 2SCC 428.
24 By section 55 of the Amendment Act Cl.4 & 5 were added to Art. 368. Cl (4) reads: No amendment of this Constitution including the provisions of Part III made or purporting to have been made under this Article whether before or after the commencement of Section 55 of the Constitution 42nd Amendment. Act, 1976, shall be called in question in any Court on any ground. Cl(5) reads :For the removal of doubts , it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by of addition , variation or repeal the provisions of this Constitution under this Article".

Mills v. Union of India[25] where its validity was struck down. The petitioners challenged the amendment on the ground that it widens the constituent powers of Parliament in an unlimited manner.[26] Highlighting the dangers arising from the impugned amendment to the Constitution, the Court struck down section 55 of the 42nd Amendment Act and held:[27]

The newly introduced clause 5 of Art. 368 demolish the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any "limitation whatsoever". It even empowers Parliament to repeal provisions of the Constitution. The power to destroy is not power to amend. Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Parliament cannot, under Art. 368 expand its amending power so as to acquire for itself the right to repeal or abrogate the constitution or to destroy the essential features.

The court in this case struck down Article 31C, (which provided a very wide scope to directive principles over fundamental right) as amended by 42nd Amendment as unconstitutional on the ground that it destroys the "basic features" of the Constitution. The majority observed that Constitution is founded on the bedrock of the balance between Part III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution which is essential feature of the basic structure.

Judicial Review or Judicial Overreach?

No doubt Parliament and the State legislature's in India have the power to make laws within their respective jurisdictions. This power however is not absolute in nature, but subject to doctrine of judicial

25 AIR 1980 SC 1789 and 3(1980) SCC 625

26 The petitioner challenged 39th Amendment by which Nationalization Act was put in 9th Schedule and 42nd Amendment by which unlimited constituent power was vested in parliament.

27 id at p. 643 of S.C.C

review which is laid down explicitly by the Constitution in several Articles, such as 13, 32, 131-136, 143, 226 and 246. If a law made by Parliament or the state legislatures violates any provision of the Constitution, the Supreme Court has the power to declare such a law invalid or ultra vires.[28] The Constitution vests in the judiciary, the power to adjudicate upon the constitutional validity of all laws by invoking the power of judicial review. It is noteworthy to quote Baghwati J. who has expounded very lucidly but forcefully the supremacy of constitution and judicial review. He states:[29]

It is necessary to assert in the clearest terms particularly in the context of recent history that the constitution is supreme lex, the permanent law of the land, and there is no department or branch of government above or beyond it. Every organ of government, be it the executive or the legislature or the judiciary, derives its authority from the constitution and it has to act within the limits of its authority. No one however highly placed and no authority however lofty can claim that it shall be the sole judge of the extent of its power under the constitution or whether its action is within the confines of such power laid down by the constitution. This Court is the ultimate interpreter of the constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if so, what the limits are and whether any action of that branch transgresses such limits.

The democratic institutions owe its existence to the active role of judiciary. It is in the interest of the sustainability of the political quarters that institutions of judiciary should be respected and should be free from political influence and corruption. We have the example of 1975 when Indira Gandhi, the then Prime Minister of India clamped an emergency

28 Article 13(2) says "The state shall not make any law which takes away or abridges the rights conferred by this Part (i.e. Part III containing Fundamental Rights) and any law made in contravention of this clause shall, to the extent of the contravention be void."

29 Rajasthan v. Union of India, AIR 1977 SC 1361 : (1977) 3 SCC 592

in the country, which almost eroded the independence of the democratic institutions especially the judiciary, in which many Supreme Court Judges had to face the heat. The elections of the appellant –the then Prime Minister- were successfully challenged by the respondent in the High Court of Allahabad. While the appeals were pending before the Supreme Court, Parliament passed the 39th Amendment Act, 1975 by which Article 71 was amended, Article 329A was introduced and certain laws including the Representation of the People (Amendment) Act 1974 and the Election Laws Amendment Act 1975 were included in the 9th Schedule. The election of Prime Minister and Speaker was ousted from judicial review.

The Court in *Indira Gandhi v. Raj Narian*[30] however, on the basis of Kesavnanda, held democracy as a feature of basic structure of which equality was an essential ingredient, so the exclusion of election of the Prime Minister and Speaker from the purview of judicial review was held invalid. Therefore Art. 329A was held to be violative of the basic structure of the Constitution.

In *Waman Rao v. Union of India*,[31] the constitutionality of Articles 31-A. 31-B, and 31-C was challenged being violative of basic structure of the Constitution. It was held that laws cannot escape judicial review merely because they are included in the 9th schedule. Thus the objective of the basic structure doctrine enunciated in 1973 was fulfilled in 1981. However Court held that laws put in 9th schedule before Kesavnanda will receive the full protection under Article 31-B.[32]

30 1975 SCC, 1

31 (1981) 2 S.C.C 362. The case had a long history. The constitutionality of the Maharashtra Agricultural Land Ceilings and Holdings Act 1961, was challenged before the Maharashtra High Court in Vithalrao Uttarawar v. State of Maharashtra AIR 1977 Bombay 99. As the impugned legislation was already in 9th schedule of the constitution, judicial review was barred wherefore the petitions were dismissed. Appeals before SC were also dismissed. Later fresh petitions were filed under Art. 32 on the grounds of violations of fundamental rights.

32 Id at p. 397

Similarly in *I.R. Coelho v. State of Tamil Nadu* [33] Supreme Court held that the power of Parliament to amend the fundamental rights was subject to the basic structure doctrine, therefore laws added to the 9th Schedule must answer to the complete test of fundamental rights.[34] Also Article 31-B could not go beyond the limited amending power contained in Art. 368 The power to amend 9th Schedule flows from Article 368.This power has to be compatible within the limits on the power of amendment. [35]

The doctrine of basic structure was the visionary approach of the Court to combat the tyrannical move of Parliament to bring all the power within the range of its wings. The decision thus crippled the strength of Article 31-B and the 9th Schedule. It has thus set the ground for the future Courts to meet any Parliamentary encroachment. In that sense, the Indian Constitution now owes its existence to Kesavananda.[36] Thus the current limitation on amendments comes from Kesavananda verdict. Justice J.S. Kehar in Supreme Court Advocates on Record Association v. Union of India, (2015) stated that the Basic structure is truly a set of fundamental foundational principles, drawn from the provisions of the Constitution itself. They are not fanciful principles carved out by the judiciary, at its own.[37]

The role of Judiciary cannot be ignored, as is evident from the aforementioned Cases, which has created a sense of harmony between law and amendments over the period of years, and also between the Fundamental Rights and Directive Principles. Democratic Institutions in India owes its existence to pro-active role of judicial quarters. However, there are voices that argue against the very concept of judicial review of constitutional issues and characterize it as anti-majoritarian, thus raising

33 (2007) 2S.C.C. 1: AIR 2007 SC 861
34 Id at 100-103
35 Id at p. 104-105
36 The observations of Upendar Baxi, courage Craft andf Contention-the supreme Court in 80's, Bombay 1985 p. 66 where he observes: "Kesavananda is the Constitution itself"
37 AIR SCW 5457

fingers on the role of judiciary as doing the act of judicial adventurism or judicial overreach instead of judicial activism making inroads into the doctrine of separation of powers. The judicial pronouncements in Golak Nath, Bank Nationalization or Kesavananda Bharti have raised passionate controversies in India. The doctrine of basic structure has been vehemently criticized. It has been said that the Court has not precisely defined as what are the essential features of the basic structure and if this doctrine is accepted every amendment is likely to be challenged on the ground that it effects some or the other essential feature of the basic structure.[38] The Law Minister in the Central Government once stated in Parliament that the courts had, through their exercise of power of judicial review, retarded the process of socio-economic development of the country, and therefore he justified certain restrictions on the power of the courts to declare laws unconstitutional.[39]

The appointment of Judges for the Apex Court and High Courts and collegiums system for that has remained another debatable area in constitution where judiciary and executive have confronted each other. The 99th Constitutional Amendment Act, 2014 validating the National Judicial Appointment Commission, regarding the appointment of Supreme Court and High Court Judges was held Unconstitutional by five judge Constitutional Bench of Supreme Court with 4:1[40] majority in *Advocates on Record Association v.s Union of India* in 2015. This Amendment was Parliament's attempt to overcome the holding of the Second Judges Case by replacing Article 124 with a new set of constitutional provisions, which established the NJAC[41], to replace the

38 Dr. J.N.Panday, Constitutional Law of India, page no. 784, edition 53rd, 2016. Central Law Agency, Allahabad.

39 MP Jain , Indian Constitutional Law, page no. 1704, edition 6th , 2010.(lexis Nexis, Butterworths Wadhwa Nagpur)

40 Justices Khehar, Lokur, Goel and Joseph wrote separate opinions for the majority, while Justice Chelamshwar dissented.

41 Article 124A detailed the composition of the NJAC. Article 124C delegated the details of the selection process to parliamentary legislation, in pursuance of which the legislature framed the NJAC, Act.

"collegiums system" in which the three senior most judges of the Supreme Court had the final say on judicial appointments, with a NJAC comprising of the Law Minister, two "eminent persons", and the three aforementioned judges. The Court held that the primacy of the judiciary in judges' appointments was embedded in the basic structure of the Constitution. The Court thought that the said Commission (composition) was the executive dominated; it was threat to independence of judiciary. This prompted a huge debate and discussion among the legal circles whether the Judiciary has stepped in the domain of Executive and Legislature or not. Even Mr. Arun Jately, the present Finance Minister, in the Union of India has remarked that judiciary is not allowing the executive to work freely. He remarked that "unelected" cannot undermine the "elected". He said that, "democracy could not be a 'tyranny of the unelected'. Democracy, he said, would be in danger if the elected are undermined.[42] The Constitution of India has provided for impeachment of Judges of Supreme Court and High Courts under Article 124(4) on the ground of proven misbehavior. However the procedure of impeachment[43] is such that both Parliament and Judiciary has a role in it. In India the impeachment proceedings were initiated on two judges while in USA the house has initiated impeachment proceedings for 64 times since 1789.

Position in Other Constitutional Systems

The doctrine of judicial review is an integral part of the American Judicial and constitutional process although the US Constitution does not explicitly mention the same in any provision. Since *Marbury v Madison*,[44] the institution of judicial review has been a subject of perennial and passionate debate among the scholars and jurists and

42 http://indianexpress.com/article/india/india-news-india/njac-sc-verdict . Last accessed on 19/10/2017

43 The Procedure for Impeachment is laid down in Judges Inquriry Act, 1986.

44 5 US 137 (1803). In 1803, in this case , the US Supreme Court very clearly and specifically claimed that it had the power of judicial review and it would review the constitutionality of the Acts passed by the Congress.

characterizes it as anti-majoritarian. However the doctrine of judicial review has made the US Supreme Court a vital institution in the governmental process of the country. [45]

The United Kingdom has a doctrine of parliamentary sovereignty, so the Supreme Court is much more limited in its powers of judicial review than the constitutional or supreme courts of some other countries. It cannot overturn any primary legislation made by Parliament. However, it can overturn secondary legislation if, for example, that legislation which is found to be *ultra vires* to the powers in primary legislation allowing it to be made.[46]

In Pakistan, the position of conflict is much alarming. Ifthikar Muhammad Chowdhry the then Chief Justice was ousted arbitrarily in 2007 by Musharf Regime. When National Reconciliation Ordinance (NRO) was issued by the former president Gen. Pervez Musharraf on October 05, 2007, which granted amnesty to politicians, political workers and bureaucrats who were accused of corruption, embezzlement, money laundering, murder, and terrorism it was declared unconstitutional by the Pakistan Supreme Court on December 16, 2009.[47] Similarly in Pakistan 18th Amendment to the Constitution was brought in 2010 because conflicts between the judiciary and President Zardari's government over judicial appointments and the prosecution of corruption cases had steadily mounted over the past two years. It is pertinent to mention that neither President nor Prime Minister will have a direct role in judicial appointments under the 18th Constitutional amendment to the Constitution of 1973 of Pakistan.[48] In the famous Panama case, on 28th July 2017, the Prime Minister Nawaz Sharif was declared disqualified by Supreme Court on not being truthful and

45 Supra 39 at 1695

46 https://en.m.wikipedia.org/wiki/Supreme_Court_of_the_United_Kingdom last retrieved on 18th oct, 2017.

47 https://www.dawn.com/news/858245 Last visited on 19th, Oct,2017

48 https://pakistanconstitutionlaw.com/18th-amendment-2010/ . Last visited on 19th, Oct,2017

honest as per Article 62 and 63 of the Constitution.[49] It seems Pakistan Supreme Court is enjoying more powers than the Parliament and executive as the latter do not have role in appointments and removal of Judges. The issue is whether the constitutional amendment concerning the removal of judges by the Parliament can be brought, if the judiciary can disqualify the PM then, why can't the parliament impeach a judge on account of misconduct or corruption.

In Bangladesh, the Supreme Court on 3rd July 2017 declared 16th Amendment[50] to the Constitution of 1972 as unconstitutional and illegal which aimed at impeachment of judges of the apex courts based on misconduct or incapacity based on two-thirds majority.[51] This has created huge tension between judiciary and parliament in Bangladesh.

Conclusion

Both Parliament and Judiciary holds an important place in the Constitutional structure of any modern state. Constitution as the *grundnorm* is the sole source for both these organs to exercise their powers and functions. The framers of the Constitution of India never envisioned the organs of the State to be in confrontation with one another, rather ensured checks and balances in the form of separation of powers as a key to success to run constitutional and democratic setup. Separation of powers is considered as the backbone of the modern democratic setups. However, over the period of time, it has been seen that the doctrine of separation of powers cannot be followed strictly on every front of governance. In modern times the state is engaged in multifarious functions in order to achieve the concept of welfare state. There is every likelihood of powers between the different organs getting overlapped while performing those functions which are numerous in nature.

49 www.theguardian.com. Last visited on 19th, Oct,2017
50 Passed on September 17, 2014
51 www.dhakatribune.com. *Last accessed on 18-10-2017.*

The tension between Parliament and Judiciary in India has been featured process especially from 70's onwards, when Supreme Court shunned away the positivistic mode of interpretation which had ruled the minds of Indian legal community for long in the backdrop of British hegemony over India. The Indian judges, lawyers and jurists were highly influenced by the Austinian Jurisprudence and laws[52] were shaped in such thought and content. Austinian positivism being anti-people, anti-values, anti-freedom and despotic in nature greatly helped British jurists to impose their laws and legal institutions to suit their imperialistic interests in India. The influence of Social justice and social change prompted the judges to interpret the provisions of the Constitution and other laws widely to accommodate social need and interests, thus the legal community embraced the sociological jurisprudence to the larger extent. The enactment of social welfare legislations and their interpretation also widened the horizon of right to life, personal liberty, equality and justice. Constitution of India was not seen merely as political document but social and economic document with the result, the Judiciary started to interpret the provisions of the Constitution connected and concerned with social reality.

The bottom line is that both these important organs of the State have to maintain a dignified balance while performing their constitutional functions without overstepping in one another's domain. Parliament is supreme law making body in India empowered by Constitution. The role of parliament must be constructive and people friendly while framing and discussing the laws. The object of bringing any bill before the house or framing any law must be to give ultimate benefit to the people of the nation, rather than scoring political points or favour any particular political constituency. The judiciary on the other hand, has to be equipped with the tool of Judicial Review to check the validity of laws, as it is the guardian of Constitution, the supreme law where from all other subsidiary and secondary laws follow.

52 see *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27

Role of Judiciary in Consumer Protection: An Analysis

Mohammad Rafiq Dar*

Abstract

The judiciary interprets the Constitution as its final arbiter. It is its duty as mandated by the Constitution, to be its watchdog, by calling for scrutiny any act of the legislature or the executive, who otherwise, are free to enact or implement these, from overstepping bounds set for them by the Constitution. It acts like a guardian in protecting the fundamental rights of the people, as enshrined in the Constitution, from infringement by any organ of the state. It also balances the conflicting exercise of power between the centre and a state or among states, as assigned to them by the Constitution.

While pronouncing decisions under its constitutional mandate, it is expected to remain unaffected by pulls and pressures exerted by other branches of the state, citizens or interest groups. And crucially, independence of the judiciary has been held to be a basic feature of the Constitution, and which being inalienable, has come to mean - that which cannot be taken away from it by any act or amendment by the legislature or the executive. This paper examines the role of judiciary in protecting the right of consumers particularly in professional sector.

***Keywords**: Judiciary, Constitution, Consumer Protection, Independent, Impartial.*

1. Introduction

The Indian judicial system is independent and impartial. Rather, this is the only pillar of Indian democracy in which all Indians have full faith and confidence. This faith is amply demonstrated by the fact that every day many new cases are being brought in courts all over the country. The Indian judiciary is thus one of the strongest pillars of Indian democracy.[1]An impartial judiciary is a *sine-qua-non* for the smooth

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1 *"The Judiciary: A Pillar of Indian Democracy... In Dire Need of Reform"* Prof. Rajiv Khanna March 1, 2010. http://www.biztechreport.com/story/443. retrieved on 15.04. 2017.

functioning of a political system. It is the third organ of the government and is charged with the responsibility of deliverance of justice to the aggrieved party. The judiciary does not have a substitute in the present society.

In modern democratic political systems, the judicial mechanism has to be open, impartial, consistent, stable and predictable. The judiciary operates in accordance with the prescriptions of the Rule of Law, such a judicial system believes in the fairness and openness of proceedings. Under our Constitution, we have a single integrated system of courts for the Union, as well as, the states which administer both Union and state laws. The Indian judiciary is independent and separate from the government and the legislature. The judges of Indian courts have maintained very high standards of judicial integrity. This is one of the main reasons that multinational corporations have been entering into joint ventures with Indian businesses and are investing billions of dollars in India to set up not only huge industrial units and develop town-ships, but also develop India's infrastructure.[2]The role of Indian judiciary has also been constructive in protecting the rights of consumers. Various types of 'services' provided or availed for consideration come within the scope of the Consumer Protection Act, 1986.

2. Role of Judiciary in Consumer Protection

The Consumer Protection Act, 1986 is a Special Law like the Indian Telegraph Act 1855. But the Consumer Protection Act is more special so far as the disputed question is concerned.[3] Applying the settled principle that Special Law will prevail over the 'general', the machinery set up under the Consumer Protection Act, 1986 to resolve the consumer disputes will prevail over Section 7-B of the Indian Telegraph Act.[4]

The courts have always had the power at general law to decline to enforce legal rights where it would be outrageous or offend good

2 *Supra*.note 1.

3 The Indian Telegraph Act deals with all the aspects of telephone system and apparatus, where as the Consumer Protection Act deals with the dispute raised by the Consumer as to the services rendered to them.

4 *General Manager, Telecom* v. *Consumer Disputes Redressal* AIR 2000 Ker 250.

conscience to do so. The approach of the legal system to unconscionable conduct was demonstrated in *Commercial Bank of Australia LM* v *Amadio*[5]in that case, a bank had taken security over the home of the parents of one of the bank's customers. The bank knew that the customer had approached his parents for help but had not explained the real risks of giving security to the bank. The bank also knew that the parents were not commercially sophisticated and that they did not have a good grasp of English. The court held the bank was not permitted to enforce its legal rights under the security arrangement because it would offend good conscience to do so. Mason J explained:[6]

Relief on the ground of unconscionable conduct will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will be granted when such advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is" unable to make a worthwhile judgment as to what is in his best interest.

The courts recognised that a consumer could sue the manufacturer of negligently manufactured goods in *Donoghue* v *Stevenson*.[7] In that case a person purchased a bottle of drink from a retailer which had been manufactured by someone else. The drink contained an impurity - a snail that had somehow made its way into the bottle during the course of the manufacturing process. The ultimate consumer of the drink became ill after drinking the contents of the bottle. Prior to the decision in Donoghue, a consumer who was injured by negligently manufactured products could only sue the person with whom he or she had a contract - such as the retailer. Donoghue permitted actions to be brought against the manufacturer. The decision in this case and the product liability regime recognised implicitly that the consumer and the retailer are not necessarily in a good position to assess and manage the risk associated with defective goods. These types of regulations have been justified on the grounds of public policy and 'dignity of profession'.

5 (1983) 151 CLR 447.
6 Ibid
7 [1932] AC 562.

In *Morgan Stanley Mutual Fund v. Kartick Das,* the Supreme Court stated the meaning of the expression "consumer" in the following words:[8]

"The consumer as the terms implies is one who consumes. As per the definition, consumer is the one who purchases goods for private use or consumption. The meaning of the word 'consumer' is broadly stated in the above definition so as to include anyone who consumes goods or services at the end of the chain of production. The comprehensive definition aims at covering every man who pays money as the price or cost of goods and services. The consumer deserves to get that he pays for in real quantity and true quality. In every society, consumer remains the centre of gravity of all business and industrial activity. He needs protection from the manufacturer, producer, supplier, wholesaler and retailer. "

A person who buys goods or hires services for resale or commercial purpose does not fall within the definition of consumer. The Supreme Court, summarized the position as under:[9]

The intention of Parliament is to exclude from the scope of definition, the persons who purchase goods for resale and also those who purchase goods with a view to use them for carrying any activity for earning. The immediate purpose as distinct from the ultimate purpose of purchase, sale in the same form or after conversion and a direct nexus with profit or loss would be the determinants of the character of transaction-whether it is for commercial purpose or not. Thus buyers for commodities or goods for self consumption in economic activities in which they are engaged would be consumers as defined in the Act.

As per the definition, consumer is the one who purchases goods for private use or consumption. The meaning of the word 'consumer' is broadly stated in the definition so as to include any one who consumes goods or services at the end of the chain of the production. The comprehensive definition aims at covering every man who pays money

8 1994 (4)SCC 225.

9 *Madan Kumar Singh v. Distt. Magistrate Sultanpur&Ors*2009(7)SCJ 558. (2009)9 SCC 79.

as the price or cost of goods and services[10].In *Lucknow Development Authority v M.K.Gupta*[11]The Supreme Court noted that the word "consumer" is a comprehensive expression. It extends from a person who buys any commodity either as eatable or otherwise from a shop, business house, corporation, store, fair-price shop to use it for private use or consumption and not for commercial purpose. For example, A licensee to run a phone is not a consumer.[12] The beneficial consumer jurisdiction cannot be extended to lotteries and wagering transactions or consequential rights flowing from void contracts. A lottery ticket holder is not 'consumer' within the ambit of the definition of 'consumer' under the Act.[13]Shares before allotment do not come into existence and cannot be regarded as goods; debentures do not come within the purview of the definition of stock. [14] Debentures are neither stock nor shares, a share cannot be held to have been issued unless a share certificate is given to the concerned person.[15]Shares before allotment have been held to be not in the category of goods.[16]An applicant who merely applies for allotment of shares is not a consumer.[17] Persons buying goods either for re-sale or for use in large scale profit making activity will not be 'consumers' entitled to protection under the Act.[18] The insurance company is not a consumer. Hence the consumer complaint by insurance company is not maintainable.[19]

The word 'person' as occurring in this definition has been held to include a 'company' incorporated under the Companies Act. The court cited section 3(42), General Clauses Act, 1897 stating that the word person includes any company or association or body of individuals

10 Avtar Singh *"Law of consumer protection principles and practice"* IV edn Eastern Book Company Lucknow.U.P. p.19
11 (1994) 1 SCC 243 at 253.
12 *Techno Combine Associates v. Union of India,* I (1194) CPJ 481: 1994 (I) CPR 298.
13 *Jagdish Chand v. Director, Sikkim State Lottery,* 1994 (I) CPR 213.
14 *Sri GopalJalan& Co v. Calcutta Stock Exchange Ltd*,AIR 1964 SC 250.
15 *Shree Gopal Paper Mills Ltd v. CIT*, (1970) 77 ITR 543.
16 *Morgan Stanley Mutual Fund v. Kartick Das,*(1994) 4 SCC 225 at 239.
17 *HG Bhatia v. ABC Computers Pvt. Ltd., 1994 (I) CPR 316.*
18 *Raj Kumar v. S.C. Verma,* 2001 (1) CPR 437.
19 *Savani Road Lines v. Sundaram Textiles Ltd.,* AIR 2001 SC 2630.

whether incorporated or not.[20]Though there is no clear provision regarding the filing of complaint on behalf of the wife in the C.P.Act 1986, the courts have allowed the husband to file a complaint on behalf of his wife. In the Indian conditions, women may be illiterate, educated women may be unaware of their legal rights, thus a husband can file complaint under the Consumer Protection Act on behalf of his spouse.[21]

3. Professional services

Professionals are required to discharge their obligations and commitments diligently and befitting with quality and standards of services. The laws of the land mandate that the professionals should provide services to the consumers in a required manner exercising duty of care and while doing so they should not commit any negligent act. In order to protect the interest of the consumers against the breach of duty, the deficient services have been defined by the statute and legal actions have been initiated on the erring professionals. The Indian judiciary has done a commendable job while dealing with the matters related to professional services like medical, lawyering and architect and engineering services.

3.1. Medical profession

Though the medical profession is not clearly mentioned in the inclusive part of the definition of service under section 2(1)(0) yet the Supreme Court has cleared the position in landmark decision of *Indian Medical Association v .V.P. Shantha and Others*[22] As a result of this judgment, medical profession has been brought under the Section 2(1) (o) of CPA, 1986 and also, it has included the following categories of doctors/hospitals under this Section:

1. All medical / dental practitioners doing independent medical / dental practice unless rendering only free service.

2. Private hospitals charging all patients.

20 *Karnataka Power Transmission Corpn v Ashok Iron Works (P) Ltd* (2009) 3 SCC 240.

21 *Punjab National Bank, Bombay v. K.B. Shetty* 1991 (2) CPR 633.

22 AIR 1996 SC 550.

3. All hospitals having free as well as paying patients and all the paying and free category patients receiving treatment in such hospitals.

4. Medical / dental practitioners and hospitals paid by an insurance firm for the treatment of a client or an employment for that of an employee.

It exempts only those hospitals and the medical / dental practitioners of such hospitals which offer free service to all patients.

A doctor undertakes to exercise reasonable care and a certain degree of skill. It may be different from the standard that shall be exercised by doctors with higher knowledge and greater advantages than him. Neither the highest degree of care nor the lowest is expected.[23] A doctor is held liable for negligence when he falls short of the reasonably skillful medical man.[24]

The Supreme Court observed:[25]

The fact, that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India and/ or State Medical Councils constituted under the provisions of the Indian Medical Council Act would not exclude the services rendered by them from the ambit of the Act.

Beside the patients, beneficiaries of a service also considered to be consumers. In the *Spring Meadows Hospital* case,[26]the Apex Court held that: In the present case, we are concerned with clause (ii) of section 2(1) (d). In the said clause a consumer would mean a person who hires or avails of any services and includes any beneficiary of such services other than the person who hires or avails of the service. When a young child is taken to a hospital by his parents and the child is treated by the doctor, the parent would come within the definition of consumer having hired the services and the young child would also become a consumer under the exclusive definition being a beneficiary of such services. The

23 *Dr. T.T. Thomas v. Elisa,* A.I.R. 1987 Ker. 52.
24 *Bolam v. Friem Hospital Management Committee*, [1957]2 All E.R.ll8 at p.12l(Q.B.).
25 supra note 22. at 989-90.
26 *HarjotAhluwalia v. Spring Meadows Hospital,* II (1997) CPJ 98 (NC).

liability of a doctor for negligence can be gathered from the following observation of the apex court in *Dr Laxman Balakrishna Joshi v. Dr. Trimbak Babu Godbole*,[27]

The duties which a doctor owes to his patients are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of the treatment. A breach of any of those duties gives aright of action for negligence to the patient.

In this case a doctor performed a surgical procedure on patient's fracture without giving anaesthesia. The patient died due to shock. The doctor was held liable for negligence.

3.2. Status of Government Hospitals under Consumer protection Act

As far as the settled law is concerned, the patients of the government hospitals cannot maintain a suit in the consumer forum under COPRA, as such services do not have any considerations for the service rendered as those are free of cost. A patient cannot claim of availing of paid medical services in a government hospital just because of the tax he pays. The patients, who approach for treatment in a government hospital are not entirely treated free of cost. There is cost for the bed, medicines and the food that is being offered to the patient and all surgeries done on a patient are not always free of cost. Only the services that a doctor renders as regular visits and checkups may be regarded as free of cost. But that do not imply that a patient is being treated without any consideration. But all the patients, who seek treatment in government hospitals, are considered to have availed medical services free of cost. They are not consumers under the COPRA as the service they are offered is not hired for consideration.

27 A.I.R. 1969 S.C. 128 at p.132.

A person who receives medical treatment in a Government hospital is not a consumer under the Act.[28] However, the State Commission of Orissa held that a patient is a Consumer being the beneficiary of services in as much as the State Government is paying the consideration amount in the form of salary to the doctors and hospital staff.[29]

In the case of *Paramjit Kaur v. State of Punjab* [30] the patient was operated upon in Punjab Government Hospital free of charge for family planning. Subsequently, she conceived and gave birth to a girl child. She filed a suit against State of Punjab and the doctor, who performed the operation, to claim compensation of Rs 2 lakh for negligence in performing the operation. The complaint was dismissed as she was treated free of cost.

The Rajasthan SCDRC has observed that a pensioner who avail the facility of free supply of medicines under Rajasthan State Pensioner's Medical Concession Scheme, by making a monthly contributions at the rate prescribed while in service, has hired the service in exchange for the contributions, and is, therefore a consumer as per the Act.[31]

3.3. The services provided by Employees' State Insurance (ESI) Hospitals:

The services provided by Employees' State Insurance (ESI) hospitals cannot be regarded as free service and persons who get treated over there under an insurance scheme are rightly qualified as consumers under COPRA as the issuer bears the charges. ESI scheme is an insurance scheme and contributes for the service rendered by the ESI hospitals/dispensaries, of medical care in its hospital/dispensaries, and as such service given in the ESI hospital/dispensaries to a member of the scheme or his family cannot be treated as gratuitous. Section 56 of ESI

28 *Consumer Unity and Trust Society v. State of Rajasthan*, (1991) I CPR 241.

29 *Smt. SukantiBehera v. Dr. SashiBhusanRath,* II (1993) CPJ 633.

30 (II(1997) C.P.J.394).

31 *Treasury Office and Member Security Pensioner Medical Fund v. G. K. Joshi,* I (1996) CPJ22(Raj.SCDRC)

Act-1948,[32] is a specific section, which has reference to the medical benefits available to an insured person or to his family member whose condition requires medical treatment and attendance and they shall be entitled to receive medical benefit." Section 59 of the same Act obligates the corporation to establish and maintain in a State such hospitals, dispensaries and other medical and surgical services as it may think fit for the benefit of the insured persons and their families. From the provisions of the ESI Act, it is clear that the corporation is required to maintain and establish the hospitals and dispensaries and provide medical and surgical services. Service rendered to the insured person or his family member in the hospital for medical treatment is not free, in

32 Section 56.ESI Act 1948.Medical Benefit. — (1) An insured person or (where such medical benefit is extended to his family) a member of his family whose condition requires medical treatment and attendance shall be entitled to receive medical benefit. (2) Such medical benefit may be given either in the form of out-patient treatment and attendance in a hospital or dispensary, clinic or other institution or by visits to the home of the insured person or treatment as in-patient in a hospital or other institution. (3) A person shall be entitled to medical benefit during any [period] for which contributions are payable in respect of him or in which he is qualified to claim sickness benefit or maternity benefit [or is in receipt of such disablement benefit as does not disentitle him to medical benefit under the regulations] :
Provided that a person in respect of whom contribution ceases to be payable under this Act may be allowed medical benefit for such period and of such nature as may be provided under the regulations :
[Provided further that an insured person who ceases to be in insurable employment on account of permanent disablement shall continue, subject to payment of contribution and such other conditions as may be prescribed by the Central Government, to receive medical benefit till the date on which he would have vacated the employment on attaining the age of superannuation had he not sustained such permanent disablement :
[Provided also that an insured person who has attained the age of superannuation, a person who retires under a Voluntary Retirement Scheme or takes premature retirement, and his spouse shall be eligible to receive medical benefits subject to payment of contribution and such other conditions as may be prescribed by the Central Government.]
Explanation. — In this section, " superannuation ", in relation to an insured person, means the attainment by that person of such age as is fixed in the contract or conditions of service as the 26 age on the attainment of which he shall vacate the insurable employment or the age of sixty years where no such age is fixed and the person is no more in the insurable employment].

the sense that the expense incurred for medical service rendered in the hospital would be borne from contributions made to the insurance scheme by the employer and the employee." It is a matter of common knowledge that the patients in a government hospital are regarded to be treated free of cost but as a matter of fact, the x-rays or other pathological tests that are required to be performed are not done in the government hospital but the patients get those done from outside/private clinics. As has earlier been mentioned the medicines are not being provided free, which they need to buy from outside from dispensaries which is not free of cost. So, free of cost service is not actually free of cost.

In *Kishore Lal v. Chairman ESI*[33] the Supreme Court held that wherever charge for medical treatment are borne under an insurance policy , it would be a services rendered within the ambit of Section 2(1) (0) of the Act, it means that the services are not free of charge.

3.4. Lawyering Services

A career in the legal profession can be intellectually challenging, personally fulfilling and financially rewarding. Law and its practice is a professional responsibility. At the heart of the legal professional's role is client service. Whether you are a lawyer representing a multinational corporate client, a paralegal assisting abused women to obtain restraining orders or a law clerk researching a tax issue for a new business, the fundamental purpose of the legal professional is the help others resolve their legal problems.

The lawyers' calling is a profession as it has all the ingredients of a profession namely,

- Collective organisation (the Bar);
- A spirit of service (a duty to the community often transcending the duty towards a particular client);
- Learning and status.

As a matter of fact, the profession of law has been characterised as 'noble profession' for good reasons. A case is won or lost as a result

33 (2007) 4 SCC579.)

of the ability or inability of the lawyer to cope and tackle with the situation successfully by bringing his ingenuity, ability, mental resourcefulness, knowledge of law and advocacy to bear upon it. Though it may seem paradoxical, it is a hard fact that a noble profession like law which is expected to provide specialised services to its clients and champion their causes, is nowadays witnessing resentment amongst its consumers.[34]In the case of legal profession it accepted worldwide that lawyers are duty bound to promote civil and political rights of individuals." So the promotion of human rights is recognised in international conventions for promotion of human dignity."[35]Over the years courts have recognized 'Legal Service' as a 'service' rendered to the consumers and have held that lawyers are accountable to the clients in the cases of deficiency of services." In *Srinath* v. *Union of India,*[36] Madras High Court held that, in view of Sec. 3 of Consumer Protection Act, 1986. Consumer Redressal Forums have jurisdiction to deal with claims against advocates. Sec. 2 (U) of competition Act, 2002 defines the term 'Service' along the lines of consumer protection Act, 1986. Thus it may be concluded that legal services are becoming subject of trade related laws where consumerism and market forces should be given adequate space .The judgement of the Supreme Court in *Lucknow Development Authority* v. *M.K. Gupta*[37] may be cited as an illustration. In the instant case the Supreme Court while establishing the jurisdiction of the Consumer Disputes Redressal Agencies created under the Consumer Protection Act emphasised that the service provided by a private body or a statutory or public authority are within the jurisdiction of the Consumer Protection Act. In this context, the Supreme Court also laid down that any defect or deficiency in such service would be treated as unfair trade practice and would amount to denial of service.

34 papers.ssrn.com/sol3/Delivery.cfm?abstr**act**id=1553545 by S.M. Mehta - 2010)

35 See the International Covenant on Civil and Political Rights 1966; the European Convention For The Protection Of Human Rights And Fundamental Freedom 1 950.

36 (AIR 1996 Mad 427).

37 (1994) 1SCC 243.

