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Editorial

Legal education in the contemporary era has widened the discourse of intellectual outreach and technological superhighway. The present issue of the journal includes a wide variety of research papers with contemporary significance and depth of knowledge. It will be quite useful for academics, scholars, legal professionals and the students of multi-disciplinary subjects. Kashmir Law College has earned credentials for regularly publishing *Kashmir Journal of Legal Studies* with wide variety of research articles of seminal importance. The present issue includes 4 Articles followed by a number of notes and comments covering up diverse themes of immense importance and current relevance.

Shabina Arfat in her paper *"An Overview of Legal Dimensions of Human Dignity"* has tried to explore the emergence of the concept of 'dignity' within the framework of legal rules and need for universal standards of human dignity that transcend culture. The author contends that the right to live with dignity has to be understood in terms of securing irreducible minimum entitlements pre-requisite for living with dignity.

Rehana Shawl and Asma Rehman in their joint research paper titled *"Victim Compensation and the Law: Indian Perspective"* have critically evaluated the law relating to victim compensation and need for the establishment of compensation Board for quick disposal of cases of victims of crime and lock up deaths in police custody.

Mohd Yasin Wani and Yasir Latif Handoo in their joint write up " *Legislation as a source of Law"* have highlighted the relevance of legislation as an effective source of law in the contemporary legal jurisprudence. The authors assert that legislation with its flexibility, adaptability and representing the will of the people, shall continue to dominate the annals of law in future.

Farah Deeba in her write up "*Judicial Review of Parliamentary Privileges in India"* has critically evaluated the status of parliamentary privileges in India and the role the courts have played to rationalize the use of these privileges.

Debajit Kumar Sarmah in his paper *"Criminal Justice in India: A Historical Outline"* has outlined the historical development of criminal justice system in India and the contribution of ancient, medieval and post constitutional period.

Satinder Kumar and Saroop Kumar in their joint paper *"Women Empowerment vis-a-vis Gender Justice in India: A Perspective"* have highlighted the gender based discrimination in India , the statutory safeguards to prevent such discrimination and the role played by Supreme Court of India in this regard. .

Afshan Gul in her paper *"Fundamental Rights and Provisions Facilitating Legal Aid: An Appraisal"* has highlighted the importance of legal aid to poor as a fundamental right for the proper administration of justice and need for its implementation in letter and spirit.

Romana Asmat and Miss Sidra Mehboob in their paper "*Justice for Women –Empowerment through Law:"* have highlighted the plight of women and redressal of the same by empowerment of women through law in general and human rights in particular. The authors suggest that the social prejudice and conventional approach inherent therein need to go.

Mohammad Rafiq Dar in his paper" *Comparative Analysis of Consumer Protection Laws in India and USA"* has critically evaluated the difference between the consumer laws of India and USA and highlighted the need for consumer awareness.

Syed Shahid Rashid in his paper "*Nature & Scope of Ijtihad in Contemporary World: An Appraisal"* has highlighted the contemporary significance of Ijtihad on issues confronting Muslim world.

Shazia Ahad Bhat in her case comment *"An Appraisal of NPMHR Case with Special Reference to AFSPA-A Critique"* has analyzed the verdict of the Apex Court in the light of the various provisions of AFSPA in the historic case of **NPMHR.**

I am thankful to the members of the Editorial Committee and other subject experts for editing the manuscripts and ensuring that the present volume finds its own niche in the academic and other relevant fields.

I will be failing in my duty if I do not place on record the appreciation for the untiring work of Dr. Fareed Ahmad Rafiqi,

Associate Editor and Mohammad Rafiq Dar, Assistant Editor, for bringing out this issue.

I am thankful to ***Mr. Omer Javeed Zargar*** for Computer Layout and the design of the journal. I am also grateful to the Salasar Imaging systems, Delhi for printing the Journal with meticulous care.

The editor acknowledges with great appreciation the support and co-operation of all the members of the management of the college in general and Mr. Altaf Ahmad Bazaz in particular whose patronage has enabled the publication of the present issue of the journal.