3.5. Architect and Engineering services

The duties of an architect towards the client depend upon the terms of the contract either oral or written. Generally he is engaged for the purpose of advising, examining the site, preparing designs, drawings and plans and supervising and certifying constructions. The liability for breach of duty in connection with these functions depends upon the terms of the contract. In *M. D. Bhoopathy v. Mrs. Sarada,*[38] the builders agreed to construct apartment and pent houses for the complainants. But they failed to construct the pent houses. The National Commission held that there was breach of contract. The builders were held liable. An architect is under obligation to carry on the construction as per the specifications given by the client. Any lapse will attract liability for breach of contract. Where the builders did not construct the house according to the specifications given by the complainants. The National Commission held that it amounted to breach ofcontract.39 In *U.T. Chandigarh Administration and Anr.v. Amarjeet Singh and Ors.40* In this case a clear cut assurance was made to the purchasers as to the nature and the extent of development that would be carried out by the appellant company as a part of the package under which sale of fully developed plots with assured facilities was to be made in favour of the purchasers for valuable consideration. To the extent the transfer of the site with developments in the manner and to the extent indicated earlier was a part of the transaction, the appellant-company had indeed undertaken to provide a service. Any deficiency or defect in such service would make it accountable before the competent consumer forum at the instance of consumers like the respondents. Whether the service provider is a private or a statutory body, it is amenable under consumer protection act and any deficiency in service is liable to be compensated by the service provider. In *Narne Construction Pvt. Ltd. &Ors. v Union of*

38 1996) 1 C.P.J. 168 (N.C.).
39 *DeshbirVerma v.The Hamirpur Co-operative House building SocietyLtd*(1996) 3 CPJ 165 (HP S.C.D.R.C.).
40 (2009) 4 SCC 660.

*India &Ors.41*The Court held that when a person applies for allotment of building site or for a flat constructed by development authority and enters into an agreement with the developer or a contractor, the nature of the transaction is covered by the expression "service" of any description. The housing construction or building activity carried on by a private or statutory body was, therefore, held to be "service" within the meaning of clause (o) of Section 2(1) of the Act as it stood prior to the inclusion of the expression "housing construction" in the definition of "service". In *I.B.A. v. E.M.1 and B.1. C. C,*[42]the sub-contractors who designed a television mast gave an assurance that it would not oscillate dangerously. But the mast collapsed. The House of Lords held them liable, without answering the question of the extent of contractual obligation. An architect shall carry out necessary examination of the site in terms of soil and other particulars before the inception of any building construction.The duty to carry out such test is imperative. In *Mohammad Ibrahim Mulla v. Hamid Aboobakar Memon*[43] the National Commission held that if a builder gave an area to the client less than agreed upon that would amount to deficiency in service. It follows that if due to the fault of an architect the space in the building gets reduced, he attracts liability for deficiency in service.

Conclusion

The Consumer Protection Act was evolved over the last decade and the judiciary can be credited with keeping consumer protection up to date with the changing times. The Supreme Court and National Commission's decisions in banking, insurance, education and civic services-related cases are now as good as law and have gone a long way in guiding the consumer protection initiative. It may be concluded that there is no lacking of legislation in India regarding consumer protection, but there are many hurdles which are to be crossed to achieve the object of these legislative measures. Consumer awareness has to be given the priority, since it is the lack of awareness of the rights in consumers

41 (2012) 5 SCC 359.
42 [1980]14 Build. L.R. 1 (H.L.).
43 (1996) 1 CPJ 28 (NC).

which hinders the progress of achieving the object of the consumer protection legislation.

The distinct roles of the Indian judiciary and the legislature are well-defined. While the governments (or legislature) formulate laws, the judiciary has the job of interpreting them if any disputes arise. The Indian judiciary, *sumoto,* has taken cognizance of issues of public interest. Whether its environmental issues, human rights or consumer concerns, judicial decisions have had significant impact on how things are run in India. While giving interpretation to the Acts, laws and rules, courts do give due attention to the intention and purpose of the law that pertains to the case in question. In a number of judgements, the Supreme Court has underlined this observation while interpreting the law. A case law in point being the *National Insurance Company Ltd* v. *Laxmi Narayan Dhat*,[44] the Supreme Court made it clear that the interpretation of the law should be made keeping in view the purpose of the Act. 'A statute being an edict of the legislature, in construing it, it is necessary to seek the intention of its maker', said the Supreme Court. There are situations where the law is silent and facts of the case demand that the meaning of particular clauses be elaborated upon. In such situations, the courts take many factors into account like the circumstances of the case and purpose of the law. This accompanied with the fundamental principle of natural justice is the basis of the interpretation. Such interpretations, when made by the judiciary, become a precedent for future cases of similar nature and if one can put it that way, they become law.

Indian judiciary has now come to play a very vital role in influencing the various aspects of the administration and governance of the country. At one time, it was thought that the role of judiciary is only to interpret the laws and regulations and provide judgements exclusively from the legal point of view. This perspective regarding the judiciary has undergone sea change in recent times. The indian judiciary, particularly the apex court has done a significant job to protect the rights of

44 (2007 [CP] 445).

consumers. The courts have time and again adopted a flexible approach with regard to cases related to the socio welfare legislations to deliver the justice to the common masses. The same is true with C P Act,1986 also.

Human Rights Protection and Forensic Science Application: A Case For Sensitizing Criminalistics and Adjudicators.

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Abstract

Every human being is entitled to enjoy basic human rights without any limitation whatsoever. These Rights have assumed importance in the present era due to the constitutional backing in most of the countries of the world, as mandated by the Universal Declaration of Human Rights and the Covenants following thereafter. Article 21 of the Indian constitution provides for the right to life and personal liberty encompassing thereby the nuances of human rights available to every person. Amongst the parameters of the right to life, fair and efficacious criminal administration of justice becomes all the more important. Over the last fifteen years, the scientific investigation and documentation of human rights violations has become a valuable tool in the search for truth and justice in societies emerging from periods of political, ethnic and religious violence. Forensic expertise has served human rights investigations led by official justice systems of states, historical truth-seeking process, international tribunals and commissions and human rights NGOs. Increasingly, academics and legal practitioners are adopting a more critical attitude towards the forensic sciences-the way these are introduced at trial and its reliance in convictions or acquittals with its attendant impact on Human Rights protection of individuals in conflict with the law. Moreover, practitioners and forensic science specialties have begun a reflective evaluation, wherein the shortfalls and indeed validity of a number of heretofore accepted techniques are being questioned. In actual practice the weight ascribed to forensic evidence in the courtroom or indeed to the opinions of experts is being consigned to the dustbin. Deficits inherent in the current system, include operational problems related to the efficiency of the justice system and the way it is

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administered, the admissibility of expert evidence, reliability tests and structural problems, including the influence of the expert evidence on the adjudicators, the adversarial nature of the system in common law jurisdictions, the bias of legal representatives and defective rule-books in forensic sciences which lead to disintegration of Human rights of individuals whose stakes are involved. Therefore, the present paper will highlight the need for educating Criminalistics in order to augment preservation and protection of human rights.

Keywords: *Forensic Science, Education, Forensic Expert, Human Rights, Medico-Legal Case.*

Introduction:

The administration of justice symbolizes the place of a state in the Comity of Nations. The nature and sensitivity of criminal administration of justice in a country can be gathered by its emphasis on the protection of human rights[1]. The United Nation has recognized the role of experts of Forensic science and related fields to investigate human rights violations as a prelude to its effective protection and enforcement. The Forensic expert has a humanitarian as well as legal roles in the context of human right violation[2]. In educational system the educators are crucial in the formation of public opinion and in deciding how that opinion is going to shape the future course of action[3]. Since these investigations will form a fundamental piece of society's vision of the truth of its past,

1 The Secretary-General renewed the commitment of the United Nations Secretariat, agencies, funds and programmes to upholding the responsibilities assigned to them by the Charter of the United Nations, the Security Council and the General Assembly whenever there is a threat of serious and large-scale violations of human rights. That was a first step in implementing the "Human Rights up Front" action plan, which places better system preparedness and preventive action at the core of United Nations efforts to avoid future conflict. See protect human rights/united nations available at: un.org › en/sections/what-we-do/protect-human-rights/...

2 Oriola Sallava, Cross border exchange of forensic DNA and human rights protection, Forensic Science International: Genetics Supplement Series , Volume 5, December 2015, Pages e86-e88

3 Arpaporn Winijkulchai, Kim McQuay, Forensic Science Enhances Access to Justice and Human Rights Protection in Thailand, February 27, 2013, Animation series raises public understanding of the role of forensic investigation in criminal justice administration.

it makes sense for human rights defenders including Criminalistics[4] to integrate their investigations with human rights education. Each of these actors and institutions can be either an ally or an opponent for a human rights organization that promotes a forensic investigation. For this reason, it is important to work with them at each stage of the process[5]. While most human rights reporting relies on verbal testimony, sometimes the bloodshed is so horrendous and so complete that there are no survivors to provide a consistent account of events and circumstances. Forensic evidence has increasingly been used to corroborate, and supplement, accounts offered by survivors[6].

1. International Overview

Forensic investigation has long been a foundation of criminal investigation, including well known human rights cases. The 1979 Filartiga case, for example, relied on forensic analysis. Forensic evidence, however, was not systematically introduced to human rights reporting until the mid-1980s.[7]

The first forensic human rights mission took place in Argentina and included participation of the accomplished forensic anthropologist Clyde Snow[8]. Eric Stover[9] recalls being approached by the grandmothers of

4 The scientific study and evaluation of physical evidence in the commission of crimes.

5 The Center for Forensic Science and Human Rights conducts forensic scientific investigation of primarily skeletonized human remains worldwide, particularly those found in circumstances indicating abuses of human rights, such as mass graves, “ethnic cleansing”, torture, or genocide. A secondary activity is forensic assistance lent to medical examiners’ offices and regional law enforcement agencies in solving missing person and homicide cases. See for details: integrativemedsci.org › center-for-forensic-science.

6 Pardo M. 2010. Evidence Theory and the NAS report on forensic science. Utah Law Rev. 2010, 367–383.

7 Forensic Evidence and Human Rights Reporting, Regents of the University of Michigan and the Human Rights Advocacy and the History of International Human Rights Standard, based on : Filártiga v. Peña-Irala case that laid the foundation of human rights perspective in USA. See for its convass”http//: www.hrp.law.harvard.edu/.

8 The mission was organized by Eric Stover, who was at the time serving as head of the Human Rights Program at the American Association for the Advancement of Science. See Clyde Snow: stories in bones available at : www.economist.com/

the disappeared in Argentina, and it was their fervent and persistent drive to learn what had happened to their loved ones that prompted the mission[10].

2. Use of Forensic Anthropology in investigations:

Forensic anthropology[11] has proven to be a very useful tool for human rights investigation, even if at times may be controversial. The approach pioneered in that first mission to Argentina was subsequently standardized by the Minnesota Lawyers, Human Rights Committee (now The Advocates for Human Rights). Their "Minnesota Protocol"[12] provides detailed instructions for conducting forensic autopsies and analysis of skeletal remains and has been adopted by the UN as part of a Manual on the prevention and investigation of extra-legal executions. The American Association for the Advancement of Science (AAAS)[13]

9 www.humanrightshistory.umich.edu/files...

10 The forensic mission was initially intended to help provide some information to close friends and relatives of victims, but it also provided evidence for use in prosecution.

11 The branch of physical anthropology in which anthropological data, criteria, and techniques are used to determine the sex, age, genetic population, or parentage of skeletal or biological materials in questions of civil or criminal law.[Dictionary.com-Unabridged Based on the Random House Dictionary, © Random House, Inc. 2018].

12 The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) is a set of international guidelines for the investigation of suspicious deaths, particularly those in which the responsibility of a State is suspected (either as a result of act or omission).The original version of the Protocol, from 1991, was entitled the Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions. It was designed to support the implementation of the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, which were endorsed by the United Nations in 1989.[1] The Manual became known as the Minnesota Protocol because of the central role played by the Minnesota Lawyers International Human Rights Committee in its development. The use of the term 'Protocol' reflects the forensic medicine element of the document rather than its legal status. In 2016, after a two-year process of revision, the new version of Minnesota Protocol was finalized by an international group of experts convened by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, and the Office of the United Nations High Commissioner for Human Rights (OHCHR).

13 https://www.aaas.org/about/mission-and-history

is no longer directly involved in forensic investigations, but the forensic units it helped establish in Argentina and Guatemala continue their work and have assisted with investigations in Haiti and elsewhere. Forensic analysis is now a typical constituent in the toolkit for human rights investigation, and it has proved an important source of evidence about such human rights carnage as the annihilation at Srebrenica. Physicians for Human Rights maintains an ongoing program in forensics and human rights, including online training in human identification and DNA analysis.

3. Cases Of Infringement Of Human Rights By Justice Agencies

One of the main necessities of an effective Criminal Justice System is that the agencies and individuals who compose it should uphold and enforce the law. It is also their role that in upholding and enforcing the law, it should be done in recognition and respect of human rights. As a matter of fact, a way that the criminal justice system enforces the law is by ensuring that when enforcing the law, there is no violation of human rights. It requires that rights such as the right to free and fair trail, to legal representation in case and the right to appear before a court of law are respected[14].

4. Uses of forensic science in the criminal justice System

The significance of forensic science to the criminal justice system cannot be excessively emphasised. Forensic Science's most important use is that it can be used in almost any criminal case to provide the formative factor in the ability of evidence to sufficiently represent the facts of a case. In complex cases, and even in relatively simple ones, the most minute details can become paramount to a successful prosecution or defence. It is forensic science that provides the means to analyse crime scenes, evidences, and personal testimony in order to create a visualisation of how a crime occurred[15]. Forensic science has in the following ways, allowed law enforcement agencies to converse via one system without losing sight of their evidence and also allows them to

14 See C. Lewis. How effective Is criminal Justice? University of Portsmouth, UK , August 2003.

15 Wheate R. 2010. The importance of DNA evidence to juries in criminal trials. Int. J. Evid. Proof 14, 129–145.

better solve cases and find connections between the cases. But the criminalistics at laboratory have been often seen to invent the evidences in the favour of influential accused or fix an innocent accused thus cause grave human right violation at first instance and then misdirecting the justice[16].

5. Crime Scene Investigation

Crime Scene Investigation (CSI) refers to the series of steps to investigate a crime scene. It consists of the detailed examination of a crime scene, and discovery, recognition and collection of relevant evidence, as well as permanent certification of the scene, although the methods and techniques used may differ, the aim is to rebuild the exact circumstance of the crime through the identification of the sequence of events and to gather physical evidence that can lead to the identification of the perpetrators.[17]. Crime Scene investigation usually begins at the place where the crime was committed. It requires that the area around the crime scene be secluded and secured to prevent the destruction or contamination of crucial physical evidence that can lead investigators to link the perpetrators to the victim. Popular television shows such as CSI, Discovery Investigation, Law and Order, Criminal Minds, NCIS depict almost accurate nut glamourized version of the activities of 21st century forensic science-particularly crime scene investigation and as such, these TV shows have changed individuals' expectations of the forensic science, an influence termed as the "CSI" effect. This has both positive and negative effects on the practice of CSI as it has led to the standard of CSI practice being high to meet public expectations while at the same time, has led to people (Offenders) being more smart and sophisticated when committing crime, so as to avoid being cough using CSI. Worth to mention here that these programs must also highlight the domain of

16 7. Gold A. 2002. Miscarriages of justice and the misuse of scientific evidence in criminal cases: '… they go together like a horse and carriage'. *ISRCL*

17 Strengthen Forensic Science In The United States: A Path Forward. National Research Council Of The National Academies. See Washington D.C. : at The National Academies Press, 2006). Page 8.

ethics of human rights vis a vis forensic science in practice and it must also educate our criminalistics[18].

6. Crime Scene Reconstruction

Crime scene reconstruction[19] is the most important aspect of forensic science; it involves the reconstruction of the circumstances and behaviours involved in a crime[20]. Gardner and Bevel explain that crime scene reconstruction "involves evaluating the context of a scene and the physical evidence found there in an effort to identify what occurred and in what order it occurred."[21] Chisum and Turvey explain that "[h]olistic crime reconstruction is the development of actions and circumstances based on the system of evidence discovered and examined in relation to a particular crime. In this philosophy, all elements of evidence that come to light in a given case are treated as interdependent; the significance of each piece, each action, and each event falls and rises on the backs of the others.[22] Therefore, Crime scene involves the careful and competent examination of the physical evidence and the documentation of the crime scene through the examination of the available physical evidence, in addition to those materials left at or removed from the crime scene, victim or accused. Crime scene reconstruction encompasses the scientific analysis of the crime scene, interpretation of scene pattern evidence and laboratory examination of physical evidence and the systematic study of related information and the logical formulation of a theory about how crime occurred based on universal principle of

18 50. Evett IW, Jackson G, Lambert JA, McCrossan S. 2000. The impact of the principles of evidence interpretation of the structure and content of statements. SCI. Justice 40, 233–239.

19 Crime reconstruction or crime scene reconstruction is the forensic science discipline in which one gains "explicit knowledge of the series of events that surround the commission of a crime using deductive and inductive reasoning, physical evidence, scientific methods, and their interrelationships.

20 See E.A Martin, Oxford Dictionary of Law: Fifth Edition, Oxford University Press, New York, 2002.

21 Gardner, R., and Bevel, T. (2009). Practical Crime Scene Analysis and Reconstruction. Boca Raton, FL: CRC Press. p. 1.

22 Chisum, W., and Turvey, B. (2007). Crime Reconstruction. Burlington, MA: Academic Press. pp. ix.

investigation known as Locard's Exchange principle[23]. In conjunction with the agreeable witness accounts, crime scene reconstruction may be a powerful instrument of corroboration. In instances of conflicted witness accounts, crime scene reconstruction provides an objective view that point to one possibility over the another and in the absence of witness accounts, crime scene reconstruction can be used to investigate and establish the actions that occurred at the scene of crime, demonstrating links between crime and suspect. As such the consideration of both the strengths and limitations of the available physical evidence are an important part of the crime reconstruction[24].

Further the assumption of integrity of evidence is a process of crime reconstruction is built on the this assumption that the evidence left behind at a crime scene which has been recognised , documented, collected, identified, compared, individualisation and reconstructed, is pristine which ensures the integrity of the evidence found within[25]. Subsequently, any conclusions reached through forensic science examination and reconstructions of that evidence are assumed to be reliable lens through which to view the crime.

7. Administration of Forensic Science

Forensic Science administration studies how to reduce error rated in forensic science by reorganising the system of forensic work. It deals with the management of forensics science labs and workers and studies the organisations of forensics labour in the criminal justice system using the tools of social science and business administration. Forensic administration studies forensic science within its legal and political context and demands higher standards of performance. The environment for forensic science administration is evolving which has placed pressure on lab managers to adopt new and higher standards of professionalism,

23 In forensic science, Locard's exchange principleholds that the perpetrator of a crime will bring something into the crime scene and leave with something from it, and that both can be used as forensic evidence.

24 Morrison G. 2012. The Likelihood-Ratio Framework And Forensic Evidence In Court: A Response to R v T. Int. J. Evid. Proof 16, 1–29.

25 Saks M, Koehler J. 2008. The Individualization Fallacy In Forensic Science Evidence. Vand. Law Rev. 61, 199–219.

verifiability, and scientific rigor in relation to forensic science[26]. The knowledge and skills of laboratory managers must now go well beyond familiarity with scientific techniques of testing and they must be up to date with the changes in the legal , political, social environment and human rights aspect of case in hand and how criminal justice system might respond to such changes. And if there failure of this system the forensic administration can expose state of expensive litigation for wrongful conviction and the possible voiding of prior convictions. It also has a tendency to reduce the actual and perceived value that the forensic science adds to the criminal justice system as the perception the forensic science is that it is untrustworthy, which weakens its evidentiary value, which in turn, reduces the value it really adds to the judicial administration.

The following matters are to be taken into account to the administration of forensics science:

i. Information pollution:

This arises when a forensic worker or expert knows irrelevant details of a case which leads him or her to draw inappropriate conclusions from the evidence, in violation of forensic practice. Information sharing between police investigators and forensic scientists creates the strong possibility of unconscious bias and also helps dishonest scientists to act on any self-conscious biases they may have. Research in forensic science administration suggests that "information hiding" will reduce the number of such bogus inferences and thereby reduce the error rate in forensics science[27].

ii. Chain of Custody

Chain of custody involves tracking evidence that comes up in a court trail from time to time it is collected from the crime scene until it is presented in court. It aims at to show that the evidence has not been

26 1. Abregu M. 2001. Barricades or obstacles: the challenge of access to justice. In Comprehensive legal and judicial development: towards an agenda for a just and equitable society in the 21st century (ed. Puymbroeck R, editor), pp. 53–69. Washington, DC: The International Bank for Reconstruction.

27 See M. Sidebottom, The importance of Forensic Science in Criminal Justice ,30th march 2008.

tampered with in the meantime[28]. It is one of the three ways to authenticate real or physical evidence in court, according to the rules of evidence. The other two methods involve either a unique piece of evidence or an item of evidence that is made unique for example, by a witness having marked it at time of the crime. The purpose of chain of custody is to preserve the evidence and if this chain of custody is not maintained as per scientific standards then the results produced may result in misleading the court and thus wrongful conviction if any. Further to mitigate and control this mishap each item of evidence is to be packaged separately to avoid contamination and damage. Every time an item of evidence is transferred form one person to another, it is signed and accounted for. The evidence is handled through a strict chain of custody. Any gap in the continuity of the timeline can render evidence useless because there is no longer any guarantee that the item was not contaminated in some way during gap period, or if it is even the same piece of evidence. Therefore, the criminalistics ought to be well educated about its importance by training hem about the most sophisticated way of standard of procedure to be adopted. They must know the accuracy and completeness of the chain of physical evidence can determine its admissibility but, more significantly, the failure of an element of the chain of custody can taint a key element of a case, resulting in a wrongful acquittal or conviction.

iii. Evidence Dynamics:

Even though a reliable chain of evidence may be established, physical evidence may have been altered prior to or during its collection and examination. Evidence Dynamics refers to any influence that changes, relocates, obscures or obliterated physical evidence, regardless of intent[29].

It comes into play during the interval that begins as evidence is being collected and transferred, and ends when the case is ultimately adjudicated. Unless the integrity of the evidence can be reliably

28 World of Forensic Science: Evidence, Chain of Custody. Enotes.com/forensic science accessed on 23rd November,2010.

29 See World of Forensic Science: Evidence, Chain of Custody. Enotes.com/forensic science accessed on 23rd November,2010.

established and the legitimate evidentiary influences accounted for, the documentation of a chain of evidence, by itself, does not provide acceptable ground upon which to build reliable forensic conclusions. The people involved in handling of evidence include investigators , technicians, forensics specialists and storage clerks who must know that how to maintain the evidence placed in their hands and how well they keep a record of its movements will determine whether it will be accepted in court. they must keep record that under what conditions evidence has been kept, who has and possession of it, for what purpose and what tests or procedures have been performed on it. The custodians of the evidence is responsible for managing the movements of the evidence and delivering it to the court with a complete, accurate provenance of its history form its discovery to its appearance in court.

iv. Cross Contamination

Trace evidence like hair fibres, paint and blood is by its very nature readily transferred from item to another. This raises the problem of cross contamination where the source of trace evidence found on a significant item is uncertain. The trace evidence may have attached itself to a relevant item during the crime itself, in which case it becomes significant evidence. However, it is also possible that the evidence was transferred to the item via a third party during investigation. This would be cross contamination and such evidence is detrimental to an investigation. Cross contamination could also occur if packaging and re-packaging of items is not done correctly. It is essential to package each piece of evidence separately in an unused container. Therefore the experts need to be vigilant and ensure that the true value of trace evidence is maintained and revealed in court.

4. Technology use in Human Rights

The Later forms of techniques like Remote sensing, DNA sequencing, and data mining have emerged as valuable techniques for investigating and gathering evidence of human rights abuses and war crimes. Collecting evidence sometimes poses legal and moral concerns concerning privacy intrusions and questions concerning the state's search and seizure authority. Furthermore, establishing and maintaining

the chain of custody of the evidence may be difficult which shakes the human right objective of doing justice in a given case.

In the view of some critics, human rights investigations have not been sufficiently rigorous in protecting data. Moving forward, we can expect that the examination and analysis of evidence by forensic experts will be subject to judicial scrutiny and the court of public opinion.

In fact, in the USA the scientific validity of some forensic methods has been called into question by an expert group-Presidents Council of Advisors on Science and Technology[30], 2016 and India has yet to follow that suit. Experience and expertise may not be sufficient against courtroom challenge, particularly when the stakes are high. However, trials will often depend upon this scientific and technical evidence[31]. The wealth of information reaped by modern systems of technology in forensic science should establish solid cases for the prosecution of crimes and thereby focus on securing the human rights of individuals involved or accused of a crime, in the world today. The exhumation of mass graves is one practice that might benefit from bringing areas of expertise together. Satellite imagery, for example, locates where the earth has been disturbed, suggesting possible locale of mass graves through the remote sensing techniques, while DNA sequencing helps identify the dead once (if) they are exhumed. Information passed from the Internet can also provide important contextual information that corroborates the information collected by satellites.

The question that how these technologies are at present used in performance and how such partnerships might be improved to support legal liability in the future for safeguarding human rights approach of forensic technology as a whole, is yet to be answered fully.

i. Forensic Science:

30 The United States President's Council of Advisors on Science and Technology (PCAST) is a council, chartered (or re-chartered) in each administration with a broad mandate to advise the President on science and technology.

31 National Research Council. 2011. Strengthening Forensic Science In The United States: A Path Forward. Washington, DC: National Academy of Sciences.

Reference to forensic science or the forensic sciences relates of course not to one single field, but to a broad range of disciplines for which there is a forensic application, each with its own associated practices and set of technologies. Consequently, 'there is a wide variety across forensic science disciplines with regard to techniques, methodologies, reliability, types and number of potential errors, research, general acceptability, and published material.

The mammoth scale and scope of issues and the pace of change; the complexities of weaving together different data-points from different data sources at different points in time to create an comprehensible description about the past and to inform what happens in the future; and the complex array of challenges – ethical, operational, commercial and political in nature – that the propagation of these new technologies now encompass, need to be addressed at the earliest for creating ambieance for human rights protection[32].

The benefits yielded from the output of the forensic sciences and associated utility for prosecutions or acquittal of the perpetrators of crime has meant that scientific evidence has become a backbone in the functioning of our criminal justice system. As Eyal Weizman highlights, 'the history of jurisprudence tells of a constant tension between human testimony and material evidence, and an ongoing shift of emphasis, at different periods, between them[33]. Moreover, the fruits of forensic evidence remain latent for the purposes of justice until an act of conversion takes place, or in other words an interlocutor is required to interpret and explain the significance of any piece of potential evidence , so that human rights education can be achieved by acquainting experts'.Thus, when unpacking the association between science and the law, our perilous contemplation turns not only to the material or forensic evidence, but also to the medium through which the evidence is presented to the forum—the expert witness—and how this dialogue is

32 13. Robertson, J. 2013. Understanding How Forensic Science May Contribute To Miscarriages Of Justice. Aust. J. Forensic Sci. 45, 109–112.

33 Ward T. 2004. Experts, Juries And Witch-Hunts: from Fitzjames Stephen to Angela Cannings. J. Law Soc. 31, 369–386.

received and perceived by the audience in the court, comprising both legal practitioners and lay members of the public. Our concern with initiating a paradigm shift should, as a consequence, focus on the toughness and acceptability of the evidence that comes before the court, the suitability of the expert, and the integrity and effectiveness of this act of active conversion. Besides, there is a paramount feature that entails the pragmatic application of science and law which is its role for the protection and advancement of human rights.

Conclusion

While the methodical hitches that serve to undermine the relationship between forensic science and the law should not be reduced to a discourse on miscarriages of justice, it is perhaps this occurrence that has become most illustrative of the breakdown in communication and perhaps therefore is the obvious mechanism by which a paradigm shift in Human Rights relevance might be effected. Furthermore, the onus is on the forensic science and judicial community to work in tandem to ensure that the introduction of new technologies, essential to keep pace with the developing world, is managed in such a way as to ensure judicial confidence from the outset. Finally, the challenge is also laid before the forensic science and law enforcement communities to allow the scientists to assume their dexterity and use their skills in the correct way, working in partnership to inform the investigative process rather than being downgraded to act simply as laboratory technicians who agitate out data and report their results in a contextualized vacuum so that basic human rights are preserved. Yet, the relationship between science and the law can at best be described as a firmly rooted argumentative symbiotic broad-mindedness. One of the first documented clashes occurred when Galileo promulgated to a highly charged and hostile court that, in his opinion, '*careful laboratory experiments could reveal universal truths*'. He was not well received.

Euthanasia: Right to Life v Right to Die

Abstract

Euthanasia also known as assisted suicide, physician –assisted suicide, doctor –assisted dying, and more loosely termed mercy killing,basically means to take a deliberate action with the express intention of ending a life to relieve intractable suffering. Some interpret euthanasia as the practice of ending a life in a painless manner. Many disagree with this interpretation, because it needs to include a reference to intractable suffering.The word euthanasia originated in Greece means a good death.Euthanasia encompasses various dimensions, from active to passive,voluntary or involuntary and physician assisted. Request for premature ending of life has contributed to the debate about the role of such practices in contemporary health care. This debate cuts across complex and dynamic aspects such as, legal, ethical, human rights, health, religious, economic, spiritual, social and cultural aspects of the civilised society. The object of this paper is to discuss the subject of euthanasia from the medical and human rights perspective given the background of the recent Supreme Court judgement (Aruna Shanbaug v. Union of India) in this context. In India abetment of suicide and attempt to suicide are both criminal offences. In P. Rathinam v. Union of India,(1994 (3)SSC 394) constitutional validity of Section 309 IPC was challenged in the Supreme court. The Supreme court declared that Sec. 309 of IPC is unconstitutional under Article 21 of the constitution. In Gian Kaur v. State of Punjab (1996 (2) SSC 648) an abetment of commission of suicide underSec.306 of IPC came to Supreme court. The accused were convicted in trial court and latter the conviction was upheld by the High Court and the High Court contended that 'right to die' be included in Art. 21 of the Indian Constitution and any person abetting the commission of suicide by anyone is merely assisting in the enforcement of the fundamental right under Art. 21 of the constitution. The court held that the right to life under Art. 21 of the constitutiondoes not include the right to die.

Keywords: *Euthanasia, Passive Euthanasia, Article 21, Permanent Vegetative State, Religions and Euthanasia*

Introduction

Euthanasia is an important problem that disturbs the modern society. In fact,euthanasia may be viewed as one of the issues which are very controversial since, on the one handit is supposed to provide incurable patients with an opportunity to end their sufferings,while on the other hand,it raises a number of ethical and legal issues,to the extent that it may be viewed as a crime.In such a situation,the necessity of the regulation of euthanasia and clear definition of its status are obvious.Euthanasia is a broad term for mercy killing-taking the life of a hopelessly ill or injured individual in order to end his or her suffering.Mercy killing represents a serious ethical dilemma.People donot always die well.Some afflictions cause people to suffer through extreme physical pain in their last days,and euthanasia may seem like a compassionate way of ending this pain. Euthanasia also seems to contradict one of the most basic principles of morality,which is that killing is wrong.Viewed from a traditional Judeo-christian point of view,euthanasia is murder and a blatant violation of the biblical command ''thou shall not kill''.

The term ''Euthanasia'' is derived from ancient Greek and means ''good death.''thus euthanasia is defined as the termination of human life by painless means for the purpose of ending physical suffering.Sometimes euthanasia is also defined as killing a person rather than ending the life of a person who is suffering from some terminal illness ,also called as mercy killing or killing in the name of compassion.[1]

Euthanasia is also defined as putting to death a person who because of disease or extremely old age or permanently helpless or subject

1 Angkina Saikia, Euthanasia Is it 'Right to kill' or 'Right to die',Cr LJ(2012)'

torapid incurable degeneration cannot have meaningful life.[2]It may also be defined as the act of ending life of an individual suffering from terminal illness or incurable condition,by lethal injection or by suspension of life support extraordinary treatment.Euthanasia is usually used inthe context of terminally-ill patients.But the word terminally ill is ambiguous not well defined anywhere and usually describes patients who are suffering from fatal diseases including those who are in permanent vegetative state (PVS).

Historical Perspective

According to the historian NDA. Kemp, the origin of euthanasia started in 1870.Euthanasia was debated and practiced in Greece and Rome: hemlock was employed as a means of hastening death on the island of Kea,a technique also employed in Marseilles and by Socrates in Athens. Euthanasia in the sense of a person's death was supported by Socrates, Plato in the ancient world,although Hippocrates appears to have spoken against the practice. He was not in favour of giving such an advice that may cause death of an individual

Euthanasia was strongly opposed in the judeo-christian tradition. Thomas Aquinas opposed both Socrates and Plato and argued that the practice of euthanasia contradicted our natural human instant of survival. [3] Suicide and euthanasia were more acceptable under Protestantism and during the age of enlightenment. Other cultures have taken different approaches: eg in Japan suicide has not traditionally been viewed as a sin,and accordingly the perceptions of euthanasia are different in Japanfrom those in other parts of the world. Adolf Hitler was supporter of the euthanasia programme as Nazi ideology was based on the principle of the 'survival of the fittest' and euthanasiaprogramme formed an essential part of Nazi genocidal policy of extermination which led to annihilation of about 6 million Jews at the concentration camps. The Nazi euthanasia though was not based on compassionate or any

2 J.S Rajawat, Euthanasia,CrLJ 321(2010)

3 Marya Mannes, Euthanasia v. Right to life,Baylor Law Review 27 (1975)

humanitarian cause but was based on economic policy that 'life unworthy of life' needs to be destroyed as their burdensome existence hampers the growth and development of national economy[4].In early 19th century this word came to be used in the sense of speeding up the process of dying and the destruction of the so called useless lives and today it is defined as deliberate ending of life of a person suffering from an incurable disease. Ancient Indian philosophy also justifies the idea of willing death .As per Hindu mythology lord Rama took Jal Samadhi in Sarayuriver and likewise, lord Buddha and lord Mahaveer attained death in similar way. Veer Savarkar and Vinoba Bhave also had chosen to die by refusing to take food. Mahatma Gandhi also supported the idea of wilful death. Thus the concept of right to die existed in early times. Right from 5th Century B.C. It has been the belief of Christians that birth and death are part of the process of life which god has created. Therefore no human has authority to choose the time and manner of his death ,Islam does not accept any kind of justification for the killing of person and thus euthanasia and suicide are prohibited in Islam.

Classification of Euthanasia

Euthanasia may be classified according to whether a person gives informed consent under the following heads:

A) Voluntary Euthanasia

b) Non-Voluntary Euthanasia

c) Involuntary Euthanasia

A) Voluntary Euthanasia:--

Euthanasia conducted with the consent of patient is termed as voluntary euthanasia. It is legalised in many states. In April 2001,Netherland became the first country in the world to legalise active voluntary euthanasia. Prior to it,it was practiced without any legislative force. In September 2002, Belgium became second to legalise euthanasia. Passive voluntary euthanasiais legal through the US.In 1994the Oregon state of US enacted physician 'assisted suicide' law.

4 Angkina Saikia, Euthanasia ,is it right to kill'or right to die LJ 356 (2010)

Assisted suicide is legal in Switzerland and the US states of Oregon, Washington and Montana. Recently, UK House of Lords has blocked a bill which sought to help terminally ill people to die.

b) Non- Voluntary Euthanasia

Euthanasia conducted where the consent of the patient is unavailable is termed as non-voluntary euthanasia. It may be contrasted with involuntary euthanasia,where euthanasia is performed ofagainst, the will of the patient.

Active non-voluntary euthanasia is illegal in all countries in the world,although it is practiced in the Netherlands on infants under an agreement between physician and districts attorneys that was ratified by Dutch National Association of Paediatricians.

Passive non –voluntary euthanasia is legal in India,Albania and many parts of the United States and is practiced in English hospitals. Although some of the people are against the view of passive non-voluntary euthanasia, according to them doctors have no authority to end the lives of patients and claim that they are simply acting in their patients best interest.

Example of non –voluntary euthanasia include child euthanasia, which is illegal worldwide but decriminalised under specific circumstances in the Netherlands.

c) Involuntary Euthanasia

It means when a patient's life is ended without the patient's knowledge and consent usually who are in permanent vegetative state,in coma or brain dead. Inthese cases the guardians like a spouse,parents or a close relative and if no such person is available then a next friend like a social worker or a lawyer may be appointed to make a decision on behalf of the terminally ill patient.

Voluntary non-voluntary and involuntary euthanasia can all be further divided into passive or active euthanasia.

1) Passive Euthanasia

It allows one to die by with-holding or withdrawing life supporting means .life supporting means may further be divided into two

categories.i.e.,ordinary and extraordinary. Ordinary means such as nutrition and hydration which are never to be withheld since they are ones basic requisites in order to survive. However, one may not be obliged to use extra ordinary means to sustain life,such a discontinuance of medical treatment which is burden some, dangerous to the expected outcome. To withdraw a life supporting treatment as condition worsen is letting one die and not a direct killing .In this case it is the disease that is killing and not the one who withdraw or consent to withdraw the treatment.

2) Active euthanasia or mercy killing is direct intentional killing of a patient with either consent or without consent when impossible to obtain (non-voluntary), without consent when not sought(involuntary).Active euthanasia entails the use of lethal substances or forces, such as administering a lethal injection which is the most controversial means.

Pronouncers of this theory have closed their ears to Gods command:thou shall not kill. The goal is to eliminate or relieve suffering of the patient by an evil means of death. These patients whether having incurable disease,being elderly or suffering in the other ways,are crying out for help and love. Palliative care not death is answer. A well known example of active euthanasia is the death of a terminally ill Michigan patient on Sept.1998.On that date, Dr. Jack Kevorkian videotaped himself administering a lethal injection to Thomas youk,52,who suffered with amyotrophic lateral sclerosis.

Reasons For Eutanasia

Euthanasia is the intentional killing by act or omission of a dependent human being for his or her alleged benefit. If death is not intended,it is not an act of euthanasia. There are various reasons for euthanasia. Some of them are:-

1) Unbearable pain
2) Demanding a right to commit suicide
3) Should people be forced to stay alive

1) Unbearable Pain:-

As the reason for euthanasia probably the major argument in favour of euthanasia is that the person involved is in great pain. Today advances are continuously being made in the treatment of pain and as they advance,the case of euthanasia/ assisted suicide is proportionally weakened. Euthanasia advocates stress the cases of unbearable pain as reasons for euthanasia. Every one whether it is a person with a life-threatening illness or a chronic condition has a right to pain relief. Killing is not the solution for such unbearable pain. Euthanasia can only be granted to the patients in permanent vegetative state (PVS)

2)Demanding a "right to commit suicide"

Euthanasia is not about the right to die. It is about the right to kill.Thus, euthanasia is not about giving right to the person who dies but, instead,is about changing the law and public policy so that doctors,relatives and others can directly and intentionally end another person's life. Euthanasia and suicide is not one and the same thing. Suicide is a tragic,individual act. Euthanasia is not about a private act. It is about letting one person facilitate the death of another.

3) Should people be forced to stay alive.

This is third important question when euthanasia is to be granted. One should not be forced to stay alive. Law and medical ethics requires that "everything be done'' to keep a person alive. Insistence,against the patient's wishes,that death be postponed by every means available is contrary to law and practice. It would also be cruel and inhumane. There comes a time when continued attempts to cure are not compassionate, wise or medically sound. Then 'only' all interventions should be directed to alleviating pain as well as to provide support for both the patient and the patients loved ones.

Religious Views On Euthanasia

There are many different religious views on euthanasia, although many moral theologians are opposed to the procedure of euthanasia. e.g, there are different views among Buddhists on the issue of euthanasia,but

many are critical of the procedure. Catholic teachings condemns euthanasia as a crime against life, and crime against god. The teachings of the catholic church on euthanasia rests on several crore principles of catholic ethics,including the sanctity of human life,the dignity of human person,concomitant human beings,due proportionality in casuistic remedies,the unavoidability of death,and the importance of charity. In Hinduism there are two Hindu point of views on euthanasia. By helping to end a painful life a person is performing a good deed and so fulfilling their moral obligations. On the other hand,by helping to end a life,even one filled with suffering,a person is disturbing the timing of the cycle of death and rebirth. This is a bad thing to do,and those involved in the euthanasia will take on the remaining karma of the patient. In Jainism Mahavira Varadhmana explicity allows a Sharavak full consent to put an end to his or her life if the Sharavak feels that such a stage is near that moksha can be achieved this way.

Kinds of Euthanasia

Euthanasia is classified into five categories:-

a)Animal Euthanasia

b) Child Euthanasia

c) Euthanasia in case of mental patients

d)Euthanasia in case of adult patients

e)Euthanasia in case of pregnant women

1) Animal Euthanasia:-

The Greek word euthanasia means good death .Animal euthanasia isthe act of humanely putting an animal to death or allowing it to die as by withholding extreme medical measures. Reasons for euthanasia include conditions or diseases[5], lack of resources to continue supporting the animal or laboratory test procedures. Euthanasia methods are designed to cause minimal pain and distress. In domesticated animals, this process is commonly referred to by euphemisms such as ‘’lay down’’,’’put down’,’’put to sleep’, or put out of its misery.’’

5 Report of the AVMA panel on Euthanasia,2000.

2) Child Euthanasia

Child euthanasia is a controversial form of non voluntary euthanasia that is applied to children who are generally gravely ill or suffer from significant birth defects..Sometimes it has been compared to infanticide. In the Netherlands, euthanasia remains technically illegal for patients under the age of 12.Where as, in exceptional cases, only in United Kingdom doctors should be given the right to withholdtreatment from seriously disabled new born babies.

3) Euthanasia In Case Of Mental Patients

In re. F(mental patient sterilization)[6] thepatient was not a minor, hence parenspatriae jurisdiction was not available,but even so,applying the inherent power doctrine,the same test,namely the test of best interest of the patient was applied by the lord Brandon of Oakbrook. Here the women was 36 years old and was mentally handicapped and unable to consent to a operation. She became pregnant.The hospital staff considered she would be unable to cope with the effect of pregnancy and to give birth to a child and that since all other forms of contraception were unsuitable and it was considered undesirable to further her limited freedomof movement in order to prevent sexual activity,it would be in her best interest to be sterilised. Her mother who was of the same view moved the court for a declaration that such operation would not amount to an unlawful act by reason of the absence of her consent. The trial judge and the court of appeal accepted that the lady be sterilised. On appeal the House of Lords affirmed the decision.

In *Simms V. An NHS TRUST*[7] is related to two patients from different families, where the patient, a boy of 18 and a girl of 16 each were suffering from a variant of Creutzfeldt -Jakob disease. Both sets of families wanted a particular treatment, so far untested on human beings,be given as the patients did not have themental capacity to think. The patients were lying in bed totally invalid. The court held that theduty

6 1990 2 AC 1

7 2002 EW HC 2734

of the doctors was secondary. He must act in the best interest of a mentally incapacitated patient. Best interests are not necessary medical; they include emotional and all other well issues.

4) Euthanasia In Case Of Adult Patients

In an NHS Hospital Trust v. S,[8]Where S aged 18,was born with a genetic condition, velo-Cardiac Facial Syndrome, and was suffering from global development delay and bilateral renal dysplasia. He had been under haemo-dialysis since May 2000.He has severe learning disability with problems arising from limited understanding of medical treatment he is receiving .He is diagnosed as autistic. He suffers from epilepsy,a tendency to blood –clotting and he has a moderate immune-deficiency. His mental capacity has been assessed as that of a 5 or 6 years child. He clearly does not have the capacity to take decisions about his medical treatment.The hospital approached the court seeking a declaration that the hospital need not perform kidney-transplantationssince that would not be in S's best interest and that S should not undergo peritoneal dialysis. Only haemodialysis could continue for the foreseeable future and if it no longer be provided no other forms of dialysis should be given except palliative care..The parents opposed the plea of the court and wanted the kidney transplantation be done. However it was held that haemodialysis be given and if it could no longer be given, then peritoneal dialysis be given and that transplantation of kidney was not in his best interests.

5) Euthanasia In Case Of Pregnant Women

In case of pregnant women the principle of best interest of the patient applied. He court in Re (adult refusal of medical treatment)[9] held that everyadult had the right and capacity to decide whether he or she would accept medical treatment even at the risk of permanent injury to health or premature death.It was the duty of the doctors to treat him in whatever way they considered, in the exercise of their clinical judgement, to bein his best interest.

8 2003 EWHC 365

9 1992 (4)ALL ER 649

Legal Aspect of Euthanasia

Controversies on legalisation of euthanasia in Europe and America are continuing.The argument for legalising euthanasia is that the individuals freedom entails liberty orchoice in all mattersas long as the rights of any other person are not infringed upon.The argument against legalising euthanasia is that it will lead to disrespect for human life.Euthanasia can then be abused for criminal purposes.A financial motive is sometimes advanced in favour of euthanasia.It costs money from the family or the Govt.to keep terminally ill people on life support which will be wastage of resources if they eventually die.

For the purpose of analysing euthanasia,5 principles are recognised by most of the theorists. These principles are:

a) The principle of motive ,i.e,each action is judged by the intention behind it

b) The principle of certainty, i.e , a certainty cannot be avoided, changed or modified by uncertainty.

c) The principle of injury,i.e., an individual should notharm others or be harmed by others.

d) The principle of hardship,i.e.,hardship mitigates easing of the rules and obligations.

e) The principle of custom,i.e., what is customary is a legal ruling.

1) The Principle Of Motive Or Intention

The principle of motive is invoked in three situations:

1 There is no legal distinction between active and passive euthanasia because the law considers only the intention behind human actions.

2 The physician involved in euthanasia either as an active participant or an advisor may have intentions relating to self-interest and not the interest of the patient or those of religion.

3 Members of the family have the intentionof hastening death inorder to inherit the deceased's estate. They may also wantto avoid he

costs of terminal care. Thus euthanasia is forbidden because of the potential evil inherent in it.

2) The Principle Of Certainty

The principle of certainty is also invoked infollowing situations:-

a) Definition of death requires that there should be no doubt at all about death, which means that there should be complete cardio-respiratory failure. There is no doubt about its irreversibility. Brain death, partial and complete,is still controversial and it is possible that new medical technology could reverse brain death. The implication of brain death is that once a person is declared dead with certainty,the withdrawal of life support does not constitute homicide and is not a case of euthanasia

b) There is doubt about the legality of living will as it is made by person in perfect health. The same person could have different opinions when in terminal or severe illness. It is,therefore untenable that in the case of euthanasia the living will is accepted without restrictions.

3) The Principle Of Injury

The principle of injury, asserts that no one should be hurt or cause hurt to others. Decisions on euthanasia hurt patients in their life and health.The family is also hurt emotionallyby the death of the patient. The converse argument could be made that the pain and suffering of the patient under life support in terminal care,the emotional and psychological burden on the patient and the familyconstitute an injury to all involved. The law requires that any injury should be mitigated to the extent possible. However, one injury cannot be removed by another injury of similar magnitude.

4) The Principle Of Hardship

The principle of hardship could be invoked wrongly in euthanasia situations:-

The pain and sufferings of terminal illness are not among the hardships recognised by classical jurists. In general in cases of hardship where a clear necessity is temporarily until the hardship is relived. A necessity is defined in law as what threatens any of the five purposes of

the law namely religion,life,intellect,progeny and wealth .Euthanasia cannot be accepted as a necessity since it destroys and does not preserve two of the purposes of the law:religion and life.

5) The Principle Of Custom

The principle of custom has several applications in euthanasia. Custom is defined as what is uniform ,widespread,predominant and not rare. Custom has the force of law. Definition of death is based on custom and precedent. The traditional definition of cardio-respiratory failure is the only one that fulfils the criteria of custom and will have to be accepted until a better definition evolves. The role of physician has customarily been known to be preservation of life .It is therefore inconceivable that they could be involved in any form of euthanasiathat destroys life.

Judicial Approach

From the moment of birth,a person is clothed with basic human rights..Right to life means a human being has an essential right to live,particularly that such human being has a right not to be killed by another human being. But the question arises that if a person has a right to live,whether he has right not to livei.e.,whether he has a right to die? While giving this answer, the Indian courts expressed different opinions

In the landmark case of state of *Maharashtra v. Maruti SripatiDubal*[10].Where the Sripati Dubal tried to immolate himself. Apex Court stated that Sec. 309 of IPC which deals with punishment for those found guilty of attempted suicide is not ultra virus of Article 14 and 21 of the constitution. Hence the court held that right to life under Art. 21 includes right to die.

However in *Chenna jagadessswar v. State of Andhra Pradesh*[11]The Andhra Pradesh High Court held that right to die is not a fundamental right under Art.21 of the constitution.

10 AIR 1997 SC 411
11 1988 Cr LJ 549

In 1994,the Supreme court of India ruled in the case of P.Rathinam V. Union of India,[12]

That Art.21 of the constitutioni.e., right to live include right not to live,. The Apex Court further stated that suicide attempt has no beneficial effect on society and the act of suicide is not against religions,morality or public policy.

However the Supreme Court in *Giankaur v State of Punjab*[13]overruled the P. Rathinams case and held that right to life does not include right to die. Extinction of life is not included in protection of life. Right to die with dignity at the end of life is not to be confused or equated with the right to die an unnatural death curtailing the natural span of life. Further the court stated that provisions under Sec.309,I.P.C penalizing attempt to commit suicide is not violative of Article 14 or 21 of the constitution.

In Giankaur's case the Supreme Court made it clear that euthanasia and assisted suicide are not lawful in India and the provisions of I.P.C get attracted to these acts. But the question is whether Giankaur's case, either directly or indirectly deals with withdrawal of life support?

In the context of Sec. 306 (abetment to suicide) there are some useful remarks in Giankaur's case which touch the subject of withdrawal of life support. Before the Supreme Court in the context of an argument dealing with abetment of suicide the decision of the House of Lords in Airedale NHS Trust v. Bland[14] court held that it is not lawful for a doctor to administer a drug to his patient to bring about his death ,even though that course is promoted by a humanitarian desire to end his suffering,however great that suffering may be.

Thus ,in this effect, the Supreme Court while making the distinction between euthanasia, which can be legalised only by legislation,and withdrawal of life support, appears to agree with the House of Lords that withdrawal of life support,is permissible in respect

12 Air 1994 sc 1844
13 AIR 1996 SC 1257
14 1993 (i) ALL ER 821

of a patient in a PVSas it is no longer beneficial to the patient that artificial measures be started or continued merely for continuance of life the court also observed that the principle of sanctity of life which is the concern of the state,was not an absolute one.

Another thing which is referred in GianKaur's case is whether a ''right to die with dignity'' was a part of a 'right to live' with dignity in the context of Art.21 ? The court observed:

A question may arise, in the context of a ding man who is terminally –ill or in a PVS that he may be permitted to terminate it by a premature extinction of his life in those circumstances..This category of cases may fall within the ambit of the right to die with dignity as a part of right to live with dignity,when death due to termination of natural life is certain and imminent and the process of natural death has commenced.

From the above passages,it is clear that the supreme accepted the statement of law by the House of lords in Airdale that 'euthanasia' is lawful and can be permitted only by the legislature i.e, act of killing a patient painlessly for relieving his suffering from incurable illness. Otherwise is not legal. Assisted suicide is where a doctor is requested by a patient suffering from pain and he helps the patient by medicine to put an end to his life. This is also not permissible in law.

But where a patient is terminally illor is in PVS,a premature extinction of his life in those circumstances,by withholding or withdrawal of life support,is part to live with dignity and is permissible,when death due to natural terminationof life is certain and imminent and the process of natural death has commenced.

Thus there is a crucial distinction between cases in which a physician decides not to provide or continue to provide treatment or case which can or may prolong his life,and b) where the physician decides, for example, to administer a lethal drug, actively to bring an end to the patients life. The former is permissible but the latter is not.

In the latest case of Aruna shanbaug[15], a 25 years old pretty ,bubbly nurse, at KEM Hospital Mumbai and dreaming of marrying her fiancé-a

15 *Aruna Ramchandra Shanbaug v. Union of India* AIR 2011SC 1290.

young doctor colleague. She was assaulted on the night of Nov.27,1973 by a ward boy when she was changing out of her uniform before going home. He sodomised Aruna after strangling her with a dog chain. Then he left her lying there and went away,but not before robbing her of her earrings.

Next day, Aruna was discovered by a cleaner, unconscious, lying in a pool of blood. It was then realised that the assault and resulting asphyxiation with the dog chain had left her cortically blind,paralysedand speechless and she went into coma from where she never came out. She was cared by KEM Hospital nurses and doctors for 37 years.

The ward boy got a 7 years sentence for attempted murder and robbery. Her friend and lawyer Pinki Virani, approached Supreme Court with a plea to direct the KEM hospital not to force freed her. But doctors at KEM did not agree.On 16TH Dec. 2009 ,The Supreme Court of India admitted the woman's plea to end her life. The Supreme Court bench comprising CJ; K.G. Balakrishnan, Justice A.K. Ganguly and B. S. Chauhan agreed to examine the merits of the case and sought responses from the union Govt., Commissioner of Mumbai police and Dean of KEM Hospital. The three member medical committee set up under the Supreme Courts directives checked upon Aruna and concluded that she met ''most of the criteria of being in a PVS''.However it turned down mercy petition on 7THMarch 2011.The court , in its land mark judgement however allowed passive euthanasia in India and laid down guidelines for passive euthanasia. According to these guidelines,passive euthanasia involves the withdrawing of treatment or food that would allow the patient to live. Thus the judgement makes it clear that passive euthanasia will ''only be allowed in caseswhere the patient is in PVS or terminally ill''.In each case,the relevant High Court will evaluate the merits of the case,and refer the case to a medical board before deciding on whether passive euthanasia can apply and till parliament introduces new laws on euthanasia .

However there are number of cases where the High Courts have rejected the euthanasia petitions. The Kerala High Court in C.A .Thomas v. Union of India[16] dismissed the writ petitions filed by a citizen wherein he wanted the Govt to set up Mahaprasthan Kendra (Voluntary Death Clinic)for the purpose of facilitating voluntary death and donation,transplantation of bodily organs. In *Suchita Srivastava V.Chandigrah Administration*[17]. The A.P. High Court dismissed the writ petition of a 25 year old terminally ill patient where the patient had expressed his wish to beput off the life support system.

Euthanasia is totally different from suicide and homicide .Under the IPC.attempt to commit suicide is punishable under Sec.309 IPC, and also abetment to suicide is punishable under Sec.306 IPC . A person commits suicide for various reasons like marital discord dejection of love,failure in the examination, unemployment etc. But in euthanasia these reasons are not present .Euthanasia means putting a person to painless death in case of incurable diseases or when life becomes purposeless or hopeless as a result of mental and physical handicap. It also differs from homicide. In murder, the murderer has the intention to cause harm or cause death in his mind. But in euthanasia although there is intention to cause death such intention is in good faith. A doctor applies euthanasia when the patient suffering from a terminal disease is in an irremediable condition or has no chance to recover or survival as he is suffering from a painful life or the patient has been in coma.

Conclusion

According to teachings of all religions, life is a divine trust and can never be terminated by any form of active or passive voluntary intervention. Except Jainism, all the religions oppose euthanasia or deliberative death. Jainism accepts self deliberative death through the practice of Sallekhna and Santhara ending the life through fasting. But the point is that is Euthanasia moral in the medical practice because

16 2000 Cr LJ 3729
17 (2009)9 SCC 1

human being is manifestation of image of God. In the latest case of Aruna Shanbaug the court in its land mark judgement allowed passive euthanasia. According to Buddhism suffering is a part of human life,it means we have to face it. Ending the life is not the solution of the problem. Life is the divine grace of God. In the concluding marks euthanasia is an anti- humanistic and anti –religious activity which ends the pristine life or manifestation of image of God. Human have will power and technique, so he faced the problem, because deviation from the problem is not a solution of any problem and all the religions of the world tell us so.

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Powerful Legal Arena of Dexterity of Unmarried Reckoned Wife

Abstract

*The marriage is a protection and safeguard to women and men in the civilized society in order to safe succeeding generation from the scourge of un-stabilization. Marriage re-affirms faith in fundamental rights of human freedoms, dignity and worth ofhumanity. Security and safety by marriage strengthens the equal rights of man and woman in their domestic affairs which promotes and protects natural equilibrium and equity in the society for its peaceful establishment. The social system and the custom of marriage recognized by the rule of law are means of unity and integrity of the nation. Social recognition of presumption of marriage is common and normal practice as spirit of tolerance and lives together in peace for private affairs of co-operation and mutual standing. Societal recognition of the relationship of man and woman as husband and wife is a "grundnorm" of marriage. Its integrantare legal age of marriage; both should be qualified to enter into the legal marriage and voluntarily cohabitation for a significant period of time. Relationship of woman and man for marital relations as spouse demands permanentcohabitation not the relationship of "**WALK IN AND WALK OUT**."*

Keywords: *Presumption of Marriage, Reckoned wife, Hindu Code, marriage ceremony, Uniform Civil Code.*

I Prologue

Plato has described in his famous, popular and useful work "Republic "that woman should be wives in common for all men, and that no woman should live with any man privately and that their children too should common, and that parent should not know his own offspring nor the child its parents.[1]It is much harder to believe in it, whether it could

1 Plato, Who Gave us the Republic: V P Gupta (Ed) 102 (2014) Plato was the greatest philosopher of the world, Plato is known for founding the first European University at Athens and having a distinguished disciple,

be practicable or advantageous. This consideration of Plato was full of controversybecause he himself accepted that the greatest blessing to have both wives and children common, if it were possible, there will be keen controversy as to whether the proposal is practicable or not ordinarily this articulation was not accepted by any society in any time, moreover, he has exuded these reasoning in his most outstanding work on Justice, Ideal State and Education.[2] Justice is always one thing which is human attribute and consists in a certain harmony in human soul. It is the disposition of all to harmonize under the rule of wisdom[3]. His co-relation about family, women, wives and 'Ideal State' was the reflection of recommendation for the concept of 'Ideal State' to abolish family and communal modes of production and censorship of art.[4]

Though idea of Plato may be one of the unpractical components of philosophy, however, quest of freedom of unmarried reckoned wife is another burning issue of modern developing free and open society for protection and promotion of humanized principles to women. If we are talking about the relation of marriage without performing ceremonies of marriage, living in relationship, and friendship of male and female for the purpose of spouse, there are various issues of legal anxieties, curiosities, interest and inquisitiveness these are- what kind of rights, facilities, powers, privileges and immunities are available to unmarried reckoned wife? Another query of controversy may be that whether it will be proper, relevant and appropriate to use the term unmarried reckoned wife? A pertinent question is also under consideration for the purpose of the definition of wife related to this research paper. Whether there is any difference between wife and reckoned wife? How far reckoned wife is indirectly and directly recognized by the courts in India? Whether there are any legislative measures for the protection of reckoned wife? What are the basic and fundamental legal national and international human

Aristotle. An author of about 27 books, Plato's dialogues follow the method of Socrates, who awakens the rational ability to perceive truth through the process of question and answer.

2 Ibid.

3 Id., Preface at 4.

4 Id.

rights principles in support (for) and against the reckoned wife? All these controversial queries will be tried to solve in this paper.

II Concept of Marriage

Every society has varying conditions and unique geographical identifications, culture, tradition, social environment, political systems, and food habits, (climatic conditions, etc. Because of these circumstances, feelings, way of life, and natural effect on the society, different kind of customary system have evolved in society to determine the relationship of male and female as wife and husband. These relationships are different because of different cultural phenomenon of the same society within the same territory of the nation; even if it may be different within same caste, places, religions, languages, political situations, national and social origins, place of birth or in other status.

India has multi culture, diverse customs, unique traditions, and ancient heritage. In each religion has unique kind of own traditions and rituals. According to changing circumstances and existing systems of religion in a particular place custom takes its socially acceptable shape. Every religion has own custom of marriage.

Hindu Marriage

The concept of Hindu marriage dependsonthe customs of regions and communities. In some places marriage is solemnized in bride's home and in other places it is solemnized in home of bridegroom, it depends on the practice and the tradition but this is not legal requirement of marriage. The law is codified in India in this regard in the year 1955 known as the "The Hindu Marriage Act 1955." Sec 7 of the Act provides the ceremonies for marriage, and gives emphasis to follow customary rites, if there are any other rites of marriage ceremonies which includes Saptapadi, it should be followed[5].

5 Sec 7 Of HMA 1955 states that (1) "A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. (2) Where such rites and ceremonies include the Saptpadi (that is, the taking of seven steps by bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh

Rituals of Muslim Marriage

To solemnize Muslim marriage, there are various rituals during, before and after marriage. In Muslim society like Mahndi Ceremony before marriage is one of the customary ceremonies and required to be performed. Marriage ceremony in Muslim community is known as Nikaah. Generally, there are no special customary rites, no officiate, no irksome formalities.[6] Specially to perform some conditions are essential; these are to offer on the part of one party to the marriage, acceptance by the other party.[7] Presence of the two witnesses is essential where the parties are Hanifis, but no witness is required if parties are Shias. The proposal and acceptance must both be expressed in one and the same meeting[8].

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step is taken. Before the HMA 1955, the marriages were based on the customary laws of Hindu society. It was thought by Indian legislatures in the year 1947 that customs which are justified, reasonable and essential for smooth running of society should be codified. Therefore, Hindu Code was drafted by Rau Committee and introduced in the legislative Assembly in 1949 and referred to Select Committee of the Constituent Assembly of India (Legislative) on 9th April 1948, The Select Committee submitted its report on 29th August 1948, and their revised draft was discussed at considerable length by the Provisional Parliament, but as the Bill could not be passed before the dissolution of Parliament it lapsed. Later on Hindu Code Bill split up into separate parts for the purpose of facilitating discussion and placed in the Parliament, and the present Bill was the first of series of such part and dealt with marriage and divorce. The earlier Bill has seen considerably revised; one significant change being the omission of all provisions relating to civil marriage, a subject dealt with in the Special Marriage which was pending before the Council of States. The separate law enacted on 9 October 1954 known as Special Marriage Act 1954 (43 of 1954). However, Hindu Marriage Bill has been passed by both the Houses of parliament and received the assent of the President on 18th May 1955. It is known as "The Hindu Marriage Act 1955 (25 of 1955)."

6 Fyzee, Muslim Law at 91, Abdul Rahim v JulaiBeevi IV (2001) CLT 440.

7 The offer and acceptance may be made by the parties or by their agents if both are competent. In case of legal incompetency, like minority or unsoundness of the mind, the guardians may validly enter into contract of marriage on behalf of their wards. (Fyzee).

8 In Muslims as technical language of a valid marriage in between two Muslim requires 'Ijab, Qubul, Baligh, Rasid and completion of marriage in one meeting.

Christian Marriage

It is solemnized in the Church. It is a very simple in the sense that both bride and the groom before two witnesses declare themselves to be husband and wife. The groom declares his wedding as promise, dedication, devotion and oath to live together in whole life.[9] The couple exchanges their rings and the priest blesses the newly wedded couple and declare them husband and wife. The couple then walks down an aisle together. Wedding ceremony is solemnized by cake cut and every one raises the toast in the name of the bride and groom.[10]

Parsi Marriage

In Parsi marriage, the gathering on the marriage day is called Shahjan, the gathering for the queenly bride. The bride groom comes first to take the seat in the room where the marriage is to be celebrated. The bride comes later. The Parsi lagan or marriage is called 'Achumichu', which takes place either at a Bang or at an Agiary.[11]

Jewish Marriage

The Jewish traditions are interesting and simple. In the Jewish religion, marriage is considered to be mandatory as a single person is considered to be incomplete. The Jewish wedding rituals can be divided into two basic phases- the Kiddushinor engagement phase and Nissu'in or the actual wedding. While Kiddushin leads to a change in the conjugal status of the bride and groom, and Nissu'in or the actual wedding is important to bring a legal change. Kiddushin is a ring ceremony where the groom places a ring on the bride's right index finger and the bride just clenches her fist to show her acceptance. However, on the day of Nissu`in, the couple is joined in matrimony, under the Chuppahi.[12]

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9 http://weddings: iloveindia.com visited on 18th August 2016.

10 Id.

11 Id. The population of Parsis in India is less in comparison to the other community and religion. Nevertheless, this community has separate custom, rites, and rituals for solemnizing their personal relationship.

12 Id.

Marriage under Special Marriage Act 1955.[13]

This law prescribes unique and special provisions for the valid marriage. Section 4 states that conditions relating to solemnization of special marriage.[14] Section 5 enumerates the procedure of notice to marriage officer of not less than thirty days. Section 6 requires entering notice of marriage in the register. It is the duty of marriage officer to publish the notice. Section 7 prescribes the procedure for inviting the objections. If there is no objection, it is the duty of marriage officer under section 11 to take the declaration from the parties with three witnesses and it shall also be counter signed by marriage officer. Section 13 provides that when the marriage has been solemnized the marriage officer shall enter a certificate thereof in the form specified in the fourth schedule. Such certificate shall be signed by the parties to the marriage and three witnesses. Latest observation of Kerala High Court in *Abdul Manaf P A v State of Kerala*[15] is relevant on the issuing of marriage certificate. The Court affirmed that marriage certificate attested by notary whereby the petitioner intended to marry with foreign nationalist can be accepted and marriage application can be proceeded and ordered that marriage be registered in accordance with Special Marriage Act. Whereas Madras High Court has not accepted the solemnization of marriage performed in secrecy in chamber of advocates and Bar Association Rooms. In *S. Balakrishnan Pandiyan v The Superintendent of Police Kanchipuram*[16]court held that marriage solemnization should not be in secrecy, it does not amount to solemnization of valid marriage. Court has referred to sec 7 of Tamil Nadu Registration of valid marriage

13 Act No 43 of 1954; it provides special form of marriage in certain cases, for the registration of such and certain other marriage and for divorce. Its application is on citizens of India, subject to the provision of sec 1(2) of the Act. Norm and criteria is citizen of India regardless of religion, race, caste, place of birth and origin.

14 It does not impose any condition of religion and caste. Its conditions are related to restrictions on living spouse, valid consent, and sound mind; complete the required age of twenty on for male, and eighteen for female limitation on prohibited degree subject to custom etc.

15 AIR 2016 Kerala 80.

16 AIR 2015 (NOC) 593 (MAD).

Act 2009 and said that registration of marriage cannot be done without physical presence of parties before Registrar.

The judgements of above two cases of different High Courts are in different directions related to proof of marriage for its registration under Special Marriage Act based on the certificate issued by notary and advocate. In a case where one party was a foreign citizen, Court has adopted liberal attitude by accepting the certificate attested by notary whereas, in second case both the citizens belong to India, the attitude of the court was based on literal meaning of the law.[17] Secondly in the first case court has accepted the marriage for registration. Section 2 of the marriage because section 1 (2) says that ".... It applies on citizens..."[18] It shows that judgement of the Court depend on the citizens circumstances and the factual situation whether the proof can again be created or not? In the first case it was not possible whereas, in the second case it was possible.

III Controversy in marriage a strong facet in Reckoned Wife

The quest of solemnizing marriage always demands and requires the proof under the Indian Evidence Act 1872. If there is no evidence of ceremony of the marriage, it is sufficient to prove that there is presumption of man and woman have cohabited continuously for number of years.[19] They will be reckoned as wife and husband.

Post-Independence

The source of reckoned wife and husband is the audacity of the judgement of Privy Council in two occasions, the Privy Council considered the scope of the presumption of marriage that could be drawn

17 Supra note 15.

18 Supra note 14; In this case the petitioner Abdul Manaf P.A. intends to marry a foreign national of the country of Switzerland.

19 Section 114 of the Indian Evidence Act 1872 gives the power to court that court may presume the existence
of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of particular case.

as to relationship of marriage between two persons living together. The first of them is *A Dinohamy v.W.L.Blahamy*[20] Privy council laid down the general proposition that "where a man and woman are proved to have lived together as husband and wife, the law will presume, unless the contrary be clearly proved that they were living together in consequence of valid marriage, and not in a stage of concubine". Again Privy Council reiterated the same proposition in *Mahabat Ali v Md. Ibrahim Khan*[21]Court held that "the law of presumption in favour of marriage and against concubine when a man and woman have cohabited continuously for number of years[22]."

Subsequent Development of Independence

After the Indian independence there was a debate, argument, thought and discourse and desire to codify the personal laws. The Constitution makers were in favour of codification of personal laws. Dr B.R.Ambedkar expressed his anxiety at the time of codification of Hindu Code Bill that "I want to assert in this House while I am here that I shall hear no argument from any community to say that this Parliament has no right to interfere in their personal law or any other laws. This Parliament is absolutely supreme and we deal with any community so far as their personal law is concerned apart from their religion. No community is in state of mind that they are immune from the sovereign authority of this parliament."[23] Unfortunately 'Hindu Code Bill' did not take its legal shape during his tenure, moreover, his endeavor may be proved by quoting his powerful and social engineering idea and thought in

20 AIR 1927 PC 185.

21 AIR 1929 PC 138.

22 The Privy Council's both the dictum provides safeguards to woman from the legal complexity of marriage regardless of religion, caste, place of birth, custom and tradition. Court has not considered the classification of personal laws of Hindu and Muslim. The only one consideration was in view of Privy Council to provide real and fact based on justice.

23 Dr B R Ambedkar on " Hindu Code" Parliamentary Debate Vol 15 at 2949. Dr Ambedkar did hard work to draft "The Hindu Code Bill" but during his regime as law minister this bill could not get its shape as Act because parliament has not passed it. Dr Ambedkar's strong arguments were in favour of codification of "The Hindu code Bill."

parliament that "I am asking of this house is this: that if you want to maintain the Hindu system, the Hindu culture, the Hindu society, do not hesitate to repair where repair is necessary. This bill asks for nothing more than repairing these parts of the Hindu system which are almost become dilapidated.[24]Dr Ambedkar was utterly disappointed because 'Hindu Code Bill' was not passed by parliament before the election of the 1952 and submitted his resignation to the Prime Minister on 27 September 1951.[25] Following developments in 'Hindu Personal law' supports the ideology of Dr.Ambedkar:

1. Two main reformative acts were enacted during the life time of Dr. B.R. Ambedkar that is before 6th December, 1956 for the welfare of the women in India. These are the Hindu Marriage Act,1955 and The Hindu Succession Act,1956.[26] Section 7 of Hindu Marriage Act,1955 prescribes the ceremonies for a Hindu marriage. It has divided into two parts: part 1 says marriage may be solemnized in accordance with the customary or ceremonies of either party there to.[27] Second part of the said section also emphasizes on rites related to completion of Saptapadi.[28] Moreover court has expanded scope of section 7 by observing that if there is no direct evidence of cermenoyonl the presumption is sufficient. In *Usha Charan Naskar v. ShrimatiNiva Rani Naskar*,[29] parties wer living together for 12 years and three children were born out of said wedlock. Contention of the husband was that they were living together without going through ceremony of marriage. On the

24 Dr Ambedkar's Writings and Speeches, Vol. 14 (1) at 283.
25 Rattu, N C "Last few years of Dr.Ambedkar" 1st ed. APH, at 18, quoted by Ajit Singh Chahal, Dr. B R Ambedkar, An Ultimate Visionary of the Era. 127-143 (2016), Dr.Ambedkar had completed four years one month and twenty-six days as law minister since the Prime Minister J L Nehru called him to accept the office. Though Dr. mentioned the reason of resignation of his ill health, but not to get pass 'Hindu Code Bill' was the another one of the reasons.
26 Hindu Marriage Act passed on 18th May, 1955 and the Hindu Succession Act passed on 17th June, 1956.
27 Section 7(1) of Hindu Marriage Act ,1955.
28 Ibid Section 7 (2).
29 AIR 2010 NOC 24 (Cal.)

back drop of these facts court decided that mere fact that no direct evidence of saptapadi or Sampradan was available, after the lapse about 40 years, it is immaterial when the fact that marriage ceremony was held has been admitted by mother and brother of husband. It shows that mere presumption is powerful rather than proof of marriage ceremony according to ceremonial rituals.