Prof. A.S.Bhat

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NOTES AND COMMENTS

An Overview of Legal Dimensions of Human Dignity

Shabina Arfat*

Abstract

In this paper author tries to explore the emergence of the concept of 'dignity' within the frame work of legal rules. Human dignity is at the heart of the protection of life in various international instruments. Judicial activism has played an astonishing role in expanding the meaning of human dignity. 'Dignity' has been upheld as one of the basic right of human beings. Indian judiciary has derived the right to live with dignity within the ambit of 'right to life' as enshrined in the Article 21 of the Constitution.

Keywords*: Human dignity, International law, Right to life, Right to live with dignity, Indian Constitution*

Introduction

Human dignity is the foundational concept of the global human rights regime, "the 'ultimate value' that gives coherence to human rights".[1] In the past two or three hundred years dignity has been widely conceived as an attribute of all human beings. The claim of human dignity is that simply being human makes one worthy or deserving of respect. Human rights can thus be understood to specify certain forms of social respect –goods, services, opportunities, and protections owed to each person as a matter of rights. And the practice of human rights provides a powerful mechanism to realize in the social world the underlying dignity of the person. Human rights thus are based on but not reducible or equivalent to human dignity. Human rights are particular set of practices for realizing a certain class of conceptions of human dignity. Human rights and human dignity capture interrelated and foundational modern notions of the nature of man and his proper relation to society. The modern notion of dignity drops the hierarchical elements implicit in

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1 Hasson. *In* Protecting Dignity: An Agenda for Human Rights Research Project On Human Dignity: Jack Donnelly (JUNE 2009) *"Human Dignity and Human Rights",* University of Denver, USA.

the meaning of *'dignitas'*, and uses the term so that all human beings must have equal dignity, regardless of their virtues, merits, actual social and political status, or any other contingent features.[2] Natural or human rights became the preferred mechanism for protecting new notions of dignity. And modern markets and modern states properly humanized by human rights in the form of liberal democratic and social welfare states have increasingly come to be seen as essential to the effective enjoyment of a life of dignity in the contemporary world.

Immanuel Kant regarded as the father of the modern concept of dignity,[3] secularized this concept and presented it front and center as a normative legal ideal. He posited that man regarded as a person possesses a dignity by which he exacts respect for himself from all other rational beings in the world".[4] For Kant, Human dignity belongs to every human being qua human being. It belongs to all in equal amounts and is inalienable, meaning that it cannot be gained or lost.[5]

There are several conceptions of dignity that one can choose from, but one cannot coherently hold all of these conceptions at the same time.[6] Alan Gewirth defines human dignity as "a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain

2 Brennan, Andrew & Y. S. Lo (2007). Two Conceptions of Human Dignity: Honour and Self- Determination. *In Perspectives on Human Dignity: A Conversation*, J. Malpas and N. Lickiss (Edit). Dordrecht: Springer Netherlands.

3 Giovanni Bognetti, *The Concept of Human Dignity in European and US Constitutionalism*, *in* European and US Constitutionalism (Georg Nolte Ed., 2005).

4 Rex D. Glensy (2011) The Right to Dignity, *Columbia Human Rights Law Review.*

5 Kant, Immanuel Groundwork of the Metaphysics of Morals (1785), translated by H.J. Paton, New York: Harper Torch Books. *In* Mark A. Lutz, Centering Social Economics on Human Dignity, Review of Social Economy, Vol. 53, No. 2 (SUMMER 1995), pp. 171-194, Taylor & Francis, Ltd. Available at http://www.jstor.org/stable/29769770.

6 Christopher McCrudden (2008) Human Dignity and Judicial Interpretation of Human Rights, 19 *Eur. J. Int.'l L.* 655.

intrinsically valuable aspects of being human".[7] Human dignity here is often presented as rooted in some particular characteristic.

Joel Feinberg suggests that attributing human dignity involves expressing an attitude of respect toward the humanity in each man's person.[8] In other words, human rights insist that the inherent worth of human beings must not be left in an abstract philosophical or religious domain but rather must be expressed in everyday life through practices that respect and realize human rights.[9]

By an international law of human dignity, Myres S. McDougal,[10] mean the processes of authoritative decision of a world public order in which values are shaped and shared more by persuasion than coercion, and which seeks to promote the greatest production and widest possible sharing, without discriminations irrelevant to merit, of all values among all human beings.