2. Common code for personal laws for the entire segment of Indian society was the dream of Constitutional makers for equal status of women.[30] K. M. Munshi supported this step of constitutional makers and said, "this is necessary for National Integrity and Unity"[31]. The Supreme court also discussed the need of uniform civil code in various cases.[32] Court also expressed its opinion that to codify the Uniform Civil Code is the subject matter of policy of government.[33]

3. In muslim law there is also the application of [resumption that I male and female is living together as husband and wife, and they the relationship of husband and wife, they will be treated as husband and wife.[34]

4. If the woman is non kitabiya, related to the man within the prohibited degree of relationship, the wife of another person, and so on, she cannot be presumed to be the wife. Same is the case of non-muslim woman who is living with muslim male.[35] Similarly cohabitation with prosttute can not give rise to the presumption of marriage.[36]

30 The Indian constitution 1950; Article 44 provided that state to secure a uniform civil code for all citizens of India.

31 VII CA Debates 547- 548.

32 *Mrs. JordenDingdeh V. S.S. Chaptra* AIR 1985 SC 934, 940; *Sarla Mudgal v. Union of India* AIR 1995 SC 1531; *Muhammed Ahmed Khan v. Shah Bano Begum* AIR 1985 SC 945; *Johal Vallamatton V. Union of India* AIR 2003 SC 2902.

33 *Ahmedabad Women Action Group v. Union of India* AIR 1977 SC 3614; *Lilly Thomas v. Union of India* AIR 2000 SC 1650; *Maharishi Awadesh v. Union of India* AIR 1994 SCC, Supl (1) 713.

34 Supra Note 21 and 22, Syed Khalid Rashid's Muslim Law; V.P. Bhartiya, edn 27th (2004).

35 *Abdul Razak V. Agha Mohamamd Jaffer,* (1893) 21 IA 56.

36 *Muhammad Amin v. Vakil Ahmad* 1952 SCR 1133.

IV Adjudicatory Averment by Legal Diagnosis

Indian Constitution opens wide vista for the power of Supreme Court as highest Court of India. Supreme Court has extra ordinary power to provide complete justice without having legislative measures. This power requires the Supreme Court to provide practical and real justice, including social, economic, criminal and political.[37] This is an equitable power for complete justice.[38] It is a valuable weapon in the hand of the court to prevent "clogging or obstruction of the stream of justice.[39] Though, Supreme Court has observed in *Ghanshyam Sukhdeo Gaikwad v. Bajaj Auto Ltd*.,[40] that if Supreme Court invoked special jurisdiction under Art 142 of the Constitution, the judgement will not be treated as precedent. It isrestricted approach enunciated by the court but plenary language of Art 142 (1) is clear that judgement delivered by Supreme Court on 142 has thesame effect as the law made by parliament. This restriction shall beinterpreted in future by same court itself in the light of the object ofthe provision and intention of the Constitution makers. Dueto the Constitutional power of interpretation of statute of highercourt, doctrine of presumption has to be applied in favour of wife who isliving with her deemed husband since long time.

37 Supreme Court of India power is prescribed by The Constitution of India 1950, Art 124 to 147. Art 142 provides the extraordinary power for enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.

38 Constitution of India, Art 142 (1) states that "Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by parliament, and, until provision in that behalf is so made, in such manner as the president may by order prescribe

39 *Supreme Court Bar Association v. Union of India* AIR 1988. SC 1895; *Delhi Electricity Supply Undertaking v. Basanti Devi* AIR 2000 SC 43.

40 AIR 2016 SC 2255; Judgement delivered by Kurian Joseph and Rohigton Fali Nariman JJ, para 10.

Audacity in reckoned wife

"The institution of marriage plays an important role in society and matrimonial relationship demands mutual understanding, trust, love and affection as well as reasonable adjustment with the spouse".[41]

Where man and woman are living in matrimonial relationship with faithful, co-operation and fiduciary bearing as husband and wife without performing essential customary rites, in such circumstance the object and purpose of matrimonial lawis to protect them for providing the real status and social safety of exercising their claims and rights.

Subsequent legal development based on implementation of Indian Constitution has been to provide social justice to the people of India as a paramount object of democratic republic of India. It means the justice to all in respect of their status, caste, religion, family status, colour, origin, and place of birth, region and any one of them. Indian judiciary has applied the said goal in various cases for dispensation of real justice to the needy spouse within the four corners of family and outside the family. Supreme Court of India rightly observed in Gokal Chand v Parvin Kumari, [42]that continuous cohabitation of woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage, but the presumption which may be drawn from long cohabitation is rebuttable and if there are circumstances which weaken and destroy that presumption the court cannot ignore that presumption. The same Court clarified the burden of proof of rebuttal by holding in another case *Badri Prasad V. Dy Director Consolidation*, [43] the heavy burden of rebuttal of presumption of marriage lies on the person who seeks to deprive the relationship of having legal origin by proving that no marriage took place.[44] Court

41 The Hindu, August 21, 6(2016): The Delhi High court made the remark while dismissing the petition of a
woman who had challenged the divorce granted to her husband by a family court on ground of desertion

42 AIR 1952 SC 231.

43 AIR 1978 SC 1557.

44 Court has laid down general proposition in favour of reckoned wife that if she is living with man as partner for long time. She has all the rights of

further observed that where partners living together for long spell as husband and wife, there would be presumption in the favour of wedlock. In Tulsa v Durghatiya[45] Supreme Court reiterated that this case of marriage between spouses is recognised marriage within the purview of section 114 read with section 50 of the Evidence Act 1872.[46]The Court further clarified the status of marriage by observing

that the act of marriage can be presumed from the common course of natural events and the conduct of parties as they are borne out by the facts of a particular case.

Proved vis-a-vis disproved of Presumption-

The general doctrine of presumption under section 114 of the Indian Evidence Act 1872 indicates makes it clear that "the court of justice are to use their common sense and experience in judging of the effect of particular facts and that they are to be subject to no technical rules whatever on the subject.[47]Thus it is a golden principle of evidence;

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wife from the property of husband. Disprove of marriage is an exception and should be based on strong evidence.

45 AIR 2008 SC 1193, In this case the issue was that father and mother of appellant Tulsa was not legal married spouse, therefore, Tulsa as daughter of the unmarried spouse has no right over the property of their ancestral but finally Supreme Court has laid down that if there are the evidences that both parents were living together since long time after the death of first husband of mother of appellant (Tulsa) it can be accepted strong presumption in favour of spouse.

46 Supra note 18. Section 50 of the Indian Evidence Act 1872 provides that "when the court has to form an opinion as to the relationship of one person to another the opinion, expressed by the conduct, as to the existence of such relationship, or any person who, as a member of the family or otherwise, has special means of knowledge on the subject, as relevant fact. Provided that such opinion shall not be sufficient to prove that a marriage is valid according to proceedings under Indian Divorce Act 1869 (4 of 1869), or for the prosecution under section 494, 495, 497, or 498 of the Indian Panel Code (45 of 1860). This case was neither related to Indian Divorce Act 1869 nor related to Indian Penal Code 1860. It was the case which is related to disputed joint property of ancestral of the appellant and respondent. Therefore, the provisions of section 50 of the Evidence Act had applied by the Court.

47 Woodroffe & Ameer Alis, Law of Evidence, 11th Edition vol. IV P N Ramaswami& S Rajgopalan (Ed) 2182 (1962-63) when events occur in the past it often becomes absolutely necessary for the purpose of justice and

where there is some lacuna in the performing of formalities this doctrine may be invoked. Supreme Court of India in *Easwari v.Parvathi and others*[4849]held that presumption of marriage requires to be proved by strong document. Court has not accepted receipt of the temple in support of marriage solemnised in temple as a documentary proof, because of the reason that it is not mentioning about the marriage ceremony or conduct and solemnisation of marriage in the receipt. Court also said that voters list is not reliable and there could be no presumption of marriage under section 114 of the Indian Evidence Act, because of the fact of long cohabitation. This is not a worthy pronouncement by rejecting application of doctrine of presumption on the ground that it requires strong support of evidence. The rejection of voter's card and list as piece of evidence for proving matrimonial relationship is not a sound and

equity that presumption should be made. [*Ramchunder v JugeshChunder* (1873) 19 WR 353, 354.

48 AIR 2014 SC 2912 Paragraph 13,14, & 15. Judgement delivered by Chandra Mauli Kr. Prasad and Pinaki Chandra Ghose JJ.

49 AIR 2015 SC 891 Judgement was delivered by M Y Eqbal and Aghay Manohar Sapre JJ. Comparison in between Easwari case and Karedla Parthasaradhi case shows that the supreme court of India in these two cases adopted different views, because of application of presumption on the ground of slide difference between evidence produced by the parties, support of voters list and card as evidence was produced in both the cases but in first case court said that it is not a reliable evidence whereas, in second case court has accepted the voters list as evidence with other relevant documents. Though the first case was decided in 2014 and second case has decided in 2015. However, it is suggested that if both the parties as husband and wife living together the presumption should be applied in favour of marriage because the name of voter list is not prepared in a day, the person who has prepared voter list visited the home of spouse and enquired about the information than enter the name as husband or wife as the case may be in the list and on the basis of name of the voter's list spouse has exercised their franchise for electing the people's representatives. It means if voter list is not reliable document for proving the name of person whose name is listed in it and that person has cast vote in favour of either party was not legal and if it was not legal than it raises the many questions of legality of the elected members of people's representative. Beside this, another relevant logic is also pertinent to consider that denial to accept the documentary proof as husband and wife is not in the social domestic justice.

strong reasoning of the court, because it has neglected the contention that spouse was not otherwise disqualified for entering into the marriage.

Whereas, Supreme Court in another case decided the matter of eckoned marriage on the ground of presumption with or without strong support of documentary proof. In *Karedla Parthasaradhi v Gangula Ramanamma (D) through L R S and Others*,[50] the Court held that voters list is a reliable evidence for presumption of marriage. The neighbour's opinion about the marriage of spouse is also relevant evidence. Name of woman as wife in bank account proves that woman was the wife of the man. Letters written by man to woman in affection also proves the strongest presumption of marriage. In the letters written to woman prefixedby the surname of man is also proof of relationship of wife and husband.[51] In support of the judgement court has taken the ratio of the

50 AIR 2015 SC 891 Judgment was delivered by M Y Eqbal and Aghay Manohar Sapre JJ. Comparison in between Easwari case and Karedla Parthasaradhi case shows that the supreme court of India in these two cases adopted different views, because of application of presumption on the ground of slide difference between evidence produced by the parties, support of voters list and card as evidence was produced in both the cases but in first case court said that it is not a reliable evidence whereas, in second case court has accepted the voters list as evidence with other relevant documents. Though the first case was decided in 2014 and second case has decided in 2015. However, it is suggested that if both the parties as husband and wife living together the presumption should be applied in favour of marriage because the name of voter list is not prepared in a day, the person who has prepared voter list visited the home of spouse and enquired about the information than enter the name as husband or wife as the case may be in the list and on the basis of name of the voter's list spouse has exercised their franchise for electing the people's representatives. It means if voter list is not reliable document for proving the name of person whose name is listed in it and that person has cast vote in favour of either party was not legal and if it was not legal than it raises the many questions of legality of the elected members of people's representative. Beside this, another relevant logic is also pertinent to consider that denial to accept the documentary proof as husband and wife is not in the social domestic justice.

51 Supreme Court upheld the decision of High Court of Andhra Pradesh. Supreme Court as accepted the findings of the High Court on the issue in verbatim which is contained in paragraph 26 to 30 of the judgment of High Court. Supreme Court also quoted the explanation of Mulla in his book "Hindu Law" 17th Edition in Article 438, page 664 under the heading- "Presumption as the legality of Marriage"- in the following words:

case *Thakur Gokal Chand v Parvin kumari alias Usha Rani*.[52] In this case Fazal Ali J during the examination of presumption of marriage in the light of section 50 of the Indian Evidence Act 1872, said "It seems to us that the question as to how far the evidence of those particular witness is relevant under section 50 is academic, because it is well-settled that continuous cohabitation for a number of years may raise the presumption of marriage." In the recent time, the Court in *Madan Mohan Singh & Ors v Rajni Kant & Anr*.[53]also laid down the presumption of marriage on the basis of cohabitation. Court reiterated on the ground of earlier judgement that "the live -in-relationship is continued for such a long time cannot be termed as "walk in and walk out"relationship and there is a presumption of marriage between them.

Supreme Court Consistently held that the law of presumption is in favour of marriage based on long cohabitation and neighbours

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"Where it is proved that a marriage was performed in fact, the court will presume that it is valid in law, and that the necessary ceremonies have been performed. A Hindu marriage is recognized as a valid marriage in English law."

Presumption as to marriage and legitimacy:

"There is an extremely strong presumption in favour of the validity of a marriage and the legitimacy of its offspring if from the time of the alleged marriage the parties are recognized by all persons concerned as man and wife and are so described in important documents and on important occasions. The like presumption applies to the question whether the formal requisites of a valid marriage ceremony were satisfied. Similarly the fact that a woman was living under the control and protection of a man, who generally lived with her and acknowledged her children and raises a strong presumption that she is the wife of that man. However, this presumption may be rebutted by proof of facts showing that no marriage could have taken place."

50 AIR 1952 SC 231 In this case plaintiff Ram Piari lived and were treated as husband and wife for a number of years, and in the absence, of any material pointing to the contrary conclusion, a presumption might have been drawn that they were lawfully married. But the presumption which may be drawn from long cohabitation is rebuttable, and if there are circumstances which weaken or destroy that presumption, the court cannot ignore them.

52 (2010) 9 SCC 209, AIR 2010 SC 2933, paragraph 22.

53 Supra note 47.

opinion. Therefore, the judgement *Easwari v Parvathi*[54] of the Supreme Court has decided in wrong notion without the application of Section 114 and 50 of the Indian Evidence Act.

Rejection of nullity on inter religion marriage

All the provisions of all marriages related to all the personal laws who have same religion are applicable on them. However, if any marriage has been solemnized between different religion of persons and they have by conduct accepted the marriage ceremony of that religions of one party at the time of marriage, later on not of the party can take any advantage for the nullity of the marriage on the ground of inter religiory of the parties. In this regard Bombay High Court rightly observed in *Viraf Phiroz Bharucha v Mrs Manoshi Barucha*[55]; that if at the time of marriage husband was Parsi by religion and wife was Hindu and they have performed their marriage as per Hindu rituals, in such circumstances it is clear that Hindu Marriage Act 1955 is applicable on Hindu. Husband cannot take any ground of not having the same religion at the time of marriage for nullity of marriage. If he was not Hindu how he can invoke the provision of Hindu Marriage Act for divorce or nullity. This judgement of the Court is indirectly in favour of wife because court has rejected the petition of husband for nullity of marriage and protected indirectly the wife.

Bombay High Court also expressed its views that if woman has not proved that she has been divorced by first husband on the ground of her custom,later on she cannot get any legal status of living with second husband from long time presumed as wife of second husband.

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54 AIR 2015 Bombay 42 (DB) Paragraphs 8, 9 &11. A plain reading of section 2 of the Act 1955 explicitly provides that the provisions of "Hindu Marriage Act " can be availed and are applicable when both spouses are Hindu and it does not apply to any party who is a Parsi, Jew, Christian or Muslim. The husband who is Parsi can not avail of provision of Act 1955 that at the time of filing of petition, both the spouses Hindus by religion except for seeking remarry of divorce under section 13 (1) (ii) of Hindu Marriage Act 1955 on the ground of person ceasing to be a Hindu due to conversion to another religion.

55 Ibid.

On the other side Gauhati High Court dealt the matter of apostasy by the husband and declared that it is a case of automatic divorce. In *Smt Krishna Dash Choudhary and Others v Musstt. Parbin Rahman Hazarika and Others*[56]Court has laid down the preposition that the moment a Muslim commit apostasy, he gets excluded from the Islamic common wealth and all his rights, interests, status and relations get automatically extinguished. His marital tie with his Muslim wife automatically gets snapped and his Muslim wife becomes free to remarry at least after the completion of the iddat period[57].

Epilogue

The queries which have risen in the second paragraph of prologue pertaining to issues of unmarried reckoned wife have been proved in this research paper by supporting statutory provisions and judicial pronouncements. Thus on the basis of legal and logistic support of existing and available legal material it can be concluded that unmarried reckoned wife has all the rights of maintenance, succession, marriage, liberty of divorce without the ceremony of marriage, privileges as natural guardian of children which have born from the wedlock of reckoned spouses. She has the immunities to live in the same shelter, no one has any right to eject and divest her from the property of husband, even after the death of husband, because she is the first class heirs especially under Hindu Succession Act 1956. She is also entitled t avail and utilize all kind of facilities from husband for enjoyment and fulfilling all necessary requirements.

56 *Kashi bai Nondeo Jadhav and Another v Yamunabai Nandeo Jadhav and others AIR 2016 (NOC) 387 (Bombay) Paragraphs 76 to80, 85 to 88,* The court's judgment categorically emphasized on two legal aspects- first- if there is any custom for divorce is prevailing, existing and recognized in any society, that is not against any legal provision it may be accepted and presumed that divorce has legal enforcement. Second- unless divorcee has not completed all the formalities of divorce based on custom or legal provision, shall not be presumed as divorce.

57 AIR 2016 Gauhati 19.

Second query which has risen in the beginning has also been proved after the thorough discussion, deliberation and analysis of the Indian and developed counties legal instruments that reckoned wife word should not be used as reckoned wife but it will be proper to be called "wife" without performing any marriage ceremony. Though ceremony is the essential requirement of every marriage, however, public opinion based under section 50 of Evidence Act has legal evidentiary value as relevant fact for the proof of marriage without performing marriage ceremony, because, object of ceremony is to publicize the marriage so that society should know the relationship of man and woman as husband and wife. Thus, if both are living together with the intention that neighbor should recognize them husband and wife since long period. Living together is equal to perform the marriage ceremony, because it fulfils the objects of social recognition subject to qualifications and conditions of valid marriage. This fact is more of the grounds of proof-of marriage as presumption under section 114 of the Evidence Act. The reckoned wife word was no-where used by the court but in this paper it has been used as assumption for the research hypothesis, which was proved by analyzing the facts and legal provisions. Another question which has arisen here being one of the pertinent fact of this paper, that difference between wife and reckoned wife, itis affirmative in answer; that for the purpose of research there is a difference between wife and reckoned wife, because, if after performing the marriage ceremony a wife is living with husband, there were no chances of legal dispute related to relationship of husband and wife. Whereas, in the matters of no marriage ceremony, there are disputes of relationship of marriage, thus reckoned word was used for the proper understanding and analysis of said dispute. The answer of last question has also proved that without performing any marriage ceremony reckoned wife is legally recognized by the court directly based on the evidence and application of related law.

At the end it will be proper to express the opinion that relationships of marriage are based on the feelings, social recognition, and equal rights, protection of all human rights of spouses including right to privacy, faith in understanding capacity, rights to fulfil obligations by

both parties, promoting equal rights of man and woman for continuous existence, abolish discrimination between male and female, maintain human dignity, participating in the social, cultural, economic and political life of societal system. Matrimonial institution should be strengthened by solving the future challenges based on changing social circumstances, ideology, technology and working conditions. Still one of the issues is in debate that in divorce there is no legal authentication on presumption without performing legal and customary formalities. It is suggested that apart from desertion as ground of divorce, there should be the application of presumption on divorce if both are living separately from long period at least five or more years. Solution of matrimonial disputes in the easiest method may be helpful in the development, peace, and maximum participation of wife in social life without any anxiety, and great contribution of women to the welfare of the family, social significance of maternity and the role of birth and relationship of parent in the family and in proper upbringing of children. Change in the traditional relations and role of men as well as the women in society and family is the need of hour to achieve full equality between men and women.

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Draft Surrogacy (Regulation) Bill, 2016: A Critical Exploration

Abstract

Surrogacy an imperative arena in the contemporary social scenario, which has never been given the prominence it prerequisites. The Courts have many times instructed the Centre to formulate the process of surrogacy but there was no law governing it. The Centre has been formulating the Assisted Reproductive Technology, Act for several years now and has gone through many revisions, until recently the Cabinet had given its nod to Draft Surrogacy (Regulation) Bill, 2016 to avoid the exploitation linking to surrogacy arrangements. The paper argues that imposing a blanket ban on commercial surrogacy does not address the real want of the time and will generate high likelihoods motivating the surrogacy market subversive through black marketing, thus creating it poorer for all the participantscomplicated in the process. In addition, in this situation, the rights of both surrogate mothers and commissioning parents will stand unrecognised and inclined toinfringement. However, one of the explanations behind presence of extensive surrogacy agreements in India is extreme insufficiency and poverty. Banning commercial surrogacy in entirety will take away the cause of occupation from surrogated mothers and further in Draft Bill, no shield cited for child born out of such surrogacy. In the welfares of averting exploitation, the draft Bill only authorizes altruistic surrogacy. Moreover, the paper contends that altruistic surrogacy itself causes to mistreatment to the surrogated mother, both economically and psychologically. Further, the Billoversteps upon Article 14 and Article 21 of the Indian Constitution and flops the assessment of legality.

Keywords: *Altruistic Surrogacy, Black Marketing, Commercial Surrogacy, ART.*

Introduction

Surrogacy has for many years been seen as an alien in the society, it has always existed but never been accepted by the public. This was the reason the Government never found it necessary to legalise the process.

In recent years, there were many problems that arose due to surrogacy which were addressed by the judiciary but after a certain point even the judiciary found it necessary for a common law on the said issue. Moreover, constantly ever since commercial surrogacy was permitted in India it has grown up to develop a large industry since 2002 and is frequently called the surrogacy capital of the world with the 228th report of Law Commission of India demanding it to have developRs. 25,000 Crore business.[1]Afterward the consecutive expansions in the field of limiting the illegality facet through numerous Assisted Reproductive Technology (Regulation) Bills, the Cabinet has here and now put permitted the outline of Surrogacy (Regulation) Bill, 2016.[2] However, this Bill has more or less regular defects, which may relatively create the problem of inferior quality. The industry is very strong with existence of many active participants. It is estimated that the demand is steadily increasing by nearly 50% every year. The majority of demand is from overseas as the rate is relatively more affordable. This industry is the only source of employment for many and with the introduction of the blanket ban on commercial surrogacy it will lead to mass unemployment. It also mentions that only close family members are eligible to be surrogate mothers, thus closing the sphere within which the surrogacy will take effect. The members of the industry have not been recognised thus there are never given an opportunity to put forward their grievances.

Commercial Surrogacy: A Predicament

Commercial surrogacy is a booming industry which has to be regulated but theDraft Surrogacy (Regulation) Bill, 2016 aim to

1 Law Commission of India, 288th Report on Need For Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations Of Parties To A Surrogacy (August, 2009).

2 Cabinet approves introduction of the Surrogacy (Regulation) Bill, 2016, Press Information Bureau, available at: www.pib.nic.in/newsite/PrintRelease.aspx?relid=149186, last visited on 26 January, 2017.

bancommercial surrogacy.[3] There are no exact figures on surrogacy as the industry is unregulated; United Nations in July 2012 estimated the business to be more than $400 million a year, with over 3,000 fertility clinics across India.[4] In past few decades medical tourism is gaining momentum in India, which is second to Thailand generating USD 2.3 Billion annually[5]. The business on the whole is expected to be worth $2Billion with nearly 25000 children born every year in the industry. Surrogacy in India has reached 'industry proportions'.[6] The Government failed to identify the outcome of the Bill rather they tried to introduce a blanket prohibition on all types of commercial surrogacy.

On the other hand if ban is forced, the surrogate mothers in distressedwant for money will be at anextradifficulty as the enactment of the proposed Bill will somewhat lead to women 'giving away their wombs' under severe and unfairsituations to the shabby clinics, the Billtry to find register.[7]

Blanket ban on various modes of Assisted Reproductive Technology is not a solution even if adoption is considered better option. The basic right to select the manner of parenthood must be utmost and unconditional, as long as it does not violate others' rights. Commercial surrogacy as long as in line with the Assisted Reproductive Technology Bill, 2014, it is not a legally illegaldecision.[8]

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3 Vishnu Sharma, "Surrogacy Bill gets the Cabinet nod" *The Hindu,*August 24, 2016

4 Nita Bhalla and MansiThapliyal, "India Seeks to Regulate Its Booming Surrogacy Industry" *Reuters Health Information*, Sep 30, 2013

5 Pande, Amrita, 2012, "Transnational commercial surrogacy in India: gifts for global sisters?" available at www.philpapers.org/archive/PANTCS.pdf, last visited on 21 February 2017.

6 A Malhotra, "Commercial Surrogacy in India" 9 IFLJ (2009).

7 Katherine B. Lieber, "Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered", 68 Ind. L.J. (1992).

8 Regulation (or Lack Thereof) of Assisted Reproductive Technologies in the U.S. and Abroad, The Center for Bioethics & Human Dignity, available at: http://cbhd.org/content/regulation-or-lack-thereof-assisted-reproductive-technologies-us-and-abroad, last visited on March 29 2017.

Monetaryphilosophies have held that bans do not essentiallybreak the act but assist the resolution of pushing stuffs into the black market.[9] For example, even after the PCPNDT Act restricting sex determination of a child before birth still exists in India. Moreover the government should also consider the high demand of surrogacy still prevalent in India. Post prohibition, surrogacy will last, but only through the black market of exploitation. This will make ways to present fertile couples as infertile and surrogates as their relations. Further, the surrogates may be moved to other nation for delivery. Such observes will not offer the government with any statisticsconcerning to surrogacy and lead to lack of ability of the government to control it.[10]

The reason why the women opt to become surrogate mother is the existence of extreme poverty and social and economic insecurities will still continue even if ban is imposed. In fact this will take the right to livelihood of such women.

On the monetaryfeature, the controlledcommercial surrogacy canproducefurther huge incomes through medical tourism,demonstrate to be a backup system for various infertile couples and at the same time aid surrogate mothers with a substantial basis of income.[11]

Draft Surrogacy (Regulation) Bill: Catastrophe to test the legality under Constitution

This Bill treats equals unequally as its provisions violate Article 14 of the Indian Constitution. The Bill clearly states that only commissioning couples will be given the opportunity to avail the service of surrogacy[12]. The classification that only these members of the society

9 Cooter, Robert, and Thomas Ulen, et.al.,"*Law and Economics*", (Pearson Addison Wesley, Boston, 2004).

10 IndraniBasu, "Things you should know about the proposed surrogacy Bill in India", *Huffington Post India,*August 24, 2016.

11 Sayantani Das Gupta and Shamita Das Dasgupta, Globalization and Transnational Surrogacy in India: Outsourcing Life (Lexington Books, New Delhi, 2014).

12 Section 2 (h) of the Draft Assisted Reproductive (Regulation) Bill, 2014 defines 'commissioning couple' as "an infertile married couple, who approach an assisted reproductive technology clinic or assisted

will avail surrogacy is unjust as it fails to notice other categories in the societies like gays and lesbians, more importantly the third gender are also been denied to right to avail surrogacy. The Bill seeks to distinguish on the basis of age, nationality, marital status and sexual orientation. A lucidinterconnection needs to happenamongst the object of such rule and the actions involved through the means of such discrimination.[13] There seems no lucid connexion amongst avoiding an exact class of link from exercising their surrogacy rights and stoppage of exploitation of women. Thus, the connection being arbitrary, the constitutionality is at stake.

Additionally, the Right to Life under Article 21 of the Constitution also embraces the right to proliferation and parenthood under the right reproductive independence.[14] The government cannot restrictthe privilege of people to select the mode of parenthood and unproductiveness cannot be a made prerequisite to surrogacy.[15]

The Bill also sets the bench mark that only couples married for a period of five years can opt for surrogacy.What implication does only five year constraintembrace and why it is not three or six years is a question that prerequisitesanswers. This classification is not in line with the present societal practises as couples are expected to have children with 3 years from marriage. The case of *Maneka Gandhi v. Union of India*[16] strikes out any scope for arbitrariness in laws. This arbitrariness goes against the very principle of Rule of law enshrined under Article 14.[17]

India is a commercial hub for surrogacy which has in turn labelled India a Surrogacy tourism spot. In countries like US the rates are from $60000- $120000, while in India, the prices of surrogacy are a lot lower,

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reproductive technology bank for obtaining service's that the assisted reproductive technology clinic or the assisted reproductive technology bank is authorised to provid

13 *SuchitaSrivastava&Anr v. Chandigarh Administration, (2009) 9 SCC 1.*

14 SuchitaSrivastava&Anr v. Chandigarh Administration, (2009) 9 SCC 1.

15 IndraniBasu, "Things you should know about the proposed surrogacy Bill in India", *Huffington Post India,*August24, 2016

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

17 *BachanSher Singh and Anr.v.State of Punjab and Ors.,* AIR 1982 SC 1325.

standing at $20,000- $60,000.[18] The Bill states that foreigners cannot avail this services which eventually contradicts the legislative intention behind Juvenile Justice (Care and Protection) Act, 2015, which allow foreign parents to adopt a child, irrespective of they being married or not. The question needs to answer is that if a person is capable of adopting a child, why he is incapable of bearing a child throughsurrogacy? This can be seen as a clear violation to Article 14 of the Indian Constitution, this will invite many petitions being filed to change the sections of the Bill.[19]

Exploitations and Fortification of Surrogate Mother under Draft Bill

This Draft Surrogacy (Regulation) Bill, 2016 encompasses a number of grave ethical and legality alarms. By permitting only altruistic surrogacy that too through a nearby relation, who must have already given birth to a child, the Bill levies a blanket ban on commercial surrogacy.

It seems that the object of the Bill was safeguarding women from occasions of exploitation rising from such arrangements. This draft law needs to answer that how non-payment for the similarend in non-exploitation. But at the same time explaining exploitation in terms of money is a parochial way of looking at the reality of society. There is no assurance that altruistic surrogate mother will not being enforced and compelled into bearing a child.[20]

The major problem is regarding the exchange of currency among individuals in the process of surrogacy. The surrogate mothers are never in contact with the couples who want the baby, they are only in contact with agents. These agents serve as middleman between the couples and

18 Surrogacy Statistics: Numbers and Success Rates Worldwide 06 March 2015 http://www.mymedholiday.com/article-info/50/639/surrogacy-statistics-numbers-success-rates-worldwide

19 Anil Malhotra, "Draft surrogacy Bill violates fundamental right of people to choose modes of parenthood" The Indian Express, March. 27, 2017.

20 PikeeSaxena, Archana Mishra, Sonia Malik, 'Surrogacy: Ethical and Legal Issues' (2012) 37 IJCM 211,213

the surrogate mothers. There are many layers of such middleman that people have to pass through to get a baby. The agents charge huge sums from the couples and as it passes through each layer the money gets shrieked, causing the surrogate mothers to get a only a small part of the whole sum that was originally exchanged. The Bill fails to identify this problem, causing a huge setback to the surrogate mothers. The Bills fails to fix a rate card or a common amount that will be paid to these mothers.

The benefit of this existing situation is that the surrogate mother delivers a baby to the commissioning parents after clearing all dues, there will be no question of closeness between the child and its surrogate mother. But this draft Billsuggests altruistic surrogacy only through nearbyrelations which will confirm that the child and its surrogate mother remain in nearvicinity and in the same compass all their lives. This will build intricate condition uptight with sensitive and ethical problems. Thus, it would have been better if there can be a certain amount of obscurity in such procedures.[21]

The objective of the Bill is to establish a framework to legalise and safeguard the process of surrogacy, in the field of surrogacy the surrogate mothers hold the prime position but theBill fails in identifying numerous problems. The Draft Bill does not give any right to surrogate mother and commissioning parents but only curtails the act by limiting the number of surrogacies to one and if couple could not discover wiling relativeshave only one way out, which is adoption. This will only destroy the livelihood of the women who are solely dependent on surrogacy. Compared to other countries altruistic surrogacy is not restricted to one time pregnancy and close relatives.Post surrogacy-industry boom, a portion of women were reliant on the same, which is not morally and ethicallyincorrect. The matter Bill seeks to report is that the woman will be driven to exploitation for her body. However, on occasion women have already given consent and is being paid the appropriate amount, then the matter does not arise. Through the draft

21 Anil Malhotra, “Draft surrogacy Bill violates fundamental right of people to choose modes of parenthood” The Indian Express, march 27, 2017

Bill, rather than regulating the means and procedures to avoid women's exploitation, the Billeliminated the notion to its wholeness.[22]

The exploitation can be emotional which can arise from the factors connecting to knowledgeable consent, the dignity of reproductive labour and psychological well-being of parties involved in the process. From this position, the predominant arrangement of commercial surrogacy has been whatever but acceptable in India. Likewise, facets like surrogate mothers not knowing of the figure of embryos implanted or aborted, not being permitted to come across or to see the baby or not knowing the nationality of intending parents and the lack of psychological counselling are factors which are identical to mistreatment of women. When these features are considered, interference on the level of strategy making is a comfortable.[23] However, banning commercial surrogacy will not provide anyway solution to the problem.

If seen from financial stance, the usage of expressions 'selling a womb' or 'buying a baby' raise numerous queries on ethical grounds. While the Bill permits altruistic surrogacy, in this case surrogate mothers do not obtain any monetary incentive over and above and the elementary expenditures of bearing a child.[24]

Further there is no guarantee that altruistic surrogacy does not encompass exploitation by rich unproductive commissioning parents of the unfortunate fertile surrogate. Moreover, various research have recommended that getting payment generates a sort of psychological disinterest of the surrogate. Therefore, opportunities of emerging a connection with the child would be greater in cases of altruistic form of surrogacy. It is also unbearable for any officiating authority to track gifts being bartered amongst the parties. Last but not least altruistic surrogacy will put unrepresented and oppressed women under extremely at risk, which will only disempower them auxiliary.

22 Pawan Kumar, "Surrogacy and women□s right to health in India: Issues and perspective" 65 IJPH 57 (2013)

23 Pikee Saxena, Archana Mishra, Sonia Malik, 'Surrogacy: Ethical and Legal Issues' (2012) 37 IJCM 211,

24 Supra note, 23.

Unfair Classification: A Major Encounter

While seeking to ban commercial surrogacy to prevent exploitation of surrogate mothers and children, the bill controversially permits only those Indian couples who have been legally marries for at least five years to access surrogacy services. The bill's other limiting criteria include allowing only close relatives to become surrogate mothers. It is clear that these criteria are meant to exclude a section of individuals and seeking to deny a host of perfectly suitable individuals who are well within their rights to demand access to surrogacy services. This is a clear violation of Article 14 of the Constitution, which insures every Indian citizen "equality before the law or the equal protection of the laws within the territory of India."

Further the bill rightfully seeks to stop the physical, emotional and economic exploitation of Indian women through unethical surrogacy practices and protect the rights of surrogate children. However, it adopts a highly discriminatory approach by not securing the reproductive rights of individuals who may have an alternative lifestyle, including those currently excluded by the bills. As equal citizens of a progressive democracy, all Indian women and men should have the freedom to decide matters pertaining to their reproductive rights. They should have the right to decide when and how they want to start a family. It is a breach of Articles 7 and 16 of the UN backed Universal Declaration of Human Rights.[25] This is particularly ironic in light of the nation's frequent calls for UN reforms and the countries rising profile in global decision making corridors.

By limiting access to surrogacy based on flimsy and exclusionary criteria, the government may just give rise to a mushrooming black marketing. The state must realise that it is effective, non-discriminatory regulation that is the answer here. It must pay heed to Aristotle, who said, "The only stable state is the one in which all men are equal before the law."

25 It calls for equality before the law and the right of a men and women of full age to found a family.

Rights of Child under Draft Bill: A Dilemma

The Draft Bill also fails to give importance to the children born from the process of surrogacy. There is no safeguard given to the children born, there is always a fear that the children may be abandoned, this being a major problem that had to be addressed. The Court had asked the legislature to make laws for the safety of such the children.[26] The Legislature has failed to address the main issue that was the reason for the Act to come into effect itself. The couples who wanted the child may get divorced when the surrogate mother is pregnant, causing the newly born child to have no home. There are also instances when a child is born crippled then it is abandoned .The Bill fails to give any solution in such instances.

The child also has to right to know information regarding its biological parents. The Bill does not give any guarantee to the child to know its parents. There is also the problem of preserving the nationality of the child born or whether the child will gain the nationality of the commissioning couples. Surrogacy involves exchange of money and a baby, this is a form of selling the child which is a clear violation to the Convention on the Rights of the Child to which India is a signatory to.[27]

Conclusion

Surrogacy is an important field in the current social scenario which has never been given the importance it needs. The Courts have many times instructed the Centre to formulate the process of surrogacy but till date there is no law governing it. The Centre has been formulating the ART Act for several years now and has gone through many revisions, until recently the Cabinet had given its nod to Draft Surrogacy (Regulation) Bill, 2016. India is a growing competitor by offering lower rates in comparison to other emerging markets such as Thailand and

26 *Baby Manji Yamada v. Union of India*, AIR 2009 SC 84

27 Article 35 of the Convention on the Rights of the Child, states "Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form

Ukraine. The Bill has prevented foreigners from coming into the country for the procedure but has to clear solution to India being the hub for surrogacy around the world. There are many areas where the Courts are awaiting clarification in the field surrogacy thus the law of surrogacy is of prima facie importance.[28]

The process of surrogacy has become complicated with the introduction of agents and the commercialisation of the process, the experience of motherhood has been lost. It was a tradition that the whole family will rejoice with joy when the woman gets pregnant and there will be celebrations in the whole community. Surrogacy now has made giving birth to a child as a business wherein we have lost the principles that were enshrined with us. There is an extreme urgency to push through the legislation in regard to surrogacy answering key issues.[29] The Bill lacks a clear objective, the Bill has to ensure that surrogacy is carried out through a legalised framework. The Bill must take steps to reduce the number of surrogacies in the long run and take steps to move towards more adoptions. It is always to be remembered that when motherhood becomes the fruit of a deep yearning, not the result of ignorance or accident, its children will become the foundation of a new race.

The draft Bill clearly violates Article 14 and Article 21 of the Constitution of India and fails both the tests of Constitutionality and rule of law. Surrogacy has exceptionally complex consequences in biological, social, psychological and cultural forms. Currently, there exists no unity upon an epitome surrogacy arrangement and ambiguities exist in equally commercial and altruistic forms. Together these practices require extremely immense rule, the likelihood of implementing the burdensomerules need a healthy dosage of practicality in the Indian situation. Commanding a blanket ban does not address the relevant of the time and will generate high likelihood ofmotivating the

28 *Shihabeldin v. Union of India,* 2014(4)Crimes481(P&H)
29 *Jan Balaz v. Anand Municipality*, AIR 2010 Guj 21

surrogacy market subversive through black marketing, thus creating it poorer for all the participants'intricate in the process.

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Constitutional Right to Speedy Justice: Law and Practice

"Right is the rule of law and law is declaratory of right"

Benjamin Whichcote

Abstract

Law is the means and Justice its end, so until the law itself does not provide for such measures which can meet the ends that is justice then the very purpose of law would become in fructuous. In India right to speedy justice is acknowledged by the state and this can be confirmed by going through the provisions in the statutes and procedural laws though it is different story altogether how far these provisions have been effective in actually dispensing speedy justice.

The relevance of providing timely and speedy justice has been acknowledged by international bodies as well as various forms of governments throughout the world. The Universal declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), The European Convention on Human Rights (ECHR) contain specific provisions regarding speedy trial and speedy justice which is now an essential ingredient of human rights jurisprudence. The state is considered as guardian of its citizens and so it becomes duty of the state to protect right of citizens from being infringed and if there is any excessive and undue delay in providing justice to citizens it is clear violation of their right to speedy justice. Man is the most accomplished of all creatures of our universe. He is so immeasurably admirable in his faculties of thought, action and reason that Shakespeare declares him, as 'the beauty of the world'. It is perhaps due to this celebrated glory of man that human community, right from the early days of civilization, has consistently held certain basic values which are inviolable under any circumstance. These basic values of life and personal liberty have come to be termed differently as civil liberties and human rights. History is replete with instances of successful and relentless struggles whenever persons in authority whose primary duty is considered the protection of human rights infringed upon these basic rights of human beings. These persons in authority often form the core of the criminal justice system in

a country, unmistakably composed of the Police, Judiciary and Correctional Services. It is often upon them that the responsibility of protection of these basic human rights rests and when they end up violating these basic rights they are in violation of the benchmark of human rights-the Universal Declaration of Human Rights (UDHR).

The present paper is an attempt to analyse the concept, importance of speedy justice and a study of existing legal framework with regard to speedy dispensation of justice in India. It deals with Constitutional and legal framework with amendments which have been made to existing statutory and procedural laws for the purpose of speedy delivery of justice and reduction of court backlogs.

Keywords: *Human Rights, Justice, Constitution, International Convention, Correctional services.*

I. Introduction

'Justice' is at the top among the aims and objectives to be achieved by the Constitution as enshrined in the Preamble. The objective of justice, social, economic and political is directly incorporated in Article 38. As observed by Seervai, the famous jurist, Article 39 amplifies the concept of justice. The Supreme Court has held that social justice would include 'legal justice' which means that the system of administration of justice must provide cheap, expeditious and effective instrument for realization of justice by all sections of the people irrespective of their social or Economic position or their financial resources.

Speedy justice has always been the sine qua non of criminal jurisprudence. It is an important safeguard to prevent undue and oppressive incarceration. It minimises anxiety and concern accompanying the accusation. It also limits the possibility impairing the possibility impairing the ability of an accused to defend himself. There also remains a keen societal interest in providing speedy justice. The right of speedy justice has been actuated many times in recent past. The

courts also in series of decisions have opened new vistas of fundamental rights.[1]

Speedy justice is an essential component in civil matters too because in civil action also rights of parties are impaired and so they take recourse to court of laws with the object to get redressal of their grievances as early as possible. Civil litigation comprises of everything other than criminal visually property matters, service matters, revenue matters , commercial matters etc which may be important issues for litigants in their life and so providing speedy justice is essential duty of the state particularly in a welfare nation. It is said that law is the means and justice is the end but if justice is not speedy and effective then it looses the essence and vitiates the very purpose of law.

The whole idea or rather the basis of speedy justice is contained in one single dictum and that is JUSTICE DELAYED IS JUSTICE DENIED.Unjust and prolonged delay defeats the very purpose of justice. The best example from Indian context of denial of justice on part of judiciary and machinery of the state is Bhopal gas leak tragedy of December 1984 in which because of leakage of Methyl Isocyanides from the factory of Union Carbide Corporation more than two thousand people lost their lives and several lakh people are still suffering from the after effects of that disaster but till date no adequate compensation has been provided to the families of the deceased people nor to the effected people. The actions of the successive governments have been very callous and the result is the culprits of Bhopal tragedy have not been brought to books till date. The plight of Bhopal victims clearly demonstrates the blatant violation of the philosophy of the Preamble of the Constitution which endeavours to provide justice social, economical and political to all citizens of India.

Access to justice including speedy justice is one of the constitutionally recognized human and fundamental rights. The need for a pragmatic and scientific approach to reforms aimed at making this

1 D P Sharma, Speedy Justice and Indian Criminal Justice System, 3 *I.J.P.A.* (July-Sep.1999)

right a reality, in conditions typical to India, has become gradually critical in the recent years.

The Constitution was framed by men of great learning and erudition after intense deliberations in the Constituent Assembly. The framers of the Constitution gave India not merely a legal document to govern the country but an instrument of establishing a just society. Dr. Shankar Dayal Sharma, the then President of India, while addressing Parliament on 9th December 1996 on the occasion of the 50th anniversary of the first sitting of the Constituent Assembly said: "It was our beloved leaders who belonged to masses, individuals with deep Knowledge and learning and imbued with the values of our civilization, who were elected to participate in the Constituent Assembly. They had broad global vision which encompassed all humanity and sought to harmonize the great spiritual values of our culture with the modern dynamic approach of other traditions."[2]

'Justice' is at the top among the aims and objectives to be achieved by the Constitution as enshrined in the Preamble. The objective of 'justice', Social, economic and political is directly incorporated in Article 38. As Observed by Seervai, the famous jurist, Article 39 amplifies the concept of justice. The Supreme Court has held that social justice would include legal justice' which means that the system of administration of justice must provide cheap, expeditious and effective instrument for realization of justice by all sections of the people irrespective of their social or Economic position or their financial resources.[3]

Oliver Wendell Holmes observed "The life of the law has not been logic; it has been experience." A law that is healthy and vital is shaped from the context in which we live. It is in the individual cases where the hard choices are made, our legal principles crystallized, and our faith in justice reaffirmed. If people do not have access to the courts at all levels

2 Dalbir Bharti, *The Constitution And Criminal Justice Administration* (A.P.H. Publishing Corporation, New Delhi, 2002)

3 justice Y K Sabbharwal, My Dream of an Ideal Justice Dispensation System, *Available at*: http://ijtr.nic.in/articles/art55.pdf (Retrieved on March, 2017)

of the Judiciary then we are missing voices, problems, and perspectives that enrich the ideals of the law enunciated at the top or at any other level of the judiciary. Our ideals of justice are not so much created and refined by logic as they are by experience.

When we talk of speedy justice, it means a constant and perpetual desire to render everyone, his or her due. This, in turn, means that the court must in every way find legal techniques to provide relief to the one who has been deprived of what was due to him or her. It is, therefore, said that justice is the ultimate objective of law. Our Constitution injects justice, equity and good conscience into Indian way of life. If people lose faith in the justice dispensed to them, the entire democratic setup may crumble down. To retain the trust and confidence of people in the responsiveness and ability of the system, it should be capable of delivering quick and inexpensive justice.

Delay in disposal of cases not only creates disillusion amongst the litigants, but also undermines the capability of the system to impart justice in an efficient and effective manner. Long delay also has the effect of defeating justice in quite a number of cases.

The problem is more acute in criminal cases, as compared to civil cases. Speedy trial of a criminal case considered to be an essential feature of right of a fair trial has remained a distant reality. A procedure which does not provide trial and disposal within a reasonable period cannot be said to be just, fair and reasonable. If the accused is acquitted after such long delay one can imagine the unnecessary suffering he was subjected to. Many times such inordinate delay contributes to acquittal of guilty persons either because of fading memory or death of witnesses or the evidence is lost or the witnesses do not come forward to give true evidence due to threats, inducement or sympathy. Whatever may be the reason, it is justice that becomes a casualty.

A large majority of our people still live below the poverty line and are hardly able to afford two square meals and a shelter on their head. It would be unrealistic to expect them to afford the services of a competent advocate. Efforts have been made by governments from time to time to address the issue of granting legal aid to the poor but, enough has not

been done and the system requires further augmentation and Strengthening, particularly on giving such people services of good and competent lawyers and not just lawyers. Unless the advocates provided (by legal services authority) are competent and hard working, no useful purpose is served by making their services available to the poor litigants.

Legal Service Authorities have to take suitable steps to ensure that they empanel only reputed counsel of proven ability and integrity, in whom the poor litigants may repose trust. There is reluctance on the part of senior counsel to come forward, to provide legal aid to the needy persons. They have to be persuaded to acknowledge their social obligations and provide their service to the weaker sections, without expecting any remuneration either from them or from the Legal Service Authorities. In developed countries *viz*. United Kingdom, the Government maintains a panel of very competent and experienced advocates for providing legal aid to the defendants in criminal cases and pays adequate remuneration to them. In our country, the State cannot afford to pay the fee being presently commanded by successful Advocates. It must nevertheless pay reasonable compensation, so as to attract talented and reasonably experienced advocates to legal aid panels. Legal services authorities should ensure that such panels are manned only by service oriented advocates and are not used for the purpose of dolling out favours to the kiths and kins of the powers that be or to advocates who do not want to work hard and join such panels merely for the purpose of earning their livelihood.

II. Social Relevance, Dynamism and Pragmatism

Another aspect to be highlighted is the Latin maxim *Boni Judicise stampliare jurisdictionem* that law must keep pace with society to retain itsrelevance. It must continue to govern our justice delivery system. If the society moves but the law remains static, it shall be good for neither ofthem.

About twenty five year back, the Supreme Court in *Delhi Judicial Service Association v. State of Gujarat*, said[4]: *"……In interpreting the*

4 (1991) 4 SCC 406

Constitution, regard must be had to the social, economic and politicalchanges, need of the community and the independence of judiciary. Thecourt cannot be a helpless spectator bound by precedents of colonial days,which have lost relevance. ....."

Lord Denning has beautifully said "every new decision or every new situation is a development of law. Law does not stand still. It moves continually. Once this is recognized, then the task of the judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic, a mere working mason laying brick on brick, without thought to the overall design. He must be an architect thinking of the structure as a whole building for the society, a system of law, which is strong, durable and just. It is on his work the civilized society depends."

Justice should be pure, visibly pure, and unadulterated. It should be fair, equitable and impartial. It should be no respecter of persons, personalities, or establishments. It should not be commercialised, nor should it be bought and sold, for nothing is as hateful as venal justice. It should be quick, for delay is certain denial. Legal justice should as closely as possible, resemble the virtue whose name is bears-virtue by which we give to everyone his due.

Laws make possible the existence of organized society, with the consequential release of human energies for constructive efforts in the satisfaction of individual and group needs of society. A peaceful and harmonious living in any society implies the systematic promotion of fair and just treatment of individuals and groups within it, the protection of conduct consistent with, and the punishment of conduct inconsistent with, the declared interests and values of society as well as the existence of a justice system by which the problems of individuals and groups are resolved peacefully. Law is therefore at the heart of the methods by which society meets these needs.

It would not be incorrect if said that speedy and effective justice is due of every person and it is responsibility of the law to provide it. Law is the means and justice the end and to make the end worthy of being cherished it becomes purpose of law and the state machinery to provide

speedy justice. The concept of speedy justice enumerates from the fact that access to justice is natural human right of every individual living in any organised society and timely justice without unjust delay to every individual is proponent of rule of law. A person should be given his due within appropriate time frame irrespective of his socio economic status in society, this should be principle of working for all justice delivery systems otherwise the faith of people would start fading away from the system of governance which in no way is good for stability and prosperity of any nation.

III. Right to Speedy Justice *vis-à-vis* Arrear of Cases in Indian Court

In present time the biggest challenge which the Indian legal system is facing is the ever mounting arrear of cases right from lower courts to Supreme Court and that is inclusive of both civil and criminal cases. In criminal cases there are provisions in the constitution like Article 21 which contain within its domain the Right to Speedy Trial as has been observed by the Apex Court in its various pronouncements that this right is basic fundamental right of every citizen within the ambit of Right to Life contained in Article 21 of the Constitution of India.[5] But in spite of such importance given to this fundamental right the factual position in the country is quiet contrary, there are thousands of under trial prisoners languishing in jails throughout India and in many cases the trials has even not started for years. According to statistics as reported in Prison Statistics India-2013 there are 278503 under trial prisoners in India. In particular, there are 19,331under trial prisoners in Maharashtra; this is the plight when Bombay High Court has constituted a special task force for ensuring speedy trial, situation in rest of the country is still worse.

The right to speedy justice is not a fact or fiction but a 'Constitutional reality' and it has to be given its due respect. The courts and the legislature have already accepted it as one of the medium of reducing the increasing workloads on the courts. The right to a speedy trial, and its resulting impact on both the defendant and society as a

5 D.P. Sharma, Speedy Justice & Indian Criminal Justice System XLV *IJPA* 365 (1999)

whole, makes this Sixth Amendment guarantee a crucial portion of the Bill of Rights and another important part of our legal heritage. Repeated delays and continuances in the criminal justice process prevent victims from ever reaching emotional, physical, and financial closure to the trauma suffered as a result of the crimes perpetrated against them. Such delays in prosecution can also limit the ability of victims to receive justice when their memories, or those of other witnesses, fade with the passage of time or when the victim's health deteriorates. The Hon'ble Apex Court on several occasions has expressed its concern in respect of delay caused in Courts and has also gone to the extent of saying that speedy trial is not only the right of the accused but of the victims of the crime also.[6]

With the increase in rate of pending cases and declination of pronouncement of justice, society now considers Justice delayed is Justice denied. The judiciary day by day, due to its delayed process losing faith of people to whom it is obliged to provide justice. Supreme Court by its decision confirmed that the speedy trial is deemed as fundamental right included in Article 21 of the Constitution of India. In spite of this, the condition is static and unchanged. Many Committees and Boards set up by the governments from time to time had come up with the approach of reformations and solutions of the rendering justice effectively. However, the implementation of these recommendations have not been considered and yet to be put in practice.[7]

The whole idea and purpose of justice is vitiated when it cannot be implemented effectively and timely in spite of the fact that it is a Constitutional obligation of the state to provide cheap and effective justice to the people. The Constitution has clearly mentioned in the preamble about the importance of speedy, economic and effective delivery of justice, it has imposed obligation upon state by way of

6 Justice B. N. Aggarwal, Pendency of Cases / Speedy Justice, available at: http://indialawyers.wordpress.com/2009/11/09/pendency-of-cases-speedyjustice/#comment-5184 (Retrieved on March, 2017)

7 Jayanth K. Krishnan & C. Raj Kumar, Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective, 42 *Georgetown Journal of International Law* 747 (2011)

incorporating provision relating to speedy justice in Part IV and the apex court by way of expanding the horizon and ambit of Article 21 has included speedy trial within the ambit of fundamental rights but in spite of all these efforts and also and other statutory and procedural laws which have adequate provisions relating to speedy trial the courts in India are highly congested and unable to deliver timely justice to people.

According to the status report of Supreme Court given on its website there are around 24230843[8] cases pending in lower courts, about 4011965 cases in High Courts[9] and around 60751 cases[10] are pending in Supreme Court itself. There is no one factor which is solely responsible for these arrears of cases. For the reformation in the present practicing judicial system, there are number of elements which must be considered.

The Law Commission of India in its various reports has mentioned the plight of courts in dispensing speedy justice, from time to time legislature by way amendments in the existing laws has implemented these recommendations and recommendations of other committees such as Malimath Committee but the problem of arrears has not improved but with time it is worsening.[11] It is estimation that with this pace infrastructure and pattern of justice dispensation the judiciary would not be able to clear its docket even in 300 years. It is indeed very disappointing that despite of all the Constitutional and statutory provisions which lay down the emphasis on speedy delivery of justice, various reports of Law Commission and other committees viewed that the state is not able to cope with the arrear of cases and thereby directly infringing the Constitutional right of people of speedy justice.[12]

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8 As on 29.5.2017, *available at*: http://njdg.ecourts.gov.in/njdg_public/main.php (Retrieved on May, 2017)

9 As on 30-09-2016, *available at* :http://sci.nic.in /court news/2016_issue_3.pdf (Retrieved on March, 2017)

10 As on 1.5.2017, *available at*: http://supreme court of india. nic.in/p_stat/pm31122016. pdf (Retrieved on May, 2017)

11 Government of India, Report: Committee on Reforms of Criminal Justice System (Ministry of Home Affairs, 2003)

12 Himadrish Suwan, Speedy and Transparent Justice System Is a Right: A Need of Hour, *available at*: http://lawyersupdate.co.in/LU/1/1640.asp (Retrieved on March, 2017)

IV. Universal Declaration of Human Rights and Speedy Justice

The Universal Declaration of Human Rights was adopted by the General Assembly by a vote of 48 to Nil with eight absentees. The declaration has been hailed as an historic event with profound significance and as one of the greatest achievements of the United Nations. The declaration "… is the mine from which other conventions and national constitutions protecting these rights have been and are being quarried." As noted above, the declaration on human rights was prepared by the commission on human rights in 1947 and 1948 and was adopted by the general assembly on December 10, 1948. When the universal declaration of human rights was adopted, it was most eloquent expression of hope by a world emerging from the most devastating war in the history of human race. The expression gave the Universal Declaration a momentum that is reflected in the boldness of this document destined for a world of peace where the right to live in peace has become reality of all.[13]

One of the main reasons to for the inclusion of the provisions concerning human rights in the U.N. charter was the bitter experience which the mankind had undergone during the First World War and the Second World War where large scale violations of human rights were made. that is why the preamble of the United Nations Charter expresses the determination " to save succeeding generations from the scourge of war" which twice in our lifetime has brought has brought untold sorrow to mankind, and "to reaffirm faith in fundamental human rights ,in the dignity and worth of the human person, in the equal rights of men and women…" thus large scale violation of human rights during the two world wars ,especially the second world war , including the Nazi atrocities were fresh in the minds of the framers of the U.N Charter . that is why one of the first decisions that the General assembly took was to prepare an International Bill of Human Rights and for this purpose asked the Economic and social council for a study by the commission of

13 S.K. Kapoor, International Law and Human Rights 777(Central Law Agency, Allahabad, 2004)

human rights .The large scale violation of human rights were also fresh in the minds of those drafted and adopted the Universal Declaration of Human Rights. These are echoed and reflected in the wordings of the preamble. It was also natural for the framers of the preamble to affirm "their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women," because they considered, and rightly too, it to be the "foundation of freedom, justice and peace in the world." it is in this context that we have to see and understand preamble of the UDHR which is as follows:

Whereas recognition of inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of the freedom, justice and peace in the world.

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspirations of the common people .

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort to rebellion against tyranny and oppression, that human being should be protected by rule of law

Whereas it is essential to promote the development of friendly relation between nations.

Whereas the people of United Nations have in their Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of human persons and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

Whereas member states have pledged themselves to achieve ,in co-operation with the United Nations ,the promotion of universal respect for and observation of human rights and fundamental freedoms.

Whereas a common understanding of these rights and freedoms is one of the greatest importance for the full realization of this pledge,

Now therefore,

The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all people ,and of all nations ,to the end that every individual and every organ of society ,keeping this declaration constantly in mind ,shall strive by teaching and education to promote respect of these rights and freedoms and by progressive measures , national and international , to secure their universal and effective recognition and observance , both among the people of member states themselves and among the peoples of territories under their jurisdiction.[14]

The UDHR consist of preamble and 30 articles containing various human rights including right to speedy justice and speedy trial. Articles 3 to 21 of the declaration contain civil and political rights and articles 22 to 27 contain economic, social and cultural rights. Article 3 contains specific provision relating to right to life, liberty and security of person and Article 7 contains right relating to equality before law and equal protection of law against any discrimination in violation of the Declaration. Article 10 has provision relating to fair trial and public hearing by an independent and impartial tribunal.

The bare perusal of the UDHR Articles along with the intention of the framers contained in the preamble would clearly demonstrate that speedy trial and speedy administration of justice is an essential component of human rights. It was on the basis of UDHR that United States of America amended its constitution and by way of fourteenth amendment incorporated right to speedy trial as a guarantee to all citizens. Hence it can be said that concept of speedy trial as incorporated in American constitution had its source in text of UDHR.

Since its adoption the Universal Declaration has exercised a powerful influence, both internationally and nationally, it has been rightly pointed out, that "whatever it's legal quality, the declaration has set a standard by which national behaviour can be measured and to which nations can aspire. As a result of universal declaration the subject of human rights has fostered so much international legislations of the

14 Id., at p. 778

highest value that as legal topic it has no parallel today. Human right has covered within its ambit the right to effective and speedy administration of justice which can be said to be direct consequence of Universal Declaration of Human Rights.

These rights were further reaffirmed in the International Covenant on Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights 1966. Under the International Covenant on Civil and Political Rights, 1966 which is an optional protocol to Universal Declaration of Human Rights, 1948, every country shall have to ensure that a citizen shall have an effective remedy for enforcing his rights or freedoms. This is not a new concept. Since the ages, the Civilization has recognized the right of every person to seek redressal in a Judicial Tribunal. The legal maxim *ubi jus ibiremedium*is not an empty promise. In fact these two covenants not only reaffirmed the notion of equality and non discrimination on any basis but also categorized or specified the rights into civil and political rights and economic, social and cultural rights. On the other hand the covenants obliged state parties to protect and promote the rights set forth in the covenants and provide effective remedies if violated. At the same time these covenants also established implementing mechanism through observation, monitoring, complaint handling, reporting to protect and promote these rights at international level.

V. Constitutional Provisions and Right to Speedy Justice

The Constitution of India places speedy justice in very high esteem and this is depicted in the Preamble itself which has resolution with regard to economic, social and political justice for all. Speedy trial has been held to be part of article 21 of the constitution which is a justifiable fundamental right enforcement of which can be done through court of law in writ jurisdiction. The most important provision with regard to speedy justice is contained in Directive Principles which is the guideline or the aim of the state which it has to achieve. We would individually take each constitutional provision which contains provision with regard to speedy dispensation of justice and also see how these provisions have

been construed by court to bring out the real purpose behind incorporation of these provisions in the constitutional document.

(A). Preamble to the Constitution of India

The preamble to the constitution sets out the aims and aspirations of the people of India and these have been translated into the various provisions of the constitution. The objectives before the constituent assembly were to constitute India into a sovereign, democratic, republic and to secure its citizens justice, liberty, equality and fraternity. The preamble of the Indian constitution starts with WE THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a [SOVEREIGN, SOCIALIST, DEMOCRATIC, REPUBLIC] and to secure to all its citizens: JUSTICE, Social, economic and political;

The people of India through the preamble have resolved to secure justice for all and it is the basic principle of law that justice delayed is justice denied and hence right to speedy and timely justice is right of every citizen of India in light of the resolution of the preamble. The apex court in India has elevated the status of preamble and the objectives enumerated in it to the level of basic structure of the constitution in *Kesavananda Bharti v.State of Kerela.*[15]

The preamble has been held by the apex court to be part of the constitution the objectives enumerated in it as the basic feature of constitution so there can be no denial that right to speedy justice is within the domain of the objectives of the preamble and so of utmost importance both for framers of the constitution and the people of the country. Justice as mentioned in preamble must mean and include timely justice for the purpose of fostering sense of faith and obedience in the people of the country towards the system which is for their welfare in nature. Justice has to be economic as well, as enumerated in the preamble and it cannot be made economical until and unless a time frame which ought to be reasonable is guaranteed to the citizen for providing justice.

15AIR 1973 SC 1461

The country today is facing a very tough time in providing speedy justice to people right from lower courts to apex court, backlog cases are piling on and on and this is an irony indeed because the Supreme Court of India which is guardian of Indian judiciary and the final interpreter of the constitution is itself unable to comply with the objectives of the preamble which it has declared as basic structure of the constitution not amenable by parliament.

(B). Article 21 of the Constitution of India

Article 21 reads as:

Protection of Life and Personal Liberty-No person shall be deprived of his life or personal liberty except according to the procedure established by law.

This article though couched on negative language, confers on every person the fundamental right to life and personal liberty. The foreigners are as much entitled to these rights as the citizens as held in *Chairman Railway Board v.Chandrima Das.*[16]

The right to speedy trial has been held to be part of the article 21 by the apex court of India through the mechanism of judicial activism even thought there are no exact specific provisions relating to speedy trial in the constitutional document. The state as a guardian of the fundamental rights of its people is duty bound to ensure speedy trial and avoid excessive long delay in trial of criminal cases that could result in grave miscarriage of justice. Speedy trial is in public interest as it serves societal interest also. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible.[17] once an accused person is able to establish that the basic and fundamental right under article 21 has been violate, it is up to the state to justify that this infringement of fundamental right has not taken place and that the restriction or provisions of law are reasonable and that the procedure followed in the case is just fair without delay expeditious and reasonable. In case the state fails to do so, the case made against the

16 AIR 2000 SC 988

17 S.N. Sharma, Fundamental Right to Speedy Trial : Judicial Experimentation 38 *IILI* 236 (1996)

accused person should be dropped and closed. On pre trial confinement, at times the accused remains in jail for much longer period than even the maximum sentence which can be awarded to him on conviction for the offence of which he is accused. It is bounden duty of trial court to ascertain that the cases are disposed of speedily at least of the under trials who are languishing in jail, yet the judiciary is unable to enforce it for want of adequate number of courts and Judges.[18]

The dictum 'Justice Delayed is Justice Denied' postulates that an unreasonable delay in the administration of justice constitutes an unconscionable denial of justice.[19] Life and liberty of a citizen guaranteed under Article 21 includes life with dignity and liberty with dignity. Liberty must mean freedom from humiliation and indignities at the hands of authorities to whom the custody of the person is may pass temporarily or otherwise, under the law of the land.

In all criminal trials an accused does not prosecute him. The state aided by complainant prosecutes him. The plea that an accused who does not demand a speedy trial stands by and acquiesces in the delays cannot bar the complaint of infringement of his right to speedy trial. It is the first duty and prioritized obligation of the state to proceed with the case with reasonable promptitude. Speedy trial is in public interest. Courts should not examine cases in piece meal manner. Once the trial commences, except for very pressing reason which makes an adjournment inevitable proceed*de die in diem* unless the trial is concluded as held in *Lt. Colonel S.J Chaudhary v. State (Delhi Administration)*.[20]

Individual liberty is a cherished right and perhaps one of the most valuable fundamental rights guaranteed by our constitution. If this right is violated or invaded upon by, except strictly in accordance with law the victim is entitled apply to the judicial powers of the state for immediate

18 B.L. Arora, *Law of Speedy Trial In India*, 20 (Universal Law Publishing, New Delhi, 2006)

19 Kermit L. Dunahoo& Raymond W. Sullins, Speedy Justice Faculty Publications, Paper 1066, *available at*: http://scholarship.law.wm.edu/facpubs/1066 (Retrieved on March, 2017)

20 AIR 1984 SC 618

relief. The interest of the society can be served only if the constitutional provisions are implemented in its strict sense and the individual liberty of every person is harmonised with the social interest of the society. The liberty of the person cannot be dealt with in any other manner by any of the state authorities. Such approaches do not advance true social interest; continued indifference to such rights is bound to erode the structure of our democratic society as was observed in the case of *Moti Lal Jain v. State of Bihar*[21].

The right to speedy trial as expounded by the Supreme Court of India to be within the ambit of right to life under Article 21 of the constitution includes all the stages namely the stage of investigation, inquiry, trial, appeal revision and retrial .this view has been expressed by the Supreme Court in many cases and more importantly in the case of *Supreme Court Legal Aid Committee v. Union of India*.[22]

The constitutional philosophy propounded as right to speedy trial has though grown in age by almost two and a half decades, the goal sought to be achieved is yet a far-off peak. It is a concept which deals with speedy disposal of cases to make the Judiciary more effective and to impart justice as fast as possible. Article 21 declares that no person shall be deprived of his life or personal liberty except according to the procedure laid by law. Justice Krishna Iyer while dealing with the bail petition in *Babu Singh v. State of U.P.*[23] remarked, 'Our justice system even in grave cases, suffers from slow motion syndrome which is lethal to 'fair trial' whatever the ultimate decision. Speedy justice is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings.'[24]

21 AIR 1968 SC 1509
22 1989 AIR 1278
23 AIR 1979 SC 1713
24 S. N. Sharma, Inordinate Delay versus Speedy Trial: An Indian Experience, 31 *Ban. L.J.* 174-183(2002)

In *Sheela Barse v. Union of India*[25], court reaffirmed that speedy trial to be fundamental right. It observed that the right to speedy trial is a fundamental right implicit in Article 21 of the Constitution. If an accused is not tried speedily and his case remains pending before the Magistrate or the Sessions Court for an unreasonable length of time, it is clear that his fundamental right to speedy trial would be violated unless, of course, the trial is held up on account of some interim order passed by a superior court or the accused is responsible for the delay in the trial of the case. The consequence of violation of the fundamental right to speedy trial would be that the prosecution itself would be liable to be quashed on the ground that it is in breach of the fundamental right. Right to speedy trial is a concept gaining recognition and importance day by day.[26]

If Article 21 and the right to speedy public trial is not merely a twinkling star in the high heavens to be worshipped and rendered vociferous lip-service only but in deed is an actually meaningful protective provision, then a fortiori expeditious hearing of substantive appeals against convictions is fairly and squarely within the mandate of the said article.

(C).Equal Justice and Free Legal Aid

Article 39 Aread as:The state shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislations or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

This Article was inserted by the Constitution (Forty Second Amendment) Act 1976. This article was included in part IV of the constitution to impose a duty upon the state to provide free legal aid to those in need of it so that justice could be done to them. Free legal aid is an essential component of speedy justice because in a country like India where more than twenty five percent of the population lives below

25 AIR 1986 SC 1773

26 Jagmohan Singh, *Right to Speedy Justice for Under-trial Prisoners* (Deep & Deep Publications, New Delhi, 1997)

poverty line and cannot afford the cost of judicial process, justice would be delayed to them because of non legal representation which can go to the extent of denial of justice.

Article 39 A imposes duty upon the state to provide opportunity of justice to all without any discrimination by way of providing free legal aid to those who cannot afford it themselves for the purpose of speedy administration of justice. Though this right is not justiciable i.e. not enforceable in any court of law but the intention of framers of the constitution was that state should work towards achieving the goals prescribed in part fourth of the constitution for the welfare of the people.

Major strides were again made in the development of the jurisprudence surrounding the 'right to life' under Article 21, particularly after the landmark decision in Maneka Gandhi.[27]The linkage between Article 21 and the right to free legal aid was forged in the decision in *Hussainara Khatoon v. State of Bihar*[28], where the court was appalled at the plight of thousands of under trials languishing in the jails in Bihar for years on end without ever being represented by a lawyer. The court declared that 'there can be no doubt that speedy trial, and by speedy trial, we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.' The court pointed out that Article 39A emphasised that free legal service was an inalienable element of 'reasonable, fair and just' procedure and that the right to free legal services was implicit in the guarantee of Article 21.

In his inimitable style, Justice Bhagwati declared: 'legal aid is really nothing else but equal justice in action. Legal aid is in fact the delivery system of social justice. If free legal services are not provided to such an accused, the trial itself may run the risk of being vitiated as contravening Article 21 and we have no doubt that every State Government would try to avoid such a possible eventuality.'[29]

27 (1978) 1 SCC 248

28 (1980) 1 SCC 81

29 M. Jagannadha Rao, Access To Justice, *available at*: http:// www.lawcom.govt.nz/sites/default/files/speeches/2004/04/India%20Law%20 Commission%20paper.pdf (Retrieved on March, 2017)

The Supreme Court of India however by way of judicial activism particularly while expanding the horizons of article 21 right to life has held certain provisions contained in part four of the constitution to be fundamental right of the citizens and violation of which would entitle people to approach courts. Right to free legal aid at the cost of the state to an accused person who cannot afford legal services for reasons of poverty, indigence or incommunica do situations is part of fair just and reasonable procedure under article 21 of the constitution as held in the case of *M.H. Hoskot v. State of Maharashtra.*[30]

The Constitution promises to every citizen justice-free, fair and unbiased. Equal access to judicial redress, which has also been reiterated in international conventions, is one of the pillars on which the rule of law stands. However, in reality access to justice is denied to the socio economically weaker sections of society. There has been a paradigm shift in the approach of the Supreme Court towards the concept of legal aid from a 'duty of the accused to ask for a lawyer' to a 'fundamental right of an accused to seek free legal aid' making the right under Article 39 A as a justiciable right. But in spite of the fact that free legal aid has been held to be necessary adjunct of the rule of law, the legal aid movement has not achieved its goal. There is a wide gap between the goals set and met. The major obstacle to the legal aid movement in India is the lack of legal awareness. People are still not aware of their basic rights due to which the legal aid movement has not achieved its goal yet. It is the absence of legal awareness which leads to exploitation and deprivation of rights and benefits of the poor. Thus it is the need of the hour that the poor illiterate people should be imparted with legal knowledge and should be educated on their basic rights which should be done from the grass root level of the country. Because if the poor persons fail to enforce their rights etc. because of poverty, etc. they may lose faith in the administration of justice and instead of knocking the door of law and Courts to seek justice, they may try to settle their disputes on the streets or to protect their rights through muscle power

30 (1978) 3 SCC 544

and in such condition there will be anarchy and complete dearth of the rule of law. Thus legal aid to the poor and weak person is necessary for the preservation of rule of law which is necessary for the existence of the orderly society. Until and unless poor illiterate man is not legally assisted, he is denied equality in the opportunity to seek justice.[31]

One of the most important but ignored of the rights which has a constitutional basis is the Right to Free Legal Aid. The right to life under Article 21 has been interpreted by the Supreme Court to also include the right to free legal aid. As such a right is unknown to the vast majority; people still pay hefty fees to lawyers out of their meagre incomes. In *Khatri v. State of Bihar*[32], the Supreme Court held that the state cannot expect the poor and illiterate to know whether they had the right to free legal aid or not, and hence it was the duty of the state to provide legal aid, whether asked by the accused or not.