Human dignity is bound up with forms of governance,[11] and is a central feature in a significant amount of modern constitutional states. Dignity is the expression of a basic value accepted in a broad sense by all peoples,[12] and constitutes the first cornerstone in the edifice of human rights.[13] Therefore, there is a certain fundamental value to the notion of

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7 Gewirth, Alan (1992) Human Dignity as the Basis of Rights. *In The Constitution of Rights: Human Dignity and American Values*, M. J. Meyer and W. A. Parent (Edit). Ithaca: Cornell University Press.

8 Feinberg, Joel (1973) Social Philosophy. Englewood Cliffs: Prentice-Hall.

9 Jack Donnelly (JUNE 2009) *Protecting Dignity: An Agenda for Human Rights,* Research Project on Human Dignity: "Human Dignity and Human Rights ", University of Denver, USA.

10 Myres S. McDougal, Perspectives For an International Law of Human Dignity, Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969), Vol. 53, Diverse Systems of World Public Order Today (APRIL 30-MAY 2, 1959), pp. 107-136, *American Society of International Law*, Available at: http://www.jstor.org/stable/25657440.

11 Larry Catá Backer (2009) Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering, *16 Ind. J. Global Legal Stud*. 85, 101.

12 Oscar Schachter (1983) Human Dignity as a Normative Concept, *77 Am. J. Int.'l L. 848.*

13 Paolo G. Carozza (2003) Subsidiarity as a Structural Principle of International Human Rights Law, *97 Am. J. Int.'l L. 38*.

human dignity, deeply rooted in any notion of justice, fairness, and a society based on basic rights.[14]

The concept of human dignity is playing an important role in the formulation and interpretation of legal rules.

International Instruments and Human Dignity

At the international level, dignity is incorporated in human rights charters, both general and specific. Universal Declaration of Human Rights (UDHR) on 10 December 1948, recognizes that everyone is born with equal and inalienable rights and fundamental freedoms. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[15] There are also several more specific uses of dignity in the remainder of the text. Article 22, on the right to social security, provides: 'everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'. Article 23(3), set in the context of right to work, provides that 'everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection'. The Universal Declaration of Human Rights reiterated that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the

14 Guy E. Carmi (2007) Dignity.—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification, *9 U. Pa. J. Const. L.* 957.

15 Article 25(1), Universal Declaration of Human Rights-Dignity and Justice for All of Us. United Nations Department of Public Information. Available at: http://www.un.org/events/humanrights/udhr60/hrphotos/declaration%20_eng.pdf.

foundation of freedom, justice and peace in the world.[16] It went on to place a number of economic, social and cultural rights side by side with civil and political rights. These include:

-The right to work, to just and fair conditions of employment, and to protection against unemployment

-The right to form and join trade unions

-The right to a standard of living adequate for health and well-being, including food, clothing, housing, medical care and social services, as well as security in the event of loss of livelihood, whether because of unemployment, sickness, disability, old age or any other reason

-The right to education, which shall be free and compulsory in its "elementary and fundamental" stages

-The right to participate in cultural and scientific life;

From 1948 to 1966 the international community struggled to agree an international covenant on human rights to turn this declaration into binding international law. Ultimately, the intense ideological cleavages of the time led to the adoption of two separate covenants, one on economic, social and cultural rights and the other on civil and political rights.

By 1986, dignity had become so central to United Nations ' conceptions of human rights that the UN General Assembly provided, in its guidelines for new human rights instruments, that such instruments should be 'of fundamental character and derive from the inherent dignity and worth of the human person'.[17] Since then, the major conventions on the Rights of Children,[18] the Rights of Migrant Workers,[19] Protection

16 Preamble of the UDHR (Universal Declaration of Human Rights).

17 GA Res. 41/120, 4 Dec. 1986.

18 GA Res 44/25, annex, 44 UN GAOR Supp (No 49), at 167, UN Doc A/44/49 (1989) Convention on the Rights of the Child, Preamble.