It was in pursuance to duty of the state under Article 39 A of the constitution of India that Legal services authority Act 1987 was passed by the parliament which was published in the gazette of India Extraordinary Part II section 1 no. 55 dated 12th October 1987.

VI. Statutory Provisions under Civil Procedure Code

The Civil procedure code was initially enacted in 1908, during the British Indian period. At that time there was only need for having a civil procedural law to effectively deal with matters civil in nature arising in courts. There was no need for having procedural laws for speedy justice as number of cases was not much. But as we know law is dynamic in nature and it has to be compatible with changing needs of society, the necessary amendments to the code were made by the legislature from time to time depending upon the needs of the society and recommendations of the Law Commission. A time came in Indian legal system where there started a explosion of litigation in courts and they became incapable of dispensing speedy justice, though the situation has

31 Law Commission of India, 221st Report on Need for Speedy Justice - Some Suggestions (April, 2009)

32 AIR 1981 SC 926

not changed much but amendments were made in civil procedure code (CPC) to incorporate new provisions and amend the existing ones to meet the requirements of speedy justice which is a Constitutional mandate. The most important amendments made in CPC in this regard are of 1999 and 2000. We would deal here with specific provisions of the code dealing with speedy dispensation of justice to litigants.

(A). Section 89: Settlement of Disputes outside the Court

(a) Where it appears to the court that there exists elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for Arbitration;

(b) Conciliation

(c) Judicial Settlement including Settlement through Lok Adalat; or

(d) Mediation

(1) Where a Dispute has been referred

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of the Act;

(b) to LokAdalat , the court shall refer the same to the LokAdalat in accordance with the provisions of sub-section (1) of section 20 of the Legal services authority Act , 1987(39 of 1987) and all other provisions of that Act shall apply in respect of the dispute to be referred to the LokAdalat;

(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a LokAdalat and all the provisions of the Legal services authority Act 1987(39 of 1987) shall apply as if the dispute were referred to a LokAdalat under the provisions of that Act;

(d) for mediation , the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

This section was inserted by the CPC (Amendment) Act 1999, section 7 (46 of 1999) (w.e.f. 1-7-2002) vide notification S.O. 603 (e), dated 6-6-2002: earlier section 89 repealed by the Arbitration Act 1940(10 of 1940) which had reference to arbitration, the procedure relating to which was embodied in the second schedule to the civil procedure code. There being now an independent enactment relating to arbitration the law has been consolidated in that Act.

The Statement of Objects and Reasons appended to the Bill state as follows:

With a view to implement the 129th Report of the Law Commission of India and to make conciliation scheme effective, it is proposed to make it obligatory for the court to refer the dispute after the issues are framed for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through LokAdalat. It is only after parties fail to get dispute settled through any of the alternate dispute resolution methods that that the suit shall proceed further in the court in which it was filed.

This is a special provision made for settlement of disputes outside the courts. A litigant is free to settle his disputes on a reference made by the court by resorting to any of the following methods:

(a) Arbitration

(b) Conciliation

(c) Judicial Settlement including settlement through LokAdalat, or

(d) Mediation

It seems that the special provision has been introduced in order to help the litigant to settle his dispute outside the court instead of going through the elaborate process in the court trial. This is a special procedure for settling the dispute outside the courts by simpler and quicker methods. The decision rendered by different forums shall have the same binding effect as if made by a civil court after an elaborate trial.

The litigants on the institution of the suit or proceeding may request the court to refer the disputes and if the court feels that there exists element of settlement which may be acceptable to the parties, it may refer them to any of the forums mentioned above at any stage of the

proceedings.The following rules have been inserted in Order X by the Amendment Act, 1999:

1A. After recording the admissions and denials, the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties.

1B. Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

1C. Where a suit is referred under rule 1A and the presiding officer of the conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then it shall refer the matter again to the court and direct the parties to appear before the court on the date fixed by it.

Justice Malimath committee in its report in Chapter VIII at page 112 and Chapter IX at page 168, 170 and 171 recommended:

If a law is enacted giving legal sanction to such machinery for resolution of disputes and resort there to is made compulsory much of the inflow of commercial litigation in regular civil courts gradually moving up hierarchally would be controlled and reduced.

This committee agreeing with the Law Commission recommends that conciliation courts should be established all over the country with power, authority and jurisdiction to initiate conciliation proceedings in all types of cases at all levels and that the amendment suggested by the Law Commission should be carried out to enable the scheme to function effectively. The conciliation procedure should also be made applicable to the Motor Accident Claims Tribunal.

The object, for making it obligatory on the part of the Court to refer the matter to the alternate dispute resolution methods, is to provide early disposal of the disputes, avoiding long waiting for justice for years and further avoiding judicial wrangles and multiplicity of appeals/revisions and also to reduce the burden on the judiciary of huge areas of cases pending at different levels of Courts. The result of this recommendation, Section 89 was inserted in the Code of Civil Procedure.

Section 89 of CPC is a new provision and even though arbitration or conciliation has been in place as a mode for settling the disputes, this has not really reduced the burden on the courts. Supreme Court of India in *Salem Advocate Bar Association, T.N. v. Union of India*[33] had observed that modalities have to be formulated for the manner in which section 89 of CPC and, for that matter, the other provisions which have been introduced by way of amendments, may have to be in operation. A Committee was constituted by Supreme Court so as to ensure that the amendments made become effective and result in quicker dispensation of justice.

Section 89 of CPC has been inserted to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the law's delays and the limited number of Judges which are available, it has now become imperative that resort should be had to ADR mechanism with a view to bring to an end litigation between the parties at any early date. The ADR mechanism as contemplated by section 89 of CPC is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation.[34]

As can be seen from Section 89 of CPC, its first part uses the word "shall" when it stipulates that the 'court shall formulate terms of settlement'. The use of the word "may" in later part of Section 89 of CPC is that where it appears to the court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the Section and if the parties do not agree, the court shall refer them to one or the other of the said modes. In other words section 89 of CPC is provision in law to facilitate introduction of court annexed ADR. The CPC has clear provisions regarding ADR and the people have started to reap the

33 (2005) 6 SCC 344

34 Reform of Procedural Law for Enhancing Timely Justice: Analysis of Section 89 of the CPC, available at: http://www.airwebworld.com/articles/index.php?article=1393 (Retrieved on March, 2017)

benefits of the system. Civil court can introduce ADR under the provisions of the Civil Code for settling the disputes.[35]

(B). Rule 5 B of Order XXVII and Rule 3A of Order XXIII

Order XXVII Rule 5 B: Duty of Court in Suits against the Government or Public Officer to assist in arriving at Settlement:

(1) In every suit or proceeding to which the Government, or a public officer acting in his official capacity, is a party, it shall be duty of the court to make, in the first instance, every endeavour, where it is possible to do so consistently with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of subject matter of the suit.

(2) If in any such suit or proceedings at any stage, it appears to the court that there is a reasonable possibility of a settlement, between the parties, the court may adjourn the proceedings for such period as it thinks fit, to enable attempts to be made to effect such a settlement.

(3) The power conferred under sub-rule (2) is in addition to any other power of the court to adjourn the proceedings.

(i). Order XXIII Rule 3 A: Bar to Suit-

No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

Rule 5 B of order XXVII and Rule 3A OF order XXIII of the code of civil procedure , 1908 (as amended by the Act no. 104 of 1976) contain special provisions enjoining a duty upon the court to make efforts and to assist the parties in arriving at the settlement in certain categories of suits/proceedings such as litigation by or against the government or public officers in their official capacity and litigation relating to matters concerning the public officers in their official capacity and litigation relating to matters concerning the family , such as sits/proceedings for matrimonial relief , guardianship and custody , maintenance and adoption, succession etc. similar provisions are also

35 Sudipto Sarkar and VR Manohar,*Sarkar on Code of Civil Procedure* 497(*LexisNexis Butterworths, Nagpur, 2009)*

found in Section 23 sub-sections (2) and (3) of the Hindu Marriage Act, 1955.

These provisions reflect the new legislative policy and indicate that the classic view of the Judicial role, namely that Judges are not supposed to have an involvement or interest in the controversies they adjudicate to enable them to decide cases fairly and impartially , has been to some extent departed from . the procedure for conciliation laid down in the aforesaid provisions, indeed, casts a duty on the courts to take an active interest in the cases of specified categories posted for trial before them, at an appropriate stage, so as to bring about reconciliation between the parties by taking such steps as may seem just and prudent having regard to the nature and the circumstances of the case.

These various provisions have been enacted with the end in view of amicably solving the disputes between the parties with the aid and assistance of the court and ensuring a just, fair and lasting solution of the controversy on an expeditious basis. These provisions are also designed to put an end to avoidable litigation and thus to reduce the burden of the courts by cutting short a litigation which might otherwise become a protracted affair.[36]

In light of the aforesaid new legislative policy and with a view to minimising the pendency of old cases and ensuring that the litigation comes to an end by way of an amicable settlement of the disputes, the conciliation courts are entrusted with certain categories of cases in which there is a reasonable possibility of settlement so as to assist the parties in arriving at a reconciliation, whether the case are at preliminary stage, or ripe for hearing, or at the execution stage.

(ii). Section 27: Summons to Defendants-Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed on such day not beyond thirty days from date of the institution of the suit.

36 P K Ganguly, *Commentary on the Code of Civil Procedure, 1908* (C.T.J. Publications, Pune, 2002)

Section 27 of the Code provides for the issue of summons to the defendants in a suit to appear and answer the claim in the suit. Earlier, the section did not provide any time limit for the plaintiff to serve the summons on the defendants. That resulted in the suits instituted decades ago being still at the preliminary stage because the plaintiffs failed to serve summons on the defendants. The Amendment Act of 1999 has plugged this loophole by providing that the defendants must be served with summons within 30 days of institution of the suit. The amendment in this particular section of the code has been done with the object to expedite the proceedings in the suit and thereby prevent the wastage of time of courts as well as litigants.

The amendments made to the various provisions of code of civil procedure by way of amendment Act of 1999 has been done keeping in mind the huge pendency of cases in various courts throughout the India whereby reducing the faith of litigants in the system of administration of justice in the country. The government being aware of its duties towards the citizens to provide speedy effective and cheap justice took several steps towards eliminating this problem of huge pendency of cases throughout the courts in India formulated many committees, the most important being Justice Malimath committee the recommendation of which have been implemented in the 1999 amendment Act of code of civil procedure with a view to check and curb the menace of arrear of cases and for providing speedy justice to the litigants in the country.

The Parliament has amended the Code vide Civil Procedure (Amendment) Act, 2002. The amendment in Code was done in 1999 also, but the said amendments were not made effective. Both the amendment acts, which became effective from 1st July 2002, taken together intend to bring in virtually certain radical changes. After a long wait and struggle, the Central Government has managed to effect some very significant and path breaking changes in the Code aiming to simplify the procedure and reduce the delays.[37]

37 Jayanth K. Krishnan and C. Raj Kumar, Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective, 2011, *available at*:

VII. Arbitration and Conciliation Act, 1996

Where two or more persons agree that a dispute or potential dispute between them shall be decided in a legally binding way by one or more impartial persons in a judicial manner, that is upon evidence put before him or them, the agreement is called as arbitration agreement or a submission to arbitration. When, after a dispute has arisen, it is put before such person or persons for decision, the procedure is called as arbitration, and the decision when made is called award. As per Lord Mustill, "The great advantage of arbitration is that it combines strength with flexibility. Strength because it yields enforceable decisions, and is backed by a judicial framework which, in the last resort, can call upon the coercive powers of the state. Flexible because it allows the contestants to choose procedures which fit the nature of the dispute and the business context in which it occurs. This was in January 1996, the Statement of Objects and Reasons to the Act made no bones of the inefficiency of the old legislation. It said that the same had 'become outdated' and there was need to have an Act, more responsive to contemporary requirements." It added: "Our economic reforms may not become fully effective if the law dealing with settlement of both domestic and international commercial disputes remains out of tune."

Amongst the main objectives of the new Act set out in the Statement of Objects and Reasons, is to minimize the supervisory role of courts in the arbitral process and to provide that every final arbitral award is enforced in the same manner as if it were a decree of the Court. If the parties agree to arbitration, then the provisions of the 1996 Act will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or

http://www.repository.law.indiana.edu/facpub/155(Retrieved on March, 2017)

mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial.[38]

One of the modes to which the dispute can be referred is 'arbitration'. Section 89(2) provides that where a dispute has been referred for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of the 1996 Act. Section 8 of the 1996 Act deals with the power to refer parties to arbitration where there is arbitration agreement. As held in *P. Anand Gajapathi Raju v. P.V.G. Raju*[39], the 1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in Section 89 of the Code where the court asks the parties to choose one or other ADR's including arbitration and the parties choose arbitration as their option. Of course, the parties have to agree for arbitration.

If reference is made to arbitration under Section 89 of the Code, the 1996 Act would apply only from the stage after reference and not before the stage of reference when options under Section 89 are given by the Court and chosen by the parties.

The whole of the Arbitration and Conciliation Act, 1996 applies when the matter is referred to arbitration or conciliation by the trial court. The constitution of the arbitral tribunal and its procedure will be in accordance with the Act. To make the arbitral proceedings effective and speedy provisions have been made in the Act in section 19 which says that arbitral tribunal shall not be bound by the Civil Procedure Code 1908 or the Evidence Act 1872.

Part I and II of the Arbitration and Conciliation Act, 1996 deal with law and procedure governing settlement of dispute through arbitration. Part III relates to conciliation which is alternative mechanism for

38 Justice S. B. Sinha, ADR and Access to Justice: Issues and Perspectives, available at: http://www.hcmadras.tn.nic.in/jacademy/articles/ADR-%20Justice%20SB%20Sinha.pdf (Retrieved on March, 2017)

39 2000 (4) SCC 539

settlement of disputes–alternative to arbitration and court litigation [Alternative Disputes Redressal (ADR)]. The law relating to conciliation process has been codified for the first time in part III, following the UNCITRAL Conciliation Rules.

Our arbitration law has been made on the UNCITRAL model with the purpose of bringing domestic arbitration laws in conformity with the international law. The 1996 Act serves two purposes first it serves the commercial or economic purpose by attracting mercantile community with such law which is acceptable to them and protects the interest of domestic commercial community too in view of globalized and liberalized economic order. The second and most important function which this law fulfills is reduction of workload of regular courts which already choked with over pendency of cases. The law of arbitration and conciliation as incorporated in the statute of 1996 is an important tool for the courts as well as litigants in the process of speedy administration of justice. Hence it won't be incorrect to say that Arbitration and Conciliation Act 1996 is an important tool in the hands of the courts in view of section 89 of the CPC to reduce their workload and help in speedy disposal of matters within the framework of this Act.

Probably the biggest advantage of ADR and resolving disputes through Arbitration is the relative simplicity, economy, speed and privacy. However, over the time it has been observed that institutional arbitration through Associations or Societies like The Indian Council of Arbitration (ICA), Federation of India Chambers of Commerce and Industry (FICCI), FICCI Arbitration and Conciliation Tribunal (FACT), the Associated Chambers of Commerce and Industry of India (ASSOCHAM) etc., is the best since they conduct Arbitration as per rules laid down which have stood the test of time and where the reputation of the Arbitrator is impeccable while at the same time the parties to arbitration know very clearly what the cost of the said arbitration be. This unfortunately cannot be said for standalone Arbitrations conducted by retired Govt. servants, professionals and retired judges etc. which usually is financially unviable and exorbitant.

It is unfortunate that most litigants and parties do not opt for institutional arbitration which has time and again proven its mettle in providing fast, economical and completely impartial resolutions of disputes within the ambit of strongly laid down process and guidelines. Misuse of the process of Arbitration by companies and parties is also not unheard of. A party may incorporate an Arbitration clause choosing venue of arbitration guaranteed to cause difficulties to the other party or name an arbitrator or quantify his per hearing fees guaranteed to cause financial hardship to the other party. The conclusion is obvious. If arbitration is to survive, the Courts and Arbitration Advocates, ADR lawyers must insist on institutional arbitration to ensure Alternate Dispute Resolution becomes a better alternative to Court litigation.

VIII. Legal Services Authorities Act, 1987

The purpose of the Act is mentioned in its preamble which reads as follows: "An Act to constitute legal services authorities to provide free and competent Legal Service to the weaker sections of the society to ensure that opportunities for Securing justice are not denied to any citizen by reason of economic or other Disabilities, and to organise Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity."[40]

The Legal Services Authority Act, 1987 ('LSA') was enforced with effect from 9th November, 1995 after certain amendments were introduced by the Amendment Act of 1994 to the main act. The Act provides for scope of legal aid support for the economically weak, backward section and disabled persons. Legal Aid scheme was introduced by Justice P. N. Bhagawati under the Legal Aid Committee formed in 1971. Justice R.N. Mishra, Chief Justice of India contributed to the enforcement of LSA and the establishment of the National Legal Services Authority on 5th December, 1995 for enforcement of LSA. 'Legal aid' has been defined and includes provision for legal assistance to the poor, illiterate, physically challenged persons who do not have access to courts due to ignorance of law and financial handicap. The Act

40 Sarfaraz Ahmed Khan, *LokAdalat: An Effective Alternative Dispute Resolution Mechanism* 34 (APH Publishing, New Delhi, 2006)

provides that anyone who is eligible to avail of legal aid as per Section 12 of LSA can seek assistance under the enactment. LSA owes its origin to the Constitution. 9th November, 2009, the day the Act came to be enforced has been declared National Legal Service Day (NLSD). The Act is meant to imbibe re-dedication to ensure equal opportunity and justice to all by provision of legal aid through the State, District and Taluk Legal Service Authorities/ Committees formed throughout the country. NLSD symbolises equal opportunity and justice to all by imparting legal aid and assistance through different forms of legal service authorities across the country.

Vision of LSA reads that 'no one shall be denied of access to Justice for the reasons of economic or other disabilities.' LSA aims at providing legal awareness, free legal aid and establishment of Lok Adalats. Introduction of Lok Adalats added a new chapter to the justice dispensation system in the country. It succeeded in providing a supplementary forum for conciliatory settlement of disputes to litigants. The country is burdened with pending cases which continue to pile up in the Courts. The Government has already tried various means to reduce the number of piled up cases.[41]

(A).Persons eligible for Legal Aid under LSA

Section 12 of LSA prescribes criteria under which legal aid will be granted to persons. The persons stated in Section 12 are entitled to legal aid. S 12 of the Act states that every person who has to file or defend a case shall be entitled to legal services under this Act if that person is:

a) a member of a Scheduled Caste or Scheduled Tribe; b) a victim of trafficking in human beings or beggar as referred to in Art.23 of the Constitution; c) a woman or a child; d) a mentally ill or is otherwise disabled person; e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, drought, earthquake or industrial disaster; or f) an industrial workman; or g) in custody, including custody in protective home within the meaning of clause (g) of Section 2 of the Immortal

41 V R Krishna Iyer, *Legal Services Authorities Act: A Critique* 96 (Society for Community Organisation Trust, Madurai, 1988)

Traffic (Prevention) Act,1956 or in a juvenile home within the meaning of clause; h) of Section 2 of the Juvenile Justice Act,1986 or in a psychiatric nursing home within the scope clause (g) of section of the Mental Health Act,1987; or (i) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State if the case is before a court other than the Supreme Court and less than Rupees twelve thousand or such other higher amount as may be prescribed by the Central Government if the case is before the Supreme Court.

(B). Structural Organisation

LSA prescribed the formation of a National Legal Services Authority (NALSA) the apex body regulating legal aid provision of the Act. Powers of NALSA are delegated to the State Legal Services Authority (SALSA) for implementation at the state level which delegates further to several groups. The movement is a combination of the State, Social Action Groups including individuals and NGOs having presence starting from the grass root, state level to the Supreme Court.[42]

NALSA provides for free legal aid to the persons covered by Section 12 of LSA and includes persons in custody and in psychiatric hospitals, victims of trafficking in human beings, victims of disasters, ethnic violence, caste atrocities, flood, drought, earthquake or industrial disaster. Nature of services provided include advocates' fees, payment of court fee for filing case before a court, expenses for typing and preparation of petition and documents, expenses for summoning witnesses and meeting expenses incidental to litigation. NALSA also provides for preventive and strategic legal aid by undertaking legal awareness programmes and transforming villages into litigation free. To take the concept of legal aid to the door-step of those who are intended to be covered by LSA, legal aid clinics are formed.

42 Available at: http://taxguru.in/corporate-law/legal-service-authority-act-1987-%E2%80%93-a-preview-of-application-on-society.html (Retrieved on March, 2017)

(C).LokAdalats

LSA also provides for **establishment of permanent and continuous LokAdalats** in all districts for disposal of pending matters, disputes at the pre-litigative stage and also establish permanent and continuous LokAdalats for Government Departments, Statutory Authorities and Public Sector for speedy disposal of the pending cases, disputes at the pre-litigative stage. Matters taken up by the LokAdalats include matrimonial cases, motor accident cases, civil cases, criminal (compounding offences) cases, redressing senior citizens' grievances, labour disputes, Bank recovery cases, disputes with mobile cellular companies, land acquisition cases, pension cases, workmen's compensation matters, consumer grievance cases, electricity matters, telephone bill disputes, Municipal matters including House Tax cases, NREGA matters, grievances of labourers in the unorganized sector and cases pending before the Supreme Court of India and High Courts.[43]

The movement of Lok Adalats has gained momentum throughout the country and has produced effective results. It started initially as a voluntary organisation for informal resolution of disputes and is mostly manned by retired members of the judicial fraternity associated with others.[44]

In the 126th Report on Government and Public sector Undertaking Litigation-Policies and Strategies the Law Commission has offered its comment on the working of Lok Adalats in Para 5.21 in Chapter V. It has found that simple disputes where an approach of give and take, which is likely to result in settlement, may be resolved in the said forum and that its utility in resolving disputes between government and citizen, Public Undertakings inter se and between local authorities and other instrumentalities of the state are limited. Despite the limitations, Lok Adalats on the whole have been successful in settling many disputes in the field of Motor Accidents Claims and disputes relating to family and

43 Law Commission of India, 222nd Report, Need for Justice-dispensation through ADR etc.(April 2009)

44 Shivaraj S. Huchhanavar, In Search of True Alternative to Existing Justice Dispensing System in India 7(1) *NALSAR Law Review* (2013)

matrimonial matters.[45] Once the Lok Adalats are institutionalized through the machinery of law, they may produce better and more effective results.[46]

IX. Conclusion

When we talk of 'delay' in the context of justice, it denotes the time consumed in the disposal of case, in excess of the time within which a case can be reasonably expected to be decided by the Court. An expected life span of a case is an inherent part of the system. No one expects a case to be decided overnight. However, difficulty arises when the actual time taken for disposal of the case far exceeds its expected life span and that is when we say there is delay in dispensation of justice. In the matter of speedy delivery of justice, every organ of the state has shown its concern including the judiciary but when it comes to exactly giving effect to measures for speedy delivery of justice we find successive failures on part of the state and the consequence is that arrear of cases.

Beside the important constitutional and statutory provisions mentioned above in this paper there are other specific statutes on relevant matters which are now enacted by legislature keeping in mind the necessity of speedy administration of justice. The litigation explosion has compelled both judiciary and legislature to ponder over the issue and solve the problem to restore the faith of people in legal system of the country. The Arbitration Act was passed keeping in view right to speedy justice and to reduce the mental agony of the litigants but after two decades of its enactment it has not given results as desired by the legislature and judiciary and the result is that courts are still overburdened.[47]

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45 Law Commission of India, 126th Report, *Government and Public Sector Undertaking Litigation-Policy and Strategies (1988)*

46 Aparajita Roy & Pooja Khetrapal, Alternative Dispute Resolution System - Crying need of this hour for resolving commercial disputes, *available at*: http://www.altius.ac.in/pdf/62.pdf (Retrieved on March, 2017)

47 Sangita Bhalla, India: The Right to Speedy Justice & New Avtar of Fast Track Courts, *available at*: http:/ / www.mondaq.com/ india/x/ 16415/Constitutional+Administrative+Law/The+Right+To+Speedy+Justice+New+Avtar+Of+Fast+Track+Courts (Retrieved on March, 2017)

The statutory provisions in my opinion are sufficient enough though there is needed some amendments in existing laws to make them more efficient for speedy disposal of cases. People need to be educated about usefulness and efficiency of ADR laws so that they can beneficially use them and reduce the burden of courts and their mental agony and pain. Right to speedy trial in criminal cases is a fundamental right within the ambit of Article 21 of the Constitution and it is duty of the state including judiciary to guarantee this right to all citizens. The provisions of the Indian Constitution guarantee speedy justice both in civil and criminal cases and speedy trial has been elevated to the level of fundamental right justiciable in courts of law. Finally we can conclude that existing Constitutional provisions and statutory laws are having minimal loop holes however there is need to educate the masses of their right to speedy justice and the modes to achieve it. It is high time now that all three organs of the state acknowledge their responsibilities to implement these provisions and remove the loopholes if any existing for speedy administration of justice.

Finally, to conclude with the words of Lord Hewet as it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Ultimately, an efficient legal and judicial system which delivers quick and quality justice reinforces the confidence of people in the rule of law, facilitates investment and production of wealth, enables better distributive justice, promotes basic human rights and enhances accountability and democratic governance. Speedy administration and dispensation of justice is the only mode to fulfil the Constitutional obligations and the state is bound by the Constitution to provide timely and effective justice to the people.

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BEGGARS AND COURTS: A CRITICAL STUDY OF JUDICIAL CONTROL ON BEGGARS

Abstract

A growing trend which is increasingly becoming visible is that the courts are using law as a tool of social revolution. Contemporary practice reveals that the Judiciary in India has started interpreting law in its contextual and social setting. The Judges are now no longer being guided by any formulation consigns of construction. Technicalities and frivolous procedural constraints are not preventing the Courts from doing justice in class and affirmative action's. Thus, while dealing with cases, if the judiciary finds that a law requires a change or a particular legislation is essential for fulfilling the objectives of the constitution, or so that it would serve better the rule of law if the executive adopts a particular line of action, there can be no objection: instead the courts are taking it as its duty to point out the lacuna in the law or in its execution and implementation. The Beggars constitute the most deprived persons, as they are living a life of pity and disrespect, so here the law and judiciary has to protect them from living a degraded life and judiciary has to check whether the government agencies are properly functioning or not and also how far the law relating to beggary conforms to the constitutional imperatives. This paper examines the role of judiciary in protecting the right of beggars to live with dignity and also examines the role of judiciary so far as interpretations of beggary laws are concerned.

Keywords: *Beggars, Right to Livelihood, Dignity, Role of Judiciary and Beggary Laws.*

Introduction:

Within the framework of Parliamentary democracy and federalism, judiciary plays an important role in the governance of a Country.[1] It protects individuals against the arbitrary actions of the executive. It does not permit any discrimination and it also ensures equality before law. In fact, the Constitution of India accords a primary place to the judiciary by conferring the power of judicial review of legislative and administrative actions and entrusting it with the task of enforcement of the Fundamental Rights guaranteed under the Constitution. The judiciary is one of the pillars on which the edifice of the Constitution is built and it is the custodian of the Constitution and the Laws.[2] Thus, an independent judicial system is perhaps better than any other institution to maintain

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1 Dnyanesh Kumar, "Short essay on Indian Judiciary system", available at: http://www.Short-essay-on-Indian-Judiciary-system.htm, (Visited on 31 December, 2014).

2 Sabaha, "Judicial process in India", available at: http://www.Judicial-Process-in-India.htm, (Visited on 1 January, 2015).

the perfect equilibrium between the liberty of the individual and the power of the State.

There is a growing trend which is increasingly becoming visible that the Courts are using law as a tool of social revolution.[3] Contemporary practice reveals that the courts in India have started interpreting law in its contextual and social setting. They are now no longer being guided by any formulation consigns of construction. And what is evident from judicial approach is that the Apex Court is using law as a tool of social transformation for creating a new social order imbued with social justice.[4] In fact, technicalities and frivolous procedural constraints are not preventing the Supreme Court and High Courts from doing justice in class and affirmative actions.[5] Thus, while dealing with different situations, if the judiciary finds that a law requires a change or a particular legislation is essential for fulfilling the objectives of the Constitution, or so that it would serve better the rule of Law if the executive adopts a particular line of action, the Courts are taking it as its duty to point out the lacuna in the law or in its execution and implementation. However, while going through the relevant material the author found that so far as the beggars are concerned they continue to remain deprived class of persons, as they are living a life of a pity and disrespect, devoid of any dignity.

Judicial Response towards Beggars:

Beggary is a socio-legal problem all over India. Beggary appears to be an ancient and universal phenomenon. Every country and every time has its own section of beggar population. In India the problem of beggary has assumed a stupendous proportion. Beggary has changed its form in the modern period and the problem has become a colossal one. Sociologically, speaking, beggary appears wherever there is, amongst a people, physical, social and economic deprivation, especially when such deprivation is not countered by any organised effort. Of all social evils today begging is perhaps the most demoralizing. So, it is high time we draw a blue print to eradicate this social menace.

Legal institutions have the potential of being instruments of either empowerment or impoverishment. The legislative zeal in the early years of the republic and the judicial activism of the post emergency period have stamped their indelible imprint on the nation's strive towards the alleviation of the oppressed. At the same time, the political-legal institutions have also demonstrated their vulnerability to majoritarian

3 P.L. Mehta and Neena Verma, *Human Rights under the Indian Constitution* 107 (Deep & Deep publication, First Edition, New Delhi, 1999).

4 Ibid.

5 Jawahar L. Kaul (ed.), *Human Rights: Issues and Perspectives* 26 (Regency Publications, New Delhi, 1995).

and socially entrenched pressures.[6] But, when it comes to the ground reality, the story is different. The recent trend adopted by the courts is to convert everything into public space in the name of beautification, greening and cleaning of the city for example footpaths have been squeezed to broaden roads, open spaces have been taken over by metro, informal housing has been removed, demolished or relocated far away from the areas where people are not able to find work, houses are eating up pavements, which creates a lots of problem for poor people and some of them turned up into a beggar due to such trend. Few years back in 2010, the ongoing effort by authorities to make the National Capital beggar free before the Commonwealth Games is one such example.[7] Similarly, the Delhi High Court asked the state government to implement stringent measures and co-ordinate with the neighbouring States to curb the menace of begging in the Capital.[8]

It is pertinent, however, to note that the *corpus juris* especially relating to the menace of beggary is far too less. Cases which would have a huge impact on this issue are still pending adjudication and only interim orders/directions have been passed. Therefore, in this paper not only final pronouncements of the courts have been cited but also interim orders and observations relating to court appointed committees have also been incorporated.

The basic intent and purpose of both the Acts namely, Bombay Prevention of Beggary Act, 1959 (BPBA) and the Jammu and Kashmir Prevention of Beggary Act, 1960 is to consolidate and amend the law relating to beggars for the purpose of making uniform and better provision for the prevention of begging and also make them better citizens. But how far have the Courts given effect to the intent and purpose of the Act is a moot question. In 1990, in *Manjula Sen v. State of Maharashtra*,[9] the constitutional validity of the Bombay Prevention of Beggary Act, 1959 was challenged by Manjula Sen, a journalist, through Public Interest Litigation (PIL) in the Bombay High Court.[10]

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6 Geetanjali Swamy, Pritam Baruah and Saurabh Bhattacharjee, "The Embarrassment of Poverty - A Critique of State Response and Responsibility" 1 NSLR 1 (2005).

7 Delhi's Anti-Beggar Drive Faces Practical Problem, available at: http://www.Delhi'sAnti-BeggarDriveFacesPracticalProblem.html, (visited on May 29, 2010).

8 Get Beggars off the streets, court tells Delhi Government, 2009, available at: http://www.GetBeggarsoffthestreets,courttellsDelhiGovernment.html, (visited on May 10, 2013).

9 Writ Petition No 1639 of 1990, in the High Court of Bombay.

10 In her writ petition Manjula Sen informed the court about the tyranny under the law that had become standard practice. She also cited an example of Rajguru, a sixteen year old handicapped boy, who was a shoe polisher, was caught outside Church gate station while he was sleeping during the day. He protested that he was not a beggar but a shoe polisher

Accordingly, on the basis of the Manjula Sen's petition, a committee was appointed by the Bombay High Court on the working of the BPBA, 1959 on the street. The committee in its report concluded that: (1) the arrest is made of the people who are found on the street in dirty clothes and wandering. They are not actually found begging; (2) large number of wrong arrests are made which is inhumane and unjust; (3) there is no criteria to decide as to who is a beggar, who is sick, physically handicapped or in need of economic help.[11] The report of the committee reveals that BPBA, 1959 is not properly implemented and it is used against poor and destitute. Accordingly, the Court passed several orders for the proper implementation of the said Act.

In Sushila Kanwar Poonam Kunwar and others v. State of Gujarat and Others,[12] the issue before the court was whether the eunuchs can seek a declaration entitling them to practise the occupation of receiving

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but nobody believed in him. According to his age he was a child [under the Juvenile Justice Act 1986], but his age was deliberately entered as 19. Rajguru has only one hand and because of it, he was presumed to be a beggar and arrested.

11 Usha Ramanathan, "Ostensible Poverty, Beggary and the Law" 43 EPW 34 (2008).

12 AIR 2000 Gujarat 194, See also *Karnika Sawhney v. Union of India & Ors.,* Writ Petition (Civil) No. 117 0f 2000. In this case, the petition was filed by a law student in the year 2000, bringing to the notice of the Delhi Court that despite the Bombay Prevention of Begging Act, 1959, having been extended and made enforceable in Delhi about forty years ago, its implementation has been very dismal and nothing seems to have been done by the respondents to implement the said Act and the Rules framed there under, namely, Delhi Prevention of Begging Rules, 1960 and, on the other hand, the problem has been increasing. Various directions have been sought in the writ petition, including appointment of Visiting Committees, making arrangements for provision of proper and clean shelter, adequate and proper food, clothing and other necessary basic amenities including proper medical aid facilities in all the beggar institutions established under the Act, for providing vocational training and increasing mobile raiding squads and linking beggary prevention programmes with other poverty alleviation programmes and income generating programmes of the government. While hearing the petition, Justice Y.K. Sabharwal and Justice Tarun Chatterjee held that the capital of the country has to be a role model for others to follow. If the fact situation in Delhi is what has been stated in the writ petition, which is substantially correct, one can well imagine the state of affairs in other parts of the country. Accordingly, the court directed the Social Welfare Department to file a detailed affidavit as to what concrete steps have been taken to implement the provisions of the Act and the Rules. The court also directed the Police Department to file a detailed affidavit as to what concrete steps have been taken to check the menace of begging, in particular, at intersections and religious places.

alms/gifts from the public and to move freely anywhere for the practise of such occupation. They claimed such rights on the basis of Part III of the Constitution of India. The High Court of Gujarat held that the Practice of receiving alms/gifts by eunuchs from public cannot be recognised by the Court. Deriving its force for the decision from the provisions of Section 363-A of Indian Penal Code which makes kidnapping and maiming a minor for the purposes of begging a serious offence, the Court observed:

> *The Eunuchs are indeed entitled to their Fundamental Rights which are guaranteed to the citizens and persons under Part III of the Constitution. However, they cannot claim a Fundamental Right to beg, in face of the provisions of the Bombay Prevention of Begging Act, 1959. Begging cannot be lifted to the level of profession. There can be no doubt that a person who is forced by circumstances to beg has to be sympathised for his plight. However, to recognise begging by eunuchs as a Fundamental Right would amount to recognising an illegality and might carry with it other serious evils t0hat may harm the society.*

In *M.S. Pattar v. Government of N.C.T. of Delhi and Others*[13] the Court on the basis of a Public Interest Litigation (PIL),[14] appointed a Committee to look into the matter. The Committee was required to find out the reasons for the death of eight beggars in the Lampur Beggars Home. The Committee submitted its report to the Court, where it was provided that the beggar homes were being run in an extremely callous and irresponsible manner without proper and adequate living arrangements for inmates. The report showed that there was contamination in the water supply and it did not measure up to the hygienic standards. The report noted that there was cholera outbreak in the beggar's home and since contamination of water is reason of the same, there could be no doubt about the cause of deaths. It is further stated that since no post mortem had been carried out in all the eight

13 AIR 2002 Delhi 133.

14 It mainly deals with the issue of death of certain beggars who were detained in Lampur (Nerala) Delhi Beggars Home under the Bombay Prevention of Begging Act, 1959. Thus, the petitioner prayed for the following directions in the writ petition: i) issue a writ/order/direction in the nature of mandamus under Article 226 of the Constitution of India, be directed to be issued against the respondents to fix the responsibility who are responsible for the loss of lives of inmates; ii) that to issue appropriate direction against the respondents that dependents of the inmates who died in the Beggars Home are entitled to compensation from the Respondents at least Rs. 5 lacs per head; iii) that the Respondents or their subordinates who may be found responsible, be punished according to law severally and jointly; and iv) to pass such further order or direction of this Hon'ble Court as may deem fit and proper.

cases, the fact that the patients died of cholera cannot be established, notwithstanding the report of the part time doctor, declaring the deaths to be natural. The report found that the Superintendents of in-charge of the home had failed to take certain precautions and if they had been vigilant enough, immediate medical attention to the inmates could have been provided. The report of committee further informed the court that various directions have been issued by the Court from time to time for improvement of the conditions of the beggar homes and there were three other writ petitions filed on allied subject concerning beggars. Accordingly, the Committee suggested various suggestions to improve the conditions. Further, in view of this, the Court issued a direction to the respondents to complete the action in terms of making the homes more habitable in consonance with the reports of the fact finding Committee within a maximum period of six months from the date of judgement.

In *Abhipraay Welfare Society v. Govt. of State of A.P, and Others,*[15] while dealing with the petition[16] Satyabrata Sinha, C.J. of Andhra Pradesh High Court, held that Section 12 of the Andhra Pradesh Prevention of Begging Act, 1977, *casts mandatory duty on Government to eradicate menace of begging as well as rehabilitation of beggars*. Directions were thus given for implementing provisions of Act as well as establishing requisite number of beggar homes. The Court further held:

While implementing the Act, which is a beneficial piece of legislation, a duty is cast upon the Government not only to see that the menace of beggary is eradicated, but also to see that those indulging in beggary and people living in abject poverty are rehabilitated by taking such measures as are necessary for their welfare and social security. Thus directions were given to the respondents to conduct another socio-economic survey of beggars within one year from the date of receipt of the copy of the order. In so far as the measures to be taken for the purpose of implementing the Act, the respondents shall construct as many beggar homes as possible, but not less than 25 at different places, depending upon the population of beggars at a given place.[17]

In July 2006, in *New Delhi Bar Association v. Commissioner of Police, New Delhi*,[18] a criminal complaint was lodged by one of the members of the New Delhi Bar Association, in the Court of the Additional Metropolitan Magistrate in New Delhi. The immediate

15 AIR 2001 AP 273.

16 This writ petition was filed by Abhipraay Welfare Society [for brevity the Society] for issuance of a writ or order, one in the nature of writ of mandamus, declaring the action of the respondents in not taking any steps for eradication of the menace of begging, though the State Legislature has enacted Andhra Pradesh Prevention of Begging Act, 1977.

17 At page 275, Para 11.

18 Sometimes written as *Court on its own Motion v. Commissioner of Police, New Delhi* - Writ Petition (Criminal) No 1840/2006.

provocation was the harassment by the lepers at Ashram Crossing near Maharani Bagh, New Delhi. In this case facts were that the leper in a blue lungi who used to harass and threaten the member at the Ashram Crossing again threatened (her) with dire consequences in case (she) reported the matter to the police in order to stop him from begging at the Ashram Crossing. The leper in blue lungi told our member to give him money, otherwise (she) would be kidnapped and taken to the *basti* of lepers where (she) would be touched by the lepers so that (she) would get affected by the disease of leprosy. However, due to the non-cooperation of victim to give evidence the complaint could not be taken to its logical conclusion.

In 2009 in case of *Ram Lakhan v. State*[19], the Delhi High Court moved away from the judicial practice of castigating begging, and upheld its legitimacy through a comparative discourse on the common law doctrines of necessity and duress, as well as on the principles of equality and liberty embodied in the Constitution of India. However, the main issue which arose for consideration, therefore, was whether the Court of Metropolitan Magistrate and Addl. Sessions Judge were legally

19 137 (2007) DLT 173. The facts of the case are that the learned Metropolitan Magistrate found the petitioner to be a beggar and ordered his detention in a Certified Institution for a period of one year under Section 5(5) of the Bombay Prevention of Begging Act, 1959. The finding that the petitioner was a beggar was upheld by the Additional Sessions Judge. However, the duration of the detention was reduced to 6 months by the Additional Sessions Judge. Being aggrieved the petitioner has preferred the revision petition. The Counsel for the petitioner has taken the point that the petitioner had been found guilty only on the basis of the testimony of two police officers and no independent witness whatsoever was examined. The allegations against the petitioner as per the prosecution case were that on 29.07.2005 at about 12.05 p.m. at the Railway Crossing at Rampura, Delhi, the petitioner was found begging from the passers-by by a raiding party headed by PW-1 (Ramesh Kumar). The prosecution examined two witnesses, PW-1 (Ramesh Kumar) and PW-2 (ASI Rozy Khanna) who was also a member of the raiding party. It was stated by them that they were on an anti-begging raid and when they reached the said Railway Crossing, the petitioner was found begging from members of the public. A sum of Rs. 47 was also recovered on the basis of a personal search conducted on the petitioner. Thus, the Counsel for the petitioner submitted that at 12.05 p.m. at the said crossing, there were a number of other people who were not members of the raiding party, but none of them were produced as witnesses. The courts above examined this contention of the petitioner and came to the conclusion that the mere fact that the public witnesses have not been examined would not throw out the prosecution case if the testimonies of the police officers were unshakable.

correct in recording the finding that the petitioner was a beggar and in ordering his detention in a certified institution.[20]

Badar Durrez Ahmed, J., who delivered the judgement in this case, formulated broad guidelines as to the manner in which the Courts exercising jurisdiction under the Bombay Prevention of Beggary Act, 1959 should precede in dealing with persons alleged to have been found begging. B. D. Ahmed, influenced by the decision of Canadian Supreme Court, acknowledged the lack of choice in begging and remarked that subjecting beggars to "further ignominy and deprivation" by ordering their detention is to de-humanize them. In this regard, Badar Durrez Ahmed, J., cited a Canadian case, comparing the defenses of self-defense, necessity and duress, *Lamer, CJ of the Supreme Court of Canada in Hibbert v. The Queen*[21] observed:

> *"The defenses of self-defense, necessity and duress all arise under circumstances where a person is subjected to an external danger, and commits an act that would otherwise be criminal as a way of avoiding the harm the danger presents. In the case of self-defense and duress, it is the intentional threats of another person that are the source of the danger, while in the case of necessity the danger is due to causes, such as forces of nature, human conduct and other than intentional threats of bodily harm, etc. Although this distinction may have important practical consequences, it is hard to see how it could act as the source of significant juristic differences between the three defenses".*[22]

A similar view was expressed by *Lord Hailsham LC in R. v. Howe*[23]

> "*There is, of course, an obvious distinction between duress and necessity as potential defenses; duress arises from the wrongful threats or violence of another human being and necessity arises from any other objective dangers threatening the accused. This, however, is, in my view, a distinction without a relevant difference, since on this view duress is only that species of the genus of necessity which is caused by wrongful threats. I cannot see that there is any way in which a person of ordinary fortitude can be excused from the one type of pressure on his will rather than the other".*[24]

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20 This revision petition was directed against the order passed by the learned Additional Sessions Judge whereby the petitioner's appeal against the judgment and order on sentence passed by the learned Metropolitan Magistrate was rejected.

21 [1955] 2 SCR 973 (at page 1012).

22 Para 7.

23 [1987] AC 417 (at page 429).

24 Para 7.

So, while in the case of exploitation and compulsion by the ring leaders of a begging racket, the beggar who begs under compulsion of fear for bodily harm from them would have the defense of duress, where the beggar takes to begging compelled by poverty and hunger, he would be entitled to invoke the defense of necessity. The common feature of both defenses being the element of involuntariness or lack of legitimate choices. It is the absence of legal alternatives that provides the defense of duress or necessity. This is aptly described by Dickson J giving the majority opinion of the Supreme Court of Canada in *Perka v. The Queen*[25] in the following manner:

> *"Given that the accused had to act, could he nevertheless realistically have acted to avoid the peril or present the harm, without breaking the law? Was there a legal way out? I think this is what Bracton means when he lists necessity as a defense, providing the wrongful act was not 'avoidable'. The question to be asked is whether the agent had any real choice: could he have done otherwise? If there is a reasonable legal alternative to disobeying the law, then the decision to disobey becomes a voluntary one, impelled by some consideration beyond the dictates of 'necessity' and human instincts".*

While distinguishing between four different kinds of beggars,[26] B. D Ahmed also apprehends the socio-economic causes of begging and in doing so, incorporates the Western doctrines of duress and necessity as a defense in cases of compulsory and involuntary begging. These doctrines are founded on the presumption that there is no "reasonable legal alternative" and the illegal act of the offender in question is involuntary and unavoidable". The duty is "cast upon the court to satisfy itself that the accused did not have a defense of necessity". Although, apparently, the said Act does not distinguish between the four different kinds of beggars mentioned above, according to the Justice *Badar Durrez Ahmed,* there is enough scope in the provisions of the said Act to treat them differently as, indeed, they should be. Professional beggars who find it easier to beg than to work may be appropriately dealt with by passing orders under Section 5(5) 4 of the said Act for their detention in Certified Institutions. But, what about the beggars who fall in the second category? His is not really a problem of begging but a problem of addiction. The solution lies in attempting to de-addict him and help in ridding himself of the malady. Then there is the third category of

25 [1984] 2 SCR 232.

26 There are various reasons for a human being to solicit alms. Firstly, it may be that he is down-right lazy and does not want to work. Secondly, he may be an alcoholic or a drug-addict in the hunt for financing his next drink or dose. Thirdly, he may be at the exploitative mercy of a ring leader of a beggary 'gang'. And, fourthly, there is also the probability that he may be starving, homeless and helpless.

beggars who are exploited and forced into begging by other ring leaders. A different approach is required here. The persons found begging need not and ought not to be detained in a Certified Institution, because, his act of solicitation, was not voluntary but under duress, the result of exploitation at the hands of others. The ring leaders need to be rounded up and penalised under Section 115 of the said Act and these beggars need to be released from their exploitative clutches. Lastly, he came to the fourth category of beggars mentioned above. They are persons who are driven to beg for alms and food as they are starving or their families are in hunger. They beg to survive; to remain alive. For any civilized society to have persons belonging to this category is a disgrace and a failure of the State. To subject them to further ignominy and deprivation by ordering their detention in a Certified Institution is nothing short of de-humanising them. It is here that courts must step in and recognise the defense of necessity. Judicial notice must be taken of the fact that as the accused are poor they will not have access to quality legal assistance, if at all. The duty is therefore cast upon the courts to satisfy themselves that the accused did not have a defense of necessity. Prevention of begging is the object of the said Act. *But, one must realise that embedded in this object are the twin goals - nobody should beg and nobody should have to beg.*[27]

While delivering the judgement, Badar Durrez Ahmed, J., said: whenever a person alleged to have been found begging is produced before a court having jurisdiction under the said Act, such court must precede in the following manner:

(1) First of all, it must satisfy itself that such person was, in fact, found begging. For this purpose, the court must carefully scrutinize the evidence produced before it. It does not matter that the inquiry is a summary one. The court must be satisfied that the person was found begging. The evidence must be clear and unimpeachable. If there is any doubt or the prosecution requires the court to draw upon many inferences then the court must not record that the person before it was found begging.

(2) Secondly, where the court is satisfied that the person before it was found begging and therefore it is compelled to record a finding that he is a beggar, the court 'may' (and not 'shall') order his detention in a certified Institution.

a) However, where the person has a defense of duress or necessity, the person ought not to be detained. As pointed out above, whether the specific defense of duress or necessity is taken by the beggar or not, it is an obligation on the Court to satisfy itself that the person did not have such a defense.

b) And, where it appears to the court that the person was found begging because of his addiction to drinks or drugs, not much purpose would be served by sending him to a certified Institution which does not

27 Para 6.

provide for detoxification or de-addiction. The burgeoning problem of drug addiction and alcohol dependence coupled with the problem of begging is a complex one. Here begging is only a symptom of the malady of addiction. Taking action on begging while ignoring the problem of addiction is much the same as prescribing a pain-killer for the pain and ignoring the treatment of the disease which is the underlying cause for the pain. So, in such cases the court, after due admonition ought to release the beggar on a condition that he shall go in for detoxification or de-addiction at an accredited institution. A bond to this effect may be taken by the Court in the manner provided in the proviso to Section 5(5) of the said Act.

c) In all other cases, after the court records a finding that a person is a beggar, the court can order detention of such a person in a certified Institution. But, here too, the court must first explore the possibility of applying the principle of admonition as given in the proviso to Section 5(5) itself.

(3) Lastly, in no circumstance should a person ordered to be detained in a certified institution, be detained in a prison. That is clearly illegal. The State must follow this legal prescription strictly.[28]

After giving obiter dictum Badar Durrez Ahmed, J. returning to the present case, said:

That I find that apart from the reasons already indicated above, there is another reason why the petitioner must be set at liberty. The only evidence against the petitioner is that of PW-1 and PW-2 are both police officers who conducted the raid. Though, as the courts below have held, there is no reason to discard their testimonies on this ground alone, what have they testified to? None of them have stated that they saw someone giving money to the petitioner. On the contrary, as recorded in the trial court order, in his cross-examination, PW-1 stated that no one gave money to the accused in his presence. Clearly, the finding that the petitioner was begging and that he was a beggar is not supported by the evidence on record. And, this is without suspecting the testimony of the two police officers in the absence of any independent public witness. Such a finding, therefore, needs to be set aside. Consequently, for this reason also, the petitioner is liable to be set free. The impugned judgment is set aside.

Accordingly, the Court directed that the petitioner be released forthwith.

In ***(1)*** *Mousham; (2) Shani V. State*[29]**,** the two revision petitions were filed by the petitioners U/S 397 read with Ss. 401 and 482 of the Code of Criminal Procedure, 1973 against the two separate judgments/orders passed by the learned Additional Sessions Judge whereby their appeals against the order passed by the trial Court holding them guilty of the commission of offence punishable U/S 2(1)(i) of The

28 Para 12.

29 Crl. Rev. P. No. 466/2012.

Bombay Prevention of Begging Act, 1959 were dismissed and their detention in a Certified Institution for a period of one year was also maintained. The only point urged before the Court in both these petitions was that the orders of the Courts mentioned above are liable to be set aside since the petitioners were held guilty only on their pleading guilty on the first date itself when they were produced before the trial Court and were unrepresented by any lawyer. It is the grievance of the petitioners that they should have first of all been legal aid by the trial Court itself before punishing them. This, according to the counsel for the petitioners, was the duty of the trial Court even to apprise them of their right to have legal aid at State expense.

The Judgment was delivered by P. K. Bhasin, J.,[30] wherein the court held that both these petitions deserve to be allowed, as the petitioners have been held guilty of being professional beggars without a fair trial which they were entitled to get even if a summary procedure was to be followed for their trial Summary procedure does not mean no procedure at all or trial ignoring the law laid down by the highest Court of the land which has been ignored by the learned Special Magistrate in the case of these two petitioners. It is clear from both these identical orders of the learned Special Magistrate that both the petitioners have been convicted without even providing them any legal aid which they were entitled to get at State expense. They were not even given any opportunity to avail of the benefit of bail given to them and straightaway their detention in a certified institution for a period of one year was also ordered.

30 The learned counsel for the petitioners had placed strong reliance on a judgment of the Hon'ble Supreme Court in *Mohd. Sukur Ali v. State of Assam, (2011) SCC 729*, in support of the contention that the conviction of the petitioners by the trial Court without providing them the legal aid at State expense is totally unsustainable. Learned Additional Public Prosecutor very fairly submitted that since the conviction of the petitioners was ordered by the trial Court without any representation by a lawyer for the petitioners by recording their pleas immediately of their production in court that they were professional beggars these revision petitions could be allowed and the matters could be remanded back to the trial Court with a direction to decide the fate of the two petitioners afresh after providing them the services of amicus curiae keeping in view the decision of the Supreme Court cited by the counsel for the petitioners and another earlier judgment also in the case of **"***Suk Das v. Union Territory of Arunachal Pradesh***"**. It was also contended that just because the petitioners were produced in a mobile court presided over by a Special Magistrate would not make any difference since the Special Magistrate could also order the detention of the apprehended persons, though in a certified institution only, upto a period of three years on being found guilty of begging which amounts to violation of their right of free movement in the society and the same cannot be denied without a fair trial.

Accordingly, both the revision petitions were allowed and the orders passed by the Special Magistrate and that of the Additional Sessions Judge holding the petitioners guilty of begging were set aside and their fresh trial in accordance with law was ordered. It was further observed that, in case the petitioners choose to have their representation by any private counsel they would be at liberty to do so, otherwise, legal aid at State expense shall be provided to them.

Different petitions have been filed as Public Interest Litigation (PIL) in different High Courts and recently in the Supreme Court which centred around the issues arising out of the implementation of the BAPA and DPBR. While these petitions have been filed in response to particular instances, the broader issues of the need to continue to criminalise the activities of the poor have not been properly addressed. Also other interventions by groups for providing legal assistance to persons brought within the criminal justice system have not been accounted for either in these petitions or by the courts passing orders in these petitions.

Suggestions:

The courts in India have to play a vital role in eradicating the menace of beggary as well as to provide some sort of relief to destitute beggars. It is submitted that, the Courts while dealing with repeated offenders can deal with them strictly. From the types of cases, that come before the Court, then Court can draw an intelligent conclusion as to whether there is a conscious effort being made by the prosecuting agencies to shield those who run begging as a structured business activity, The courts can and should insist on the apprehension of those involved in begging as a source of livelihood and are so enamoured by the easy method of minting money. The courts can and should effectively rein the police officials and social welfare officers who have been given the responsibility to check begging activities and apprehend beggars, so that they do not let off the professional beggars for ulterior and corrupt motives. The Courts are further required to take an active interest in preventing the exploitation of young children for begging. Hence, whenever the Court smells such a possibility or suspects the hand of organized criminals in the begging activity complained of, it must set the police machinery to motion under the, Indian penal code. The Courts are further required to take a greater interest in the conditions prevailing in the Certified Institution. The courts can play a creative role in all this and law as well as judiciary has to protect them from living a degraded life and judiciary has to check whether the government agencies are properly working or not and also to see how far the law relating to beggary conform to the constitutional imperatives. Thus, the Court would render justice in the true sense, protecting the weak from inhuman exploiters and at the same time delivering society form the bane of begging.

Conclusion:

Within the framework of Parliamentary democracy and federalism, judiciary plays an important role in the governance of a Country. It protects individuals against the arbitrary actions of the executive. It does not permit any discrimination and it also ensures equality before law. In fact, the Constitution of India accords a primary place to the judiciary by conferring the power of judicial review of legislative and administrative actions and entrusting it with the task of enforcement of the Fundamental Rights guaranteed under the Constitution. The judiciary is one of the pillars on which the edifice of the Constitution is built and it is the custodian of the Constitution and the Laws. Thus, an independent judicial system is perhaps better than any other institution to maintain the perfect equilibrium between the liberty of the individual and the power of the State. Various laws have been enacted to eradicate poverty: some of them directly deal with them and some of them indirectly. Nevertheless, their tardy implementation makes us lag behind in effectively dealing with the problem. Further they are of the view that the Union and the State Governments should accord top priority to implementation of the judgments rendered by our Supreme Court in their letter and spirit in order that the lot of the have-nots is ameliorated. But the question is how much this law is being respected on our roads and other places are every bodies guess. Do the Law enforcement agencies really mean business by enforcing the laws or only those laws are to be enforced which bring the enforcement agencies dividends and rest are for the sake of dead letters in the Statute Books only.

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Women Workforce in India: Problems and Challenges in Perspective

Abstract

The status of women in India has been subject to many great changes over the past few millennia. From equal status with men in ancient times through the low points of the medieval period, to the promotion of equal rights by many reformers, the history of women in India has been eventful. In modern India, women have held high offices in India including that of the President, Prime Minister, Speaker of the Lok-Sabha and Leader of the Opposition. As of 2011, the Speaker of the Lok-Sabha and the Leader of the Opposition in the Lok-Sabha were women. However, women in India continue to face atrocities such as sexual harassment, rape, disparity in wages, insecure jobs and other physical problems at the workplace. The status of women in India has been many ups and downs. The 20th century has been many changes in the global arena, economic, scientific and social. We have made noteworthy strides in all aspects of living of which the most exemplary one would be in the social sphere. Women have been given equal opportunities to compete with men and one another. In the last century and the early 20th century women were mostly relegated to the home and their place was the kitchen. The 20th century has witnessed a great deal of independence and autonomy for many countries. Women have been equal fighters for freedom in employment opportunities. They have demanded for and received equality in education and there lies the secret of their success. Education and the awareness that comes with it have enabled this gender to fight their cause.Thus, in this paper, an attempt has been made to discuss the Women's problems and issues confronting their workplace in both organised and unorganised sectors of employment in India.

Keywords: *Gross Domestic Product (GDP), Skilled, Unorganised, Seasonal Employment, Wage Discrimination.*

I. Introduction

Throughout their working lives, women continue to face significant obstacles in gaining access to decent work. Only marginal improvements have been achieved since the Fourth World Conference on Women in Beijing in 1995, leaving large gaps to be covered in the implementation of the 2030 Agenda for Sustainable Development, adopted by the United Nations in 2015. Inequality between women and men persists in global labour markets, in respect of opportunities, treatment and outcomes. Over the last two decades, women's significant progress in educational achievements has not translated into a comparable improvement in their position at work. In many regions in the world, in comparison to men, women are more likely to become and remain unemployed, have fewer chances to participate in the labour force and have to accept lower quality jobs. Progress in surmounting these obstacles has beenslow and is limited to a few regions across the world. Even in many of those countries where gaps in labour force participation and employment have narrowed and where women are shifting away from contributing family work and moving to the services sector, the quality of women's jobs remains a matter of concern. The unequal distribution of unpaid care and household work between women and men and between families and the society is an important determinant of gender inequalities at work.Women in the workforce earning wages or a salary are part of a modern phenomenon, one that developed at the same time as the growth of paid employment for men; yet women have been challenged by inequality in the workforce.[1]

In India, Working women face problems at the workplace just byvirtue of their being women. Social attitude to the role of women lags much behind the law. The attitude which considers women fit for certain jobs and not others, causes prejudice in those who recruit employees. Thus women find employment easily as nurses, doctors, teachers, secretaries or on the assembly line. Even when well qualified women are

1 Andal, N. (2002). Women and Indian society: Options and constraints. New Delhi: Rawat Publications.

available, preference is given to a male candidate of equal qualifications. The gender gap in the ownership and control of property is the most significant contributor to the gender gap in the economic wellbeing, social status and empowerment of women.[2]A gender bias creates an obstacle at the recruitment stage itself. When it comes to remuneration, though the law proclaims equality, it is not always practiced. The inbuilt conviction that women are incapable of handling arduous jobs and are less efficient than men influences the payment of unequal salaries and wages for the same job. But in most families her salary is handed over to the father, husband or in-laws. So the basic motive for seeking employment in order to gain economic independence is nullified in many women's case. Problems of gender bias beset women in the industrial sector when technological advancement results in retrenchment of employees.Women's economic well-being is usually enhanced by women acquiring independent sources of income that begets increased self-esteem and improved conditions of their households and the overall level of development in their communities. The above assertion can be summed up in the words offormer Honourable President of India,Dr. A.P.J. Abdul Kalam who said;

"Empowering Women is a prerequisite for creating a good nation, when women are empowered, society with stability is assured. Empowerment of women is essential as their value systems lead to the development of a good family, good society and ultimately good nation".

II. Emerging Issues Relating To The Protection And Empowerment Of Working Women In India.

India has been experiencing a consistently high growth rate during thepost-liberalisation period following the implementation of economic reforms in the early 1990s. It has achieved excellence in several key areas ranging from information technology and pharmaceuticals to automotive parts, and is now considered as one of the fastest growing economies of the world. Despite these positive developments, India is still among the countries with some of the lowest indicators of human

2 Ibid.

development. Its levels of malnutrition, illiteracy and poverty are unacceptably high. The rise in income inequalities and regional disparities is also a matter of concern. Employment has grown, but the jobs created are not of high quality. Although there has been an expansion in several social services like health, nutrition and education, the quality of most of these services remains poor in most of the rural areas. And above all, an overwhelming majority of the population is deprived of basic social protection. Policy-makers are thus faced with a paradox—the persistence of deprivations and increasing insecurities among a large section of the population amidst growing affluence and prosperity for some. The Eleventh Five-Year Plan has also reflected upon these concerns and has highlighted the need for balanced and 'inclusive growth'.[3]

The National Commission for Women estimates that 94 percent of the total female workforce is to be found in the unorganized sector. The presence of a vast multitude of women as workers and producers in the unorganized sector, where earnings are low, employment seasonal and insecure, supportive services woefully inadequate or even non-existent, growth opportunities few and collective organization weak, has brought into sharp focus the failure of the mainstream to alleviate their predicament. While it is true that workers, irrespective of sex, are exploited in the unorganized sector, women suffer more by the fact of their gender. India's patriarchal society thinks of women only as homemakers and sexual objects and is generally subjected to exploitation and torture.[4] The changing patterns of economic development in the liberalization era have put a heavy burden on women, which is reflected in their health status. The small farmers, landlessness, forced migration both temporary and permanent, have undoubtedly affected women's health, nutritional and emotional status. The growth of small and cottage industries has depended heavily on

3 Report of a Consultation on Human Development in India: Emerging Issues and Policy Perspectives February 5-6, 2010, New Delhi

4 Dube, L. (2001). Anthropological explorations in gender: Intersecting fields. New Delhi: Sage Publications Pvt. Limited.

female labour. Women work in industries like tanning, tobacco, cashew, coir, textiles, garment, fish processing and canning, construction and domestic work, etc. In all these industries, they toil long hours at low paid, skilled or unskilled workers. As a result they face serious health problems related to work place, hazards of pollutants on women who work during adolescence, and pregnancy have serious consequences on women. Women work the most; paradoxically they earn the least in life. The additional social responsibility shouldered by them, their subordinate status in society, patriarchal family set up, socio- economic backwardness, proneness for occupation in the unorganized sector with low productivity and marginalization in employment opportunities account for their poor or low earning skills, illiteracy, ignorance and surplus labour and thus face high level of exploitation. This hampers their bargaining power for higher wages andany opportunities for further development.[5]

III. Trends For Employment Of Women In India

The increase in the number of women in the labour market signifies an important trend regardingwomen's employment. This has been occurring alongside increases in labour force and workforce, especially for urban women, although rural women workers predominate in terms of participation rates and overall magnitude. The increasing share of women's participation in the labour force and its significant contribution to household income as well as GDP require some policy attention be paid to the gender dimensions of employment. The eleventh Five Year Plan document for the first time in the history of Indian planning recognizes women not only as equal citizens but as 'agents of sustained socio-economic growth and change' (GOI, 2008, p. 5). A multi-pronged approach is emphasized to address issues concerning women workers, such as provision of basic entitlements and strengthening of institutional mechanisms.

5 Manju, Women in unorganized sector - Problems & issues in India: International Journal of Applied Research 2017; 3(4): 829-832

The circumstances that give rise to increased female participation are complex and contrasting.[6]The increase in the growth of employment appears to be much higher for female workers compared to male workers. Even where the proportion of working women as reflected in the female work participation rate may be low, the absolute numbers have significantly increased, given the rate of population growth over time. Urban areas almost doubled their number of women workers, while in rural areas women workers increased from 9 to 12 million. Are these signs of a gradual but definite wind of change with more women entering the labour market? This positive change is noted more forcefully in the urban context where requisite educational inputs and modern thinking vis-à-vis women's work is increasingly becoming noticeable. Rural agriculture is increasingly drawing women's labour supplies, with over four-fifths of the women in rural areas working in agriculture. This gains significance amidst the declining share of male workers (from 74 per cent in 1993-94 to 66 per cent in 2004-05 to nearly 61 per cent in 2014-15). Thus it seems that women in rural areas are finding it harder to shift away from agriculture. Involvement of women in agriculture is largely as cultivators/farmers as well as agricultural labourers. However, there has been a slight decline in the share of women as agricultural labourer, while theirshare among cultivators has increased. In urban areas, women have achieved substantially highergrowth of employment in manufacturing and have been able to increase their share, especially after 1999-2000 (from 24 per cent to over 28 per cent in 2004-05 to 34 per cent in 2014-15). Thus, in urban areas, the share of female workers in manufacturing has increased substantially while that of male workers has not. Even in the services sector, women have gained in terms of employment, especially in the domestic and personal services category.

6 Sinha, J.N., a Rational view of Census Economic Data", Indian journal of industrial Relations, October 1972; Sinha J.N., '1981 Census Economic Data: A Note, 'Economic and Political Weekly, February 6, 1982, p.195-197.

India's economy has undergone a substantial transformation since the country's independence in 1947. Agriculture now accounts for only one-third of the gross domestic product (GDP), down from 59 per cent in 1950, and a wide range of modern industries and support services now exist. In spite of these changes, agriculture continues to dominate employment, employing two-thirds of all workers. India faced economic problems in the late 1980s and early 1990s that were exacerbated by the Persian Gulf Crisis. Starting in 1992, India began to implement trade liberalization measures. The economy has grown-the GDP growth rate ranged between 5 and 7 per cent annually over the period and considerable progress has been made in loosening government regulations, particularly restrictions on private businesses. Different sectors of economy have different experiences about the impact of the reforms. In a country like India, productive employment is central to poverty reduction strategy and to bring about economic equality in the society. But the results of unfettered operation of market forces are not always equitable, especially in India, where some groups are likely to be subjected to disadvantage as a result of globalization. Women constitute one such vulnerable group.

Since globalization is introducing technological inputs, women are being marginalized in economic activities, men traditionally being offered new scopes of learning and training. Consequently, female workers are joining the informal sector or casual labour force more than ever before. For instance, while new rice technology has given rise to higher use of female labour, the increased work-load for women is in operations that are unrecorded, and often unpaid, since these fall within the category of home production activities. The weaker sections, especially the women, are denied the physical care they deserve. There is, thus, hardly any ability for the majority of Indian women to do valuable functioning; the "capability" to choose from alternatives is conspicuous by absence.

Most women in India work and contribute to the economy in one form or another, much of their work is not documented or accounted for in official statistics. Women plow fields and harvest crops while working

on farms, women weave and make handicrafts while working in household industries, women sell food and gather wood while working in the informal sector. Additionally, women are traditionally responsible for the daily household chores (e.g., cooking, fetching water, and looking after children). Although the cultural restrictions women face is changing, women are still not as free as men to participate in the formal economy. In the past, cultural restrictions were the primary impediments to female employment now however; the shortage of jobs throughout the country contributes to low female employment as well. The Indian census divides workers into two categories: "main" and "marginal" workers. Main workers include people who worked for 6 months or more during the year, while marginal workers include those who worked for a shorter period. Many of these workers are agricultural labourers. Unpaid farm and family enterprise workers are supposed to be included in either the main worker or marginal worker category, as appropriate. Women account for a small proportion of the formal Indian labour force, even though the number of female main workers has grown faster in recent years than that of their male counterparts.[7]

IV. Problems And Challenges faced By Working Women In India

A large number of women from rural areas migrate to cities and towns all over India. Most of these women and girls are illiterate and unskilled. They work in inhuman conditions in cities as their living standard is extremely poor. It is a recognized fact that there is still no society in the world in which women workers enjoy the same opportunities as men. According to the 2011 census about 94% of women workers in India are in unorganized sector. The women unorganized sector are facing so many problems:

1. Lack of education: Illiteracy is the biggest problem because they do not get time to educate themselves. In childhood, they have to start working early which do not allow them to go school.

7 Barati, Arab & Masoumi Challenges and Problems Faced By Women Workers in India, Chronicle of the Neville Wadia Institute of Management Studies & Research ISSN : 2230-9667.

2. Insufficient skill & knowledge: Majority of female do not have proper training and skills aligned to their task. This result is excessive stress and inefficient working.

3. Exploitation of the female labour: Female worker are more vulnerable to exploitation by employer. They can be easily threatened of their job for indecent favours.

4. Insecure job: Absence of strong legislation controlling the unorganized sector makes the job highly insecure in this sector.

5. Non sympathetic attitude of employer: Temporary nature of employment in this sector does not allow the bond between the employee and employer to establish and become strong.

6. Extreme work pressure: Female are overworked, they work twice as many hours as worked by their male counterpart. In agriculture sector the condition is the worst. When measured in terms of number of tasks performed and the total time spent, it is greater than men as per one study in Himalayas which found that on a one-hectare farm, a pair of bullocks' works 1064 hours, a man 1212 hours and a woman 3485 hours in a year.

7. Irregular wages payment: There is lack of controlled processes in unorganized sector which results in to untimely payment of wages to the workers. When it comes to payment to female, it is even worst.

8. Wage discrimination: Female do not get similar payment to the male for same work.

9. Seasonal employment: Many of the unorganized sector industries are seasonal. These industries includes fruits processing, pickle making, agricultural sector, construction sector etc. They have to fetch another employment when there is no work during offseason.

10. Physical problems: The working conditions are not healthy. Work place is not ergonomically designed. This results into workers facing fatigue resulting physical problems. Female workers are mostly on such tasks where they need to remain in one position such as agriculture. This results on to saviour problems such asbackache and knee-ach.

Some of the important issues are discussed below in detail:

1. Mental distress:

It is an age old convention that women are less capable and inefficient in working as compared to men. The attitude which considers women unfit for certain jobs holds back women. In spite of the constitutional provisions, gender bias creates obstacles in their recruitment. In addition to this, the same attitude governs injustice of unequal salaries for the same job. The true equality has not been achieved even after 61 years of independence. In order to achieve success in corporate sector, women feel that they must do better than their male colleagues. This leads to higher expectations and efficiency by their bosses and subordinates. Working in such conditions inevitably puts strain on women to greater extent as compared to men, thus making them less eager in their career. No one thinks of upgrading their skills with technological advancement which makes it easyto terminate woman's employment and hire other persons. Maternity leave is seldom given. Women's issues do not occur on the priority list of most of the trade unions. Traditionally women are seen as the house-keepers and child bearers. A woman could still bear up with these problems if she controls over money that she earns but in most cases, their salary is handed over to father, husband or in laws. Therefore, main purpose for seeking employment to get independence is nullified in many cases. The story doesn't end here. Sexual harassment, which was an invisible problem until quite recently, has now become a major social problem with the widespread entry of women in to the labour force.