19 GA Res 45/158, annex, 45 UN GAOR Supp (No. 49A), at 262, UN Doc A/45/49 (1990), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Arts 17 and 70.

against Forced Disappearance,[20] and the Rights of Disabled Persons[21] have all included references to dignity. But, in addition, international instruments in other more specific spheres as far apart as those dealing with the right to food (for instance the Preamble to the Agreement establishing the International Fund for Agricultural Development of 1977, recognizes ' that the continuing food problem of the world is afflicting a large segment of the people of the developing countries and is jeopardizing the most fundamental principles and values associated with the right to life and human dignity) and the death penalty[22] have also adopted dignity language in their preambles. A further major incentive to the use of dignity in the international sphere was given by the adoption of dignity as the central organizing principle of the Vienna World Conference on Human Rights in 1993. The Declaration and Programme of Action adopted dignity as foundational not just to human rights in general,[23] but also adopted the concept of dignity in their provisions dealing with particular areas of human rights, such as the treatment of indigenous peoples,[24] the prohibition of torture,[25] the prohibition of gender based violence and harassment,[26] the abolition of extreme poverty,[27] and the issue of biomedical ethics.[28]

Increasingly, the role of dignity has expanded beyond the preambles to international human rights documents and into the texts of their substantive articles. References to dignity have expanded to include not

20 E/CN 4/2005/WG 22/WP 1/Rev 4 (2005), International Convention for the Protection of All Persons from Enforced Disappearance, Art. 19.

21 GA Res A/61/611(2006) International Convention on the Rights and Dignity of Persons with Disabilities, Preamble, Arts 3, 8, 16, 24.

22 UN Doc A/44/49 (1989) GA Res 44/128, annex, 44 UN GAOR Supp (No. 49), at 207, Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, Preamble.

23 UN Doc A/CONF 157/24 (Pt 1), at 20 (1993) Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14 – 25 June 1993, Preamble.

24 Vienna Declaration and Programme of Action. Art. 20.

25 Ibid. Art. 55.

26 Ibid. Art. 18.

27 Ibid. Art. 25.

28 Ibid., Art. 11.

only rights relating to conditions of and treatment during detention[29] and the right to education,[30] but also other rights: rights in the criminal justice process,[31] rights to be provided minimum conditions of welfare,[32] the right to health,[33] the right of disabled persons to be treated as autonomous individuals,[34] the right of children to be treated with dignity following abuse,[35] rights to reputation,[36] rights of indigenous cultures,[37] rights to control access and use of personal data,[38] and the conduct of biomedical experimentation.[39]

The CEDAW Committee has recommended that states parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act; that states parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity, and that effective

29 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 17.
30 Convention on the Rights of the Child, Art. 28; Convention on the Rights of Persons with Disabilities, Art. 24.
31 Convention on the Rights of the Child, Arts 37 and Art. 40.
32 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 70.
33 Convention on the Rights of Persons with Disabilities, Art. 25.
34 Ibid. Art. 16.
35 Convention on the Rights of the Child, Art. 39; Convention on the Rights of Persons with Disabilities, Art. 3; Convention on the Rights of Persons with Disabilities, Arts 1 and 3.
36 International Convention for the Protection of All Persons from Enforced Disappearance, Art. 24.
37 Indigenous and Tribal Populations Convention, 1957, Art. 2; UN Declaration on the Rights of Indigenous Peoples, Adopted by GA Res 61/295 on 13 Sept. 2007, Arts 15 and 43.
38 Identity Documents Convention (Revised), 2003, at para. 8; International Convention for the Protection of All Persons from Enforced Disappearance, Art. 19.
39 UN GA Res AIRES/53/152 (9 Dec. 1998) The UNESCO Universal Declaration on the Human Genome and Human Rights, 1997, Preamble, Arts 1, 2, 6, 10, 11, 12, 15, 21, and 24.

complaints procedures and remedies, including compensation, should be provided.[40]

The UN Development Programme (UNDP), in its Human Development Report, for example, has stated: "A decent standard of living, adequate nutrition, health care and other social and economic achievements are not just development goals. They are human rights inherent in human freedom and dignity. But these rights do not mean an entitlement to a handout. They are claims to a set of social arrangements – norms, institutions, laws and enabling economic environment – that can best secure the enjoyment of these rights. It is thus the obligation of governments and others to implement policies to put these arrangements in place".[41]

International Committee of the Red Cross proposed to the Powers assembled in Geneva the text of a Preamble, which was to be identical in each of the four Conventions: 'respect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual undertaking. Such a principle demands that, in time of war, all those not actively engaged in the hostilities and all those placed "hors de combat" by reason of sickness, wounds, capture, or any other circumstance, shall be given due respect and have protection from the effects of war, and that those among them who are in suffering shall be succored and tended without distinction of race, nationality, religious belief, political opinion or any other quality'.[42] The text of the Conventions, as adopted, incorporated 'dignity' most prominently in Common Article 3, which prohibits inter alia 'outrages

40 CEDAW Committee (1992), General Recommendation No. 19 (11th session) on Violence against Women, Available at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm.

41 Human Development Report, 2000, p. 73; "UN Common Understanding of a Human Rights-based Approach to Development Cooperation". In UNDP, Human Rights in the UNDP, Practice Note, April 2005.

42 Diplomatic Conference of Geneva (1949) 'Remarks and Proposals submitted by the International Committee of the Red Cross ', Document for the consideration of Governments invited by the Swiss Federal Council to attend the Diplomatic Conference of Geneva (Feb. 1949).

upon personal dignity, in particular humiliating and degrading treatment'.[43] Such acts 'are and shall remain prohibited at any time and in any place whatsoever' with respect to persons protected by the Conventions.

Subsequently, Additional Protocol I to the Conventions relating to the protection of victims of international armed conflicts prohibited 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault' in Article 75 relating to 'fundamental guarantees'.[44] Article 85 provided that certain acts 'shall be regarded as grave breaches of this Protocol, when committed willfully and in violation of the Conventions or the Protocol' including ' (c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination'.[45] Article 4 of the Second Additional Protocol prohibited 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.[46] Since then, the statutes of *ad hoc* international criminal tribunals and the Rome Statute establishing the International Criminal Court have incorporated similar references to 'outrages upon personal dignity'.

The Constitution of UNESCO, adopted on the 16 November 1945, states that the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfill in a spirit of mutual assistance and concern. On 19 October 2005, the 33rd Session of the General Conference of UNESCO adopted the Universal

43 Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 Aug. 1949, Art. 3.

44 Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

45 *Ibid*.

46 Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

Declaration on Bioethics and Human Rights, Article 3 of the Declaration provides that human dignity, human rights and fundamental freedoms are to be fully respected.

In the Millennium Declaration, UN Member States stated that they would spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms. In so doing, they recognized that while freedom from want and fear are essential they are not enough. All human beings have the right to be treated with dignity and respect. The protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability. No security agenda and no drive for development will be successful unless they are based on the sure foundation of respect for human dignity.[47]

Human dignity is also at the heart of the protection of life in the Arab Charter on Human Rights, which was adopted by the League of Arab States in 2004 and entered into force on 15 March 2008. The Preamble to this Charter begins with the words 'Based on the faith of the Arab nation in the dignity of the human person' and this theme is continued throughout the document.

South African Constitution (Sec.1) states 'human dignity, the achievement of equality and the advancement of human rights and freedoms' as the first set of foundational values, and the Bill of Rights features equality, human dignity, and several liberties in that order. In addition, Section 39 provides that when interpreting the Bill of Rights, a court/ tribunal, or forum 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.' Similarly, the preamble to the 1995 Constitution for Bosnia and Herzegovina opens with a statement of 'respect for human dignity, liberty, and equality.' In German Constitutional law, dignity doctrine consists mostly of a rather list of violations of dignity, including

47 United Nations, Report, Freedom to live in dignity, Available at http;//www.un.org

genocide, humiliation, and torture. Thus, the first clause (Article 1, section 1) of the Basic Law states: "The dignity of man is inviolable." Constitutional justices and scholars have interpreted this clause as the supreme principle of the German Constitution and the theoretical foundation for the human rights enumerated in the subsequent articles (Walter, Christian, 1998).[48]

The concept of dignity came to be used as a rallying cry for a variety of other social and political movements advocating specific types of social reform during the 19th century. One of Friedrich Schiller's epigrams, *Würde des Menschen* (1798), puts well the connection between dignity and social conditions which was beginning to develop: 'give him food and shelter; when you have covered his nakedness, dignity will follow by itself'.[49] In Europe and in Latin America, dignity came to be particularly associated with the abolition of slavery.

Human Dignity & Judicial Activism: International Response

Article 3 of ECHR prohibition of torture and inhuman and degrading treatment and punishment; have drawn extensively on the concept of human dignity as a basis for their decisions. The first references to human dignity appeared in the decision of the Commission in the *East African Asian* case where the racial discrimination the applicants were subjected to constituted an infringement of their human dignity,[50] which in the particular circumstances of the case amounted to degrading treatment. The first reference by the Court (ECHR) to human dignity was in *Tyrer v. The United Kingdom*,[51]in which corporal punishment, administered as part of a judicial sentence, was held to be

48 Walter, Christian (July 1998) "Human Dignity in German Constitutional Law." European Commission for Democracy through Law (Venice Commission).

49 D. Kretzmer and E. Klein (2002) The Concept of Human Dignity in Human Rights Discourse.

50 *East African Asians v. United Kingdom,* 3 EHRR (1981) 76, at paras 203–207.

51 Application no. 5856/72, 25 April 1978, European Court of Human Rights.

contrary to Article 3 on the ground that it was an assault 'on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity'.[52] Since then, it has been drawn on in the context of the right to a fair hearing,[53] the right not to be punished in the absence of a legal prohibition,[54] the prohibition of torture,[55] and the right to private life.[56] The Court now regards human dignity as underpinning all of the rights protected by the Convention.[57]

The European Court of Human Rights (ECHR) has increasingly resorted to the use of dignity language in interpreting Article 3. In *Selmouni v. France*[58] the Court 'reiterates that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3'. In *Pretty v. United Kingdom,* the Court said: 'As regards the types of "treatment" which fall within the scope of article 3 of the Convention, the court's case law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterized as degrading and also fall within the prohibition of article 3.'[59]

The European Commission of Human Rights in *East African Asians v. United Kingdom* held that 'publicly to single out a group of persons for differential treatment on the basis of race might, in certain

52 *Tyrer v United Kingdom,* 2 EHRR 1, at para. 33.
53 *Bock v. Germany* , 12 EHRR (1990) 247, at para. 48.
54 *S W v. UK; CR v. UK,* 21 EHRR (1995) 363, at para. 44.
55 *Ribitsch v. Austria,* 21 EHRR (1995) 573, at para. 38.
56 *Goodwin v. United Kingdom,* 35 EHRR (2002) 447, at paras 90– 91.
57 *Pretty v. United Kingdom,* 24 EHRR (1997) 423, at para. 65: ' [t]he very essence of the Convention is respect for human dignity and human freedom'.
58 23 EHRR (1999) 403.
59 21 35 EHRR (2002) 1, at 33, para. 52.

circumstances, constitute a special form of affront to human dignity'.[60] A decision applied in *Moldovan v. Romania*,[61] where the (ECHR) upheld the claim of a number of Roma that their rights under Article 14 had been breached. In addition to providing a theoretical underpinning to constitutional and statutory equality guarantees, dignity has been drawn on heavily as a theoretical underpinning by judges in interpreting prohibitions against sexual harassment, both in Europe and the United States.[62]

The European Court of Justice (ECJ) stated that 'to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard'.[63] In *Omega*, the Court held that 'the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law'.[64]

Andrew Clapham has usefully suggested that: concern for human dignity has at least four aspects: (1) the prohibition of all types of inhuman treatment, humiliation, or degradation by one person over another; (2) the assurance of the possibility for individual choice and the conditions for 'each individual's self-fulfilment', autonomy, or self-realization; (3) the recognition that the protection of group identity and culture may be essential for the protection of personal dignity; (4) the creation of the necessary conditions for each individual to have their essential needs satisfied.[65]

60 3 EHRR (1973) 76, at 86, para. 207.

61 44 EHRR (2007) 16.

62 Ehrenreich, (1999) 'Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment' , 88 *Georgetown LJ* (1999) 1.

63 Case C–13/94, *P v. S and Cornwall County Council* [1996] ECR I – 2143, at para. 22.

64 Case C–36/02, *Omega Spielhallen und Automatenaufstellungs- GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I – 9609, at para 34; Case C – 377/98, *Netherlands v. European Parliament and Council* [2001] ECR I – 7079.

65 GA Res. 41/120, 4 Dec. 1986. In A. Clapham (2006), *Human Rights Obligations of Non-State Actors*, at at 545 – 546.

The Inter-American Court of Human Rights, for example, held that the right to life 'includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence'.[66]

In *De Reuck v. Director of Public Prosecutions,*[67] the Constitutional Court of South Africa considered whether the conviction of a film producer under a criminal provision relating to child pornography was unconstitutional. The decision by Langa DCJ for the Court considered the objective of the legislation: 'the purpose of the legislation is to curb child pornography, which is seen as an evil in all democratic societies. Child pornography is universally condemned for good reason. It strikes at the dignity of children.'[68] In deciding to uphold the legislation, Langa J continued, 'Children's dignity rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth.'[69]

In *Faurisson v. France*[70] the concurring opinion of Prafullachandra Bhagwati in the Human Rights Committee emphasized that the restrictions in French law relating to denial of the holocaust (the Gayssot Act) were justified in part on the basis that the restrictions upheld human dignity. The restriction on the author's freedom of expression imposed under the Gayssot Act was necessary for respect of the rights and interests of the Jewish community. 'The necessary consequence and fall-out of such statements would have been, in the context of the situation prevailing in Europe, promotion and strengthening of anti-semitic feeling. Therefore, the imposition of a restriction by the Gayssot Act was necessary for securing respect for the rights and interests of the

66 Inter-American Court of Human Rights, Case of the 'Street Children', *Villagran-Morales v. Guatemala*, Judgment of Nov. 1999 (Merits), at para. 144.

67 28 2004 (1) SA 406 (Const Ct S Africa)

68 *Ibid.,* at para. 61.

69 *Ibid.,* at para. 63.

70 Communication 550/1993, (1996) 2 BHRC, UNHR Committee.

Jewish community to live in society with full human dignity and free from an atmosphere of anti-semitism.'[71]

Regarding the concept of human dignity as having some sort of constitutional value, one of the first times that the term dignity appears in a Supreme Court (United States). *Korematsu v. United States,* of course, is an infamous case where the Court rejected a challenge by a Japanese American who claimed that his forcible relocation and detention during World War-II, on the sole grounds of his ancestry, was unconstitutional.[72] Justice Murphy (dissent) rejected the contention that the Court had to defer to what the military thought was necessary because to give constitutional sanction to the action of the military is to adopt one of the cruelest of rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups."[73]

In *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, the *U.S.* Court struck down the school district's anti-segregation policy that classified children by their race, noting, in part, that, "one of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." In his concurrence in the judgment, Justice Kennedy added that, "to be forced to live under a state mandated racial label is inconsistent with the dignity of individuals in our society."[74]

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71 Individual opinion by Prafullachandra Bhagwati. In Human Dignity and Judicial Interpretation of Human Rights. Christopher McCrudden (2008) *The European Journal of International Law Vol. 19 no. 4.*

72 *Korematsu v. United States*, 323 U.S. 214, 240 (1944). Petitioner challenged exclusion order targeting Japanese Americans as a Fifth Amendment violation beyond the scope of the congressional and executive war powers.

73 Id. at 240 (Murphy, J., dissenting).

74 *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) at 701, 746 (Kennedy, J., concurring).

The key paragraph of the judgement by Inter-American Court of Human Rights, in *Villagrán Morales*[75] concerning the right to life culminates thus: "In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it"[76] The Joint Opinion on the case by Judges Cançado Trindade and Arbeu Burelli elaborates this concept further: "The arbitrary privation of life is not limited, then, to the illegal act of homicide: it extends to the deprivation of the right to live with dignity. This conception of the 'right to life' extends not only to civil and political rights but also to economic, social and cultural rights, illustrating the interrelationship and indivisibility of all human rights. In the present case, there is the additional aggravating circumstance that the lives of those children had already lost meaning: that is, the children who were victims were already deprived of the possibility of creating and developing the project of their life and of finding a meaning for their own existence. The need to protect the most vulnerable people - as in the case of street children - definitely requires an interpretation of the right to life which encompasses the minimum conditions for a life with dignity (*una vida digna*). We believe that the project of life is consubstantial with the right to existence, and that its realisation requires the conditions which make possible a life with dignity and enable the person to have security and humane treatment."[77]

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment.[78]

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75 *Villagrán Morales et al v. Guatemala*, 19 November 1999, Inter-American Court of Human Rights.

76 Para. 144.

77 Joint Opinion, *Villagrán Morales et al v. Guatemala,19 November 1999*, Inter-American Court of Human Rights.

78 *Rodúguez v. British Columbia (A.G.)*, (1993) 3 S.C.R. 519.

Indian Scenario

So far as India is concerned, dignity