2. Sexual harassment:

Encyclopaedia of Islam says: "Islam does not restrict the economic activity of women; what it restricts are those factors which might encourage or incite the spread of obscenity in society" for Allah's messenger explicitly permitted this in these words: *"O Women! You have been allowed by Allah to go out for your needs*"(Shahi-i-*Bukhari*). Today, almost all working women are prone to sexual harassment irrespective of their status, personal characteristics and the types of their employment. They face sexual harassment on way on transports, at working places, educational institutions, and hospitals, athome and even

in police stations when they go to file complaints. It is shocking that the law protectors are violating and outraging modesty of women. Public transport system is overcrowded and women become easy targets for physical harassment. Most of the women tend to be concentrated in the poor service jobs whereas men are in an immediate supervisory position, which gives them an opportunity to exploit their subordinate women. It is a difficult situation for woman if the higher officer demands sexual favours. If refused the boss takes out other means to make her life miserable. There have been several cases of sexual harassment recently involving even the senior women officials. If a woman is praised for her work or promoted on merit, her colleagues do not hesitate to attribute it to sexual favours. This psychological pressure can easily lead to a woman resigning from her job. In our society, most cases of sexual abuse go unreported because of the trauma and the social stigma attached to it. In the recent past, various guidelines, resolutions have been made to broaden the definition of sexual exploitation. There must be gender equality which includes protection from harassment and right to work with dignity. Sexual harassment of a female at the place of work is incompatible with her dignity and needs to be eliminated. Appropriate steps must be taken by employers or persons in charge of workplaces, public or private sector, to ensure safe working atmosphere for women. Appropriate work conditions must be provided in respect of work, health and hygiene to further ensure that there is no hostile environment towards women at workplaces. If we want to see a society free of sexual harassment, there is need of changing the mind-set of the society. Simply enacting laws is not sufficient. So, the political structure should be altered to achieve the goal.

3. Discrimination at Workplace/Wage disparity:

Wage Discrimination is a problem all over the world, especially in the third world countries, where the process of industrialisation is still going on. A double standard on pay still plagues women workers

everywhere according to ILO report.[8]Also, Indian women are often deprived of promotions and growth opportunities at work places but this doesn't apply to all working women. A majority of working women continue to be denied their right to equal pay, under the Equal Remuneration Act, 1976 and are underpaid in comparison to their male colleagues. This is usually the case in factories and labour-oriented industries.

4. Safety of Working Women while traveling:

Typically, the orthodox mind-set in the Indian society makes it difficult for a working woman to balance her domestic environment with the professional life. In some families, it may not be acceptable to work after six o'clock. Those families that do accept these working hours may experience considerable anxiety every day about a woman's safety while traveling. So many issues affect a working woman because she is closely protected or watched by her family and the society. According to survey conducted by ASSOCHAM, on 1000 women professionals, around 80 per cent of the households expect their daughters-in-law to prioritize household requirements over the official work. Further, many of them are physically and psychologically abused, by their in-laws and husband but they do not complain or let others know about it, particularly if they have children.[9]

5. Lack of Family Support

Lack of proper family support is another issue that working women suffers from. At times, the family doesn't support women to leave the household work and go to office. They also resist for women working till late in office which also hampers the performance of the women and this also affects their promotion.

8 "Double standards of pay hit the women." Workers The Hindustan Times, 7,1983.

9 Dr. Kamini B. Dashora, Problems faced by Working Women in India, International Journal of Advanced Research in Management and Social Sciences ISSN: 2278-623 Vol. 2 | No. 8 | August 2013.

6. Insufficient Maternity Leaves

Insufficient maternity leave is another major issue that is faced by a working mother. This not only affects the performance of women employees at work, but is also detrimental to their personal lives.

7. Job insecurity

Unrealistic expectations, especially in the time of corporate reorganizations, which sometimes puts unhealthy and unreasonable pressures on the employee, can be a tremendous source of stress and suffering. Increased workload extremely long work hours and intense pressures to perform at peak levels all the time for the same pay, can actually leave an employee physically and emotionally drained. Excessive travel and too much time away from family also contribute to an employee's stressors. This often humiliates and annoys her a lot and creates a lot of friction in her married life.[10]

8. Workplace Adjustment

Adjusting to the workplace culture, whether in a new company or not, can be intensely stressful. Making oneself adapt to the various aspects of workplace culture such as communication patterns of the boss as well as the co-workers, can be lesson of life. Maladjustments to workplace cultures may lead to subtle conflicts with colleagues or even with superiors. In many cases office politics or gossips can be major stress inducers.

9. Other reasons

It include Personal demographics like age, level of education, marital status, number of children, personal income and number of jobs currently had where you work for pay and Work situation characteristics like job tenure, size of employing organization, hours worked per week. Even though she has proved her efficiency, the employer thinks twice before promoting her. Even if she is given a chance, there is always a remark that she is being taken because she is a women.[11]

10 Promilakapur, the changing status of the Working Women in India, P.69.

11 Urmila patel, "Problems of working Women in India" in T.M.Dak (ed.), women and Work in Indian Society, P.228.

V. Limited Applicability of Labour Laws

1. Domestic Workers:

Despite constituting a significant segment of the working population of the country, there is very little legal regulation of the working conditions of domestic workers. This is attributable primarily to its location in the unorganized sector, which is not entirely within the regulatory framework of labour law. The domestic work sector is marked by heterogeneity with respect to mode of employment, skill requirements for different work, local practices and expectations of employer-worker relations and so on, which defeats any standardized form of regulation.[12] Additionally, the site of work being the domestic sphere, which has historically been seen as outside the scope of legal regulation, and the nature of the work being that which continues to be devalued as non-productive i.e. work mostly done by women in the household, such as cooking, cleaning, caring etc., are also factors responsible for the absence of any legal regulation of domestic work.[13] As a result, domestic workers have minimal legal protection. Some states, like Kerala, Karnataka, Maharashtra, Andhra Pradesh, Bihar and Rajasthan have notified minimum wages for domestic work. But for the most part, domestic workers do not have social security, maternity benefits, definite conditions of work or any other labour rights that they can enforce against their employers or placement agencies. The Domestic Workers Welfare and Social Security Bill is under consideration. The Bill covers domestic workers who work in a „household or in „similar establishments. It mandates the setting up of a Domestic Workers Welfare Fund to be maintained by Funds from the Central and State governments as well as contributions from beneficiaries. The Bill further provides for working hours, weekly day of rest, minimum wages for both time-rate and piece rate, overtime wages and rest at periodic intervals. Minimum wages can be for hourly, daily or

12 Neetha, N and Rajni Palriwala. 2011. The Absence of State Law: Domestic Workers in India, Canadian Journal of Women and the Law, Vol. 23, No.1, pp. 97-119.

13 Ibid.

monthly employment. Further, laws such as the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979; the Contract Labour (Regulation and Abolition) Act, 1970 and the Shops and Establishments Act, 1954 are applicable to domestic workers. The recently enacted Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2012 covers domestic workers, thus providing legal recourse to domestic workers. It is essential that a law is passed with immediate effect in order that a legal framework for the rights of domestic workers is provided. The Act will provide for a regulatory mechanism and will also lead to the recognition of the devalued and invisible labour performed by domestic workers, and open up the private domain of the family to the application of labour laws.

2. Industrial Workers:

Indian law prohibits working of female employees beyond permissible hours after 7:00 PM/8:30 PM/9:30 PM/10:00 PM in factories & commercial establishments. Indian law also lays down maximum permissible hours of work as well overtime hours in a day/week. It is to be understood that working beyond permissible hours can only be on rare occasions and not a norm. Any deviation from this requires prior permission of Govt. Authorities. Such permissions are conditional and impose restrictions and duties on the employer aimed at ensuring security of female employees. Arranging for secured transportation to female employees working beyond permissible hours is mandatory. Non-adherence of such conditions attracts penalties. In case a female employee becomes a victim of crime against her body because of such negligence on the part of the employer, management of the employer is exposed to criminal penalties.[14]Some of the legal provisions regarding work timings of female employees in factories & commercial establishments and the constraints in their applicability are as follows

14 http://asklabourproblem.info/note-on-work-timings-for-female-employees-in-india.

1. Provisions pertaining to permissible working hours in a day/week; permissible spread-over of an employee in a day; total permissible overtime hours in day/week; intervals of rest etc. for manufacturing units are provided under Factories Act, 1948 and for commercial establishments in the respective State based Shop & Establishments Act. Each State has its own Factories Rules through which Factories Act is enforced.

2. Section 66(1)(b) of Factories Act, 1948 prohibits women from being engaged in a factory from 7 PM till 6 AM. State Government through a notification in the Official Gazette may allow employees to work till 10 PM at night and begin work at 5 AM in the morning. Women working at fish curing and fish canning industries are exempted from these provisions. There are similar provisions in the Shops & Establishments Act prohibiting engagement of female employees during night time.

3. Section 66(1)(b) of the Factories Act, 1948 has been declared as unconstitutional by the Madras & Gujarat High Court, as the same has been considered discriminatory and against Fundamental Right of equality enshrined under Article 15 of the Constitution. However, Kerala High Court has upheld the constitutionality. The Madras High Court laid down certain conditions for protection of women incase they are required to work beyond 10 PM, which includes protection against sexual harassment, separate transportation facility, separate canteen facility/restrooms, women to work in groups etc. However, Section 66 is valid in other states as on date preventing female employees from working after 7 PM in the evening till 6 AM in the morning.

4. In case of commercial establishments the State Governments have been granting exemption to specific establishments or group of establishments, such as IT companies, Hotels, Media Companies etc., allowing them to engage female employees beyond permissible hours at night. These exemptions are conditional and employer needs to follows certain measures such as;

- Special arrangements should be made for protection of female employees working before 6 AM and after 8.30 PM including transport.

- Female employees should be provided job jointly or in group.
- Arrangement of rest rooms and lockers should be made for all women employees.

5. No women employee shall be asked to come for night shift for more than 15 days. For both factories and commercial establishments maximum permissible working hours in day is capped at 9 hours and in a week is capped at 48 hours. Any work beyond these periods is classified as overtime for which an employee is entitled to be paid at twice the ordinary rates of wages. Any deviation from this would require prior intimation and confirmation of the relevant regulatory authority. Under no scenario in factories can the total number of hours of work in a week, including overtime, exceed sixty and in a quarter total number of overtime hours exceed 50. Each State Govt. has prescribed similar limits on overtime hours in commercial establishments.

6. Similarly the spread-over of an employee in day whether in a factory or commercial establishment cannot be beyond 12 hours including intervals of rest in day under normal circumstances? Spread-over basically means the time period between commencement and termination of work. On certain days in year such as; year-end closing; financial year closing etc. spread over hours can be extended by taking prior permission of regulating authorities.

Thus, it can be concluded by saying that application of the law and access to labour rights to women workers in the unorganized sector and to unregulated workers in the organized sector is minimal. A large number of labour welfare legislations have created confusion in the system and there is a dire need of having an umbrella legislation which would cover all types of women workers in India. A closer look at some of the laws enacted for application to the unorganized sector reveals that firstly, many of these laws do not provide entitlements to very basic rights such as access to a grievance redressal system which is available to workers in the organized sector and in some instances even clean drinking water/decent living conditions, as in the case of migrant workers. In the organized sector itself, NCEUS findings indicate that

actual coverage of labour regulations in India is very small.[15] Coverage of chapter VB of the Industrial Disputes Act, 1947, is 1.4% of the total workforce or 3% of the hired workforce; coverage of the ESI Act is 87.5.%; that of the Factories Act is 73.5% and that of the Shops and Establishments Act is 44.7%.[16] Additionally, lack of effective and stringent implementation of existing laws renders existing laws and rules useless.

The „triple burden on women's work i.e. inside the household, outside of it and within the larger economy must be recognized and addressed. Women workers have practically no control over their own conditions of work, starting from the process of doing the work till the proceeds of the work are received.[17] There are structural constraints, which are specifically linked to the informal sector, such as the casual nature of work, insecurity in terms of employment and income associated with flexible labour. Unpaid work for women is one manifestation of the unjust terms of social division of labour between men and women.[18]Within the household, women engage in work that "frees" the male worker to work longer hours for capital and so increases the rate of surplus value.[19] Domestic work, mostly done by women, is often not recognised in terms of work or paid in monetary terms.

Due to the feminisation, sexual division of labour and gender division of work in the unorganized sector there is an imminent need for the coverage of women workers through labour laws and policy to address the exploitation faced. The National Commission for Enterprises

15 Ibid.

16 National Commission for Enterprises in the Unorganized Sector, The Challenge of Employment in India, An Informal Economy Perspective, Volume I, Main Report, 2009 at p. 170.

17 Jayati Ghosh, „Macro-Economic Trends and Female Employment; India in the Asian context, Paper presented at seminar on Gender and Employment in India; Trends, Patterns and Policy Implications, organised by the Indian Society of Labour Economics and Institute of Economic Growth, New Delhi, December 18-20, 1996.

18 Brinda Karat, Survival and Emancipation Notes from Indian women's struggles, Three Essays, New Delhi, 2005.

19 Selma James and Maria Rosa Dalla Costa, The Power of Women and the Subversion of Community, Bristol Falling Wall Press, 1973.

in the Unorganized Sector (hereinafter referred to as „NCEUS□), in its Report found that there was a need to consolidate labour laws in order that key terms such as „employee□, „employer□, „establishment□ are uniformly defined and proposed the formulation of a National Labour Code for this purpose.[20] The NCEUS also found that collective bargaining should be considered the main form of joint decision making in resolving interest disputes.106 Increased representation of women in trade unions and the constitution of women's wings in trade unions, where it is absent, are essential in this context. Further home-based workers must be recognized as workers so that they may avail of legal rights. A system needs to be developed for calculation of wages of home-based workers including to collect data on home-based workers. In line with the recommendations of the Second National Commission on Labour (2002), and the National Commission for Enterprises in the Unorganised Sector, it is recommended that an all India service for labour administration is created. This will provide for professional experts in the labour departments, autonomous bodies, and labour adjudicators. For purposes of faster adjudication process, the institution of Lok Adalats must be encouraged to enable faster disposal of cases.[21]

Time use surveys must be used to document the unpaid labour performed by women workers in addition to national data sets. NSSO Surveys have been unable to capture work done by the „difficult to measure sectors□ (Hirway, 2002)[22]. It is therefore essential that this method is used as an additional mechanism to capture the extent to women□s work in the informal sector which goes non-reported. In addition, a National Policy for Older Women must be implemented by the Central and State governments. Older women who contribute to the informal economy through their unpaid labour and remunerated work in the unorganized sectors are a vulnerable group. Finally it is

20 National Commission for Enterprises in the Unorganized Sector, The Challenge of Employment in India, An Informal Economy Perspective, Volume I, Main Report, 2009 at p. 134.

21 Ibid.

22 Indira Hirway, Employment and Unemployment Situation in the 1990's: How good are NSS Data?, Economic and Political Weekly, May 2002.

recommended that legal literacy and legal aid should be provided at regular intervals to workers in the unorganized sector. Continuing social audits of the operation of labour laws with special emphasis on registrations, inspections, amongst others, must be carried out.

VI. Conclusion

Women workers have dual responsibility of home and work. There are various reasons for pitiable conditions of women in unorganized sector i.e. gender discrimination, poverty, lack of basic knowledge, ignorance of government, inadequate laws which are failing to prevent them. For the betterment of women in unorganized sector, government need to prepare statistics records of employed women. On the basis of this record government has to prepare programs for educating women for their rights. Central and state government had launched many schemes for providing support to women but there are not sufficient to overcome the problems of women workers. There is need of effective implementation of these schemes and laws for empowering the women workers.

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Legal Aid as a Means to Combat Crime against Women: An Analysis

Abstract

The concept of legal aid as an aspect of distributive justice should be understood as not being related only to the administration of justice through the courts, but also as related to other measures for the promotion of equality and social welfare. This leads us to treat all measures that help in removing "legal incompetence" of the marginalised population specially women by way of ascertainment and enforcement of their legal rights as legal aid measures. Legal aid covers activities concerned with creation of awareness about legal rights and process, rendering legal advice, litigation in the courts, helping the enforcement of court verdicts etc. However, the concept of legal aid and activities falling within the legal sweep are subject to change in the light of the prevailing philosophy and accompanying justifications. It is therefore, necessary that legal aid should be appreciated as a dynamic concept of distributive justice and rule of law. It would, therefore, not be inappropriate to designate legal aid movement as the future social barometer for gauging the overall social attitude towards the weak sections of society specially women.

***Keywords**: Legal Aid, Distributive Justice, Women, Rule Of Law, Equality, Social Welfare*

I. Introduction

Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of a free democracy is not imaginary but very real, because democracy's life

depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness.[1]

There has, of course, been progress in all directions, especially in agriculture, science, industry, technology, but the important question is how this progress be measured in context of availability of minimum conditions essential for development. This task becomes more difficult when we focus our attention on the development of women. In fact, access to justice is the primary need and right of every individual. However it is also true that dispensation of justice in real terms depends on many factors. As far as conditions of women are concerned, it is generally admitted that female population is assigned a subordinate status in society. Gender-based bias against women has been a feature of Indian society since centuries. Even today they are discriminated against in education, health, housing, employment, and even in the matter of access to law and justice.[2] Women have been the victim of violence and exploitation by the male dominated society all over the world. In India women have been socially, economically, physically and psychologically and sexually exploited from time immemorial. Before the adoption of the Constitution of India, the concept of equality of male and female were almost unknown.[3] The discrimination and violence against women starts even when she is in mother's womb. It continues in her day to day life in the shape of molestation, kidnapping, rape, dowry, harassment at home and at work place. Women in many countries are victims of legal inequality. The Indian Constitution, taking a more humane view, has expressly permitted beneficial discrimination in favour of women.[4]

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1. W J Brennan, the Community's Responsibility for Legal Aid, 15 The Legal Aid Brief, Dec. 1956, p. 75. Also quoted in Law and Poverty Cases and Materials. Ed. L.M.Singhvi, 1973, p 281.
2. K. D. Gaur; Criminal Law and Criminology; Deep & Deep Publications Pvt. Ltd.; 2002; p. 593.
3. http://shodhganga .inflibnet.ac.in/bitstream/ 10603 /7785/8/08_chapter %201.pdf. Time 10.30AM date 25-05-2013
4. Article 15(3) of the Constitution of India provides that: Nothing in this article shall prevent the State from making any special provision for women and children.

In the words of Krishna Iyre J:

Indian woman is the sad reflection on the distance between the law in book and the law in action"[5].

Owing to biological disabilities and social ignorance, they suffer injustice. These vulnerable categories need specialized and sensitive measure of protection through the law. Of course, platitudinous equality of sexes and constitutional concern for the moral and material abandonment or exploitation of tender age and feminine physiology exists but a functionally intelligent free legal service programme which can deliver the goods is desideratum. Women have been victimized over centuries. The legal hope that disabilities of womanhood would be firmly wiped out is embodied in the constitutional guarantee of sex equality. Articles 15[6] and 16[7] go further to sanction benign

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5. *C.B.Muthamma v Union of India*, AIR 1976 S.C. 1968.
6. *Article 15* Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
   1. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
   2. No citizen shall, on ground only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -
   a. access to shops, public restaurants, hotels and places of public entertainment; or
   b. the use of wells, tanks, bathing ghats, roads and places of public resort maintained whole or partly out of State funds or dedicated to the use of general public.
   3. Nothing in this article shall prevent the State from making any special provision for women and children.
   4. Nothing in this article or in clause (2) or article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
7. Article 16: Equality of opportunity in matters of public employment.
   1. There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
   2. No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
   3. Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority

discrimination for women and children since masculine cultural domination is a reality and biological vulnerability to crime is a fact. The classification of legal aid on the basis of receiving category consists of women and children[8], is perfectly constitutional in light of the provisions of Article 15 of the constitution.

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within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

4. Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

5. Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

8. Section 12 of the Legal Services Authorities Act, 1987 prescribes the criteria for giving legal services to the eligible persons. Section 12 of the Act reads as under:-

"12.Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is:–

(a) a member of a Scheduled Caste or Scheduled Tribe;

(b) a victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution;

(c) a woman or a child;

(d) a mentally ill or otherwise disabled person;

(e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

(f) an industrial workman; or

(g) in custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956); or in a juvenile home within the meaning of clause

(j) of section 2 of the Juvenile Justice Act, 1986 (53 of 1986) or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987 (14 of 1987); or

(h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Govt., if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Govt., if the case is before the Supreme Court."

II. Legal Aid and Women

The Indian society vehemently professes at the top of its voice that a women is an embodiment of power and must be respected as such. The position however is quite reverse. She is treated merely as a weakling who is being ill-treated, harassed and subjected to cruelty consequent to her illiteracy, economic dependence, and absence of awareness of her civil and political rights and with social restraints and restrictions on her activities. She has to pocket all the insult and humiliation heaved upon her in the ongoing male dominated society.

A woman plays the role of a daughter; sister; wife and mother. The ethical and moral postulates in our society have given her a place of pride. The chastity of women is a pinnacle of the moral structure in India. A woman has been compared with the beauty of Nature in Indian literature and the sanctity of Goddess is attached to her. These values are deep rooted in the minds of the Indian people and have been accommodated in ancient laws to a great extent. The legal history of India reveals that severe punishment was inflicted upon the violators of these values.[9]With the passage of time and the dominance of the materialist and patriarchical values the respected status of women showed a steady decline to the extent that in the last six-seven hundred years, it reached a point where a woman who was earlier worshiped became the object of enjoyment and trade in all its forms. Crimes against women have existed invariably with time and place. Even periods of transformation have never been comfortable for them. Types and trends of crimes, however, kept changing with change in mind-set and techniques. Its culmination has been their regular exploitation and victimization. On the continuation of this practice, exploiters became culturally violent, having opted violence as a way of life.[10]Crimes against women are showing an upward trend. According to National

9. Partil J.S., Rape, Criminal Law and Morality, 1981-82, CMLJ, 166.
10. Anand A. S., "Dynamics of Gender Justice: Crime against Women," *Justice for Women concerns and expressions*, Universal Law Publishing Co. Pvt. Ltd., 2002, p. 5

Crime Report[11] a total of 2,13,585 incidence of crime against women (both under IPC and Special and Local Laws) were reported in the country during 2010 as compared to 2,03,804 during 2009 recording an increase of 4.8% during 2010.

A total of 2,28,650 incidents of crime against women (both under IPC and SLL) were reported in the country during the year 2011 as compared to 2,13,585 incidences in the year 2010 recording an increase of 7.1% during the year 2011[12].A total of 2,44,270 incidents of crime against women (both under IPC and SLL) were reported in the country during the year 2012 as compared to 2,28,650 in the year 2011 recording an increase of 6.4% during the year 2012.

The head-wise details of the reported crimes during 2007-2015 along with percentage variations are presented in the table below:

11. The National Crime Report, 2010, p. 79.
12 Crime against women, Available at http://ncrb.nic.in/CD-CII2011/cii-2011/Chapter%205.pdf.(visited on September 2013).

S.No	Crime Head	2007	2008	2009	2010	2011	2012	2013	2014	2015	Percentage variation in 2015 over 2014
1.	Rape(sec.376 IPC)	20,737	21,467	21,397	22,172	24,206	24,923	33,707	36,735	34,651	-5.7
2.	Kidnapping &Abduction (sec.363 to 373 IPC)	20,416	22,939	25,741	29,795	35,565	38,262	51,881	57,311	59,277	3.4
3.	Dowry Death(sec.304 -IPC)	8,093	8,172	8,383	8,391	8,618	8,233	8083	8,455	7,634	-9.7
4.	Cruelty by Husband & relatives (sec.498-A IPC)	75,930	81,344	89,546	94,041	99,135	1,06,527	1,18,866	1,22,877	1,13,403	-7.7
5.	Molestation (sec.354 IPC)	38,734	40,413	38,711	40,613	42,968	45,351	70,739	82,235	82,422	0.2
6.	Sexual Harassment(509 IPC)	10,950	12,214	11,009	9,961	8,570	9,173	12,589	9,735	8,685	-10.8
7.	Importation of Girls(sec366-B IPC)	61	67	48	36	80	59	31	13	6	-53.8

8.	Sati Prevention Act, 1987	0	1	0	0	1	0	0	0	0	0
9.	Immoral Traffic(Prevention)Act 1956	3,568	2,659	2,474	2,499	2,435	2,563	2,579	2,070	24,24	17.1
10.	Indecent Representation of Women(prohibition)Act,1986	1,200	1,025	845	895	453	141	362	47	40	-14.1
11.	Dowry Prohibition Act,1961	5,6235	5,555	5,650	5,182	6,619	9,038	10,709	10,050	9,894	-1.5
	Total	185312	195856	203804	213585	228650	244270	3,09,546	3,37,922	3,27,394	-3.1

Source: - National Crime Records Bureau.

The above figures show that the offences against women are increasing and if not controlled the problem will get complicated in future.

Women in India, even after more than six decades of our political emancipation and self-governance remain discriminated, oppressed and ignored. There are various and varied factors which are responsible for pitiable condition of fair sex. Centuries old inertia, projecting and adoring them only as embodiment of sacrifice, patriarchal domination and anti-women social, economic and cultural mores are some of these factors. A major portion of women population remains illiterate, which is main stumbling block in the progressive development. Consequently they are not aware of their rights and privileges and remain in the

slumber of ignorance. However, efforts to awake them from their slumber of injustice are on. In recent times international human rights jurisprudence and judicial activism shown by the Supreme Court of India have become beacons of women's rights. Thus, whenever the crimes are committed against women the same should be viewed in the context of violation of her rights under Article 21 of the Constitution of India and not merely as a crime against the society.

Therefore to safeguard the identity of women the concept of legal aid has been introduced. The provisions of legal aid to poor and especially to women are based on humanitarian ground. Guarantees of women's rights to equality shall be realized only if women are encouraged to assert their rights in a court of law. In order to achieve this objective, there is need to ensure a women's access to legal aid services.

Our constitution makers have realized the legal aid provisions in the system of judicial administration are an effective instrument for an attack on poverty, social backwardness and lethargy. For that reason alone, we have adopted the concept of legal aid as an integral part of our judicial administration system. It is, therefore, important that the benefit of legal aid should have an adequate content and potency to make the deprived and downtrodden in the democracy enjoy the benefits of freedom, liberty and other rights made available to them as the citizens, without any fear of their extortion or extinction.

For a society to remain peaceful and prospering, law must not only speak justice but also behave justly and do justice. This can be done by injecting legal aid in the arteries of our legal system. Social awareness and community efforts both should go together to achieve the objectives of legal aid. So there is an urgent need to implement the provisions of legal aid properly so that the needy and poor can be benefited.

Legal aid has a close relationship with the welfare state and the provision of legal aid by a state is influenced by attitudes towards welfare. Legal aid is a welfare provision by the state to people who could otherwise not afford access to the legal system. Legal aid also helps to ensure that welfare provisions are enforced by providing people entitled to welfare provisions with access to legal advice and the courts.

Historically legal aid has played a strong role in ensuring respect for economic, social and cultural rights which are engaged in relation to social security, housing, social care, health and education service provision, which may be provided publicly or privately. Jurists such as Mauro Cappelletti argue that legal aid is essential in providing individuals with access to justice, by allowing the individual legal enforcement of economic, social and cultural rights. His views developed in the second half of the 20th Century, when democracies with capitalist economies established liberal welfare states that focused on the individual. States established themselves as contractors and service providers within a market based philosophy that emphasised the citizen as consumer. This led to an emphasis on individual enforcement to achieve the realisation of rights for all.

Despite the special constitutional guarantee as well as enactment of large number of legislations to protect the poor from exploitation and harassment, it is reported that they have not been getting effective protection. The major reason lies in the imperfect law and indifferent implementation. In addition to this, the poor are in a disadvantaged position in getting access to the courts. There is also dire need to provide legal literacy programmes to the poor to create awareness among themselves to take initiatives in enforcing their rights. Social activist and NGO's should be involved in spreading the awareness and also in getting free legal aid and legal services to the poor and the weaker sections of the society to ensure protection from exploitation and harassment.

The women, the most vulnerable section, face multiple disadvantages, their needs are special, and therefore, they require effective implementation of provisions with respect to free legal aid at every stage of litigation including the pre-litigation stage, as this right to them is the need of the hour. The right of an accused to be defended by a counsel of her choice commences the moment she is arrested or put in jeopardy of her life or personal liberty. But in fact, the right to legal aid at state's expense is available only after the completion of two important stages in criminal proceedings, i.e., investigation and inquiry, when the accused is for the first time produced before the Magistrate and this has been so laid down by Supreme Court in various judgments. It is

submitted that the right to legal aid should be made available to a female accused while she is in police custody and should thus correspond with the right to counsel as laid down in Article 22.

III Role of Judiciary Vis A Vis Legal Aid

The Legal Aid movement in India has got impetus on the part of judiciary itself; initially the approach of judiciary in interpreting the provisions of the Constitution of India or other statutes conferring Legal Aid benefits was not much liberal as it exists now. The right to free legal aid and speedy trial are guaranteed fundamental rights under art 21. It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the Court's process that he should have Legal Services available to him. Free Legal Service to the poor and the needy is an essential element of any reasonable, fair and just procedure[13].

Though Art 39-A of the Constitution provides fundamental right to equal justice and free legal aid and though the state provide amicus curiae to defend the indigent accused, he would be meted out with unequal defence if, as is common Knowledge, the youngster from the bar, who has either a little experience or no experience or is assigned to defend him. It is high time that senior counsel practicing in the court concerned, volunteer to defend such indigent accused as a part of their professional duty. The right of defence includes the right to effective and meaningful defense at the trail and nor a more show of it which undoubtedly occurs when an inexperienced lawyer is engaged by the state to defend an indigent against an experienced and able public prosecutor or counsel for the state obviously, it is an unequal battle in which the poor accused cannot defend himself effectively and adequately the greater the need for caution and higher the responsibility for the law enforcement agencies of the state to provide experienced counsel.

13. *Hussainara Khatoon v. State of Bihar,* AIR 1979 SC 1369.

The Voluntary organization and social action groups must be encouraged and supported by the state in operating the legal aid programmes. It is a fact that the legal aid programme which is needed for the purpose of reaching social justice to the people cannot afford to remain confirmed to the traditional or litigation oriented legal aid programme but it must, taking into account the socio-economic conditions prevailing in the country, adopt a more dynamic posture and take within its sweep what may be called legal aid schemes but such Voluntary organization or Social action group must not be under control of or supervision of the State Government or the State Legal Aid and Advice Board because Voluntary organizations and social action groups operating these programmes should be totally free from any Governmental control.[14]

In *Nandini Satpathy v. P.L.Dani,*[15] the Supreme Court emphasized that the spirit of Article 22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a lawyer of his choice. Lawyer's presence is a constitutional claim in some circumstances in our country, and in context of Article 20(3), is an assurance of awareness and observance of right to silence. Over-reach Article 20(3) and Section 161(2), Criminal Procedure Code, 1973 will be obviate by this requirement. If an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-incrimination secured in secrecy and by coercing the will, was the project.

In a landmark decision The Supreme Court in *Delhi Domestic Working Women's Forum v Union of India*[16]**,** has indicated broad

14. *Centre for Legal Research and another V State of Kerala*, AIR 1986 SCC 1
15. AIR 1978SC 1025.
16. 1995 SCC (Cri) 7.

parameters in assisting the victim of rape by police. The relevant parameters are as follows:

1. Complaints of sexual assault should be provided with legal representation. The victim's advocate should not only assist her in filing the complaint but also guide her in getting other kinds of assistance like psychiatric and medical.

2. Legal assistance will have to be provided at the police station as well in view of the distressed state of mind of the victim.

3. Police should be under a duty to inform the victim of the right to get representation before asking her questions and the police report should state that she was so informed.

4. A list of advocates who are willing to act in these cases should be kept.

5. Such advocates should be appointed by the court, but to avoid delay advocates should be authorized to act in police satiation before permission from the court has been obtained.

Bhagawati J. comments social justice is a very vague and indeterminate expression and that no clear cut definition can be laid down which will cover all the situations. The concept of social justice thus takes within its scope the objective of removing all inequalities and affording equal opportunity to all citizens in social affairs as well as economic activities. The policies of the government should be to protect the weak against the strong and poor against exploitation by rich group and to formulate laws to provide equal opportunity and social order. To express it in the words of President Roosevelt, the state should strive to establish a social order which would ensure freedom from wants and freedom from fear for all. Our social system is multilingual, multi religious and multicultural as well, and in this complex society we are facing several problems. The legal literacy became a very important facet of life, in the light of the ignorance or money, especially the schedule castes, S.T & B.C and the other downtrodden sections of the society.

Emphasizing the social service aspect of legal aid, the Law Commission of India has observed:[17]

Equality before law necessarily involves the concept that all the parties to proceedings in which justice is sought must have an equal opportunity of access to the Court and of presenting of their cases to the Court. But access to the Courts is by law made dependent upon the payment of court-fees and the assistance of skilled lawyers is in most cases necessary for the proper presentation of a party's case in a court of law. Insofar as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal and laws, which are meant for his protection, have no meaning and to that extent fails in their purpose. Unless some provision is made for assisting the poor man for the payment of court-fees and lawyer's fees and other incidental costs of litigation, he is denied equality in opportunity to seek justice. The rendering of legal aid to the poor litigants is therefore, not a minor problem of procedural law but a question of a fundamental character.

Rajoo alias Ramakant v. State of Madhya Pradesh[18]

The court in this case observed this is the obligation of the court to inquire the accused or convict whether he or she requires legal representation at state expenses. Neither the constitution nor The Legal Services Authorities Act makes any distinction between a trial and an appeal for the purpose of providing free legal aid to an accused or a person in custody.

Various directives have been issued by Supreme Court in Re Inhuman Conditions in 1382 prisons [21]

1. The under trial review committee in every district should meet every quarter. The secretary of the district legal services committee should attend each meeting of the under trial committee and follow-up the discussions with appropriate steps for the release of under trial

17. Fourteenth Report (Reform of Judicial Administration) Vol. 1, p. 587 (1958).
18 AIR 2012 SC 3034.
21 2016 SC 993

prisoners who have undergone their sentence or are entitled to release because of remissions granted to them.

2. The under trail review committee should specifically look into aspects pertaining to effective implementation of section 436 of the CRPC and section 436A of the Cr.P.C so that under trail prisoners are released at the earliest and those who cannot furnish bail bond due to their poverty are not subject to incarceration only for that reason

3. The member secretary of the state legal services authority of every state will ensure ,in coordination with the secretary of the district legal services committee in every district , that an adequate number of competent lawyers are empanelled to assist under trail prisoners and convicts particularly the poor and indigent, and that legal aid for the poor doesn't become poor legal aid

According to the view of judiciary, now it reveals that, it is the responsibility of Court to ensure the implementation of the directives and to harmonize the social objective underlying the directive with the individual rights. Accordingly, the Court many times seems to have correlated Article 21 of the Constitution of India dealing with Fundamental Right to Life and Personal Liberty with Article 39-A, a Directive Principle of State Policy. It is also worthy to be noted here that, the Apex Court in India has not only contributed in evolution of the concept of Legal Aid in India but has played a significant role in enforcement of it. While attempting this, the Court has dealt with many aspects or components of Right to Legal Aid through its various verdicts.

IV. Conclusion

At present the legal aid movement in India is unorganized, diffused and sporadic. There is lack of co-ordination in it. The ideal of equal access and availability of legal justice has not reached satisfactorily. There is a wide gap between the goals set and met. Illiteracy is also a major obstacle to legal aid. Now it is common knowledge that about 70% of the people living in rural areas are illiterate and even more then that are not aware of the rights conferred upon them by law. It is the

absence of legal awareness which leads to exploitation and deprivation of rights and benefits of the poor.

Despite the fact that our legal system functions on the premise that ignorance of law is no excuse, still the achievement of 'legal literacy' in its absolute terms remains a myth.[19] Everyone is equal before law but beneath this surface there remains a profound, inequality in the actual working of the legal system by reason of the indifference of the law to the inequality between the rich and poor. It is necessary that people not only be aware of their rights and remedies, they must believe that the enforcement of such rights is possible and that they will get adequate remedies within a reasonable time, on a reasonable expense or no expenses. The whole perception must change as there is a direct relationship between the faith the people have in an institution and the success of that institution.

Despite the existence of various Constitutional and Statutory provisions to provide free legal aid to women, in practice her position is very miserable. She cannot take advantage of the said provisions. There is the lack of will in the society to enforce these provisions in right earnest. The legal remedies are very costly and cumbersome and for an ordinary woman, all the statutory provisions become *non-est.* Effective disbursement and implementation of legal aid demands more affirmative action on the part of the legislature, executive and judiciary as has been provided in Article 15(3) of the Constitution of India to effect right to equality in its real sense. In absence of such affirmative action for women in the field of legal aid, justices for all remains like a paper slogan only and no civilized society can progress and develop without giving justice to its one-half population which discharges major roles in the creation, maintenance and development of the men, family, society and nation.

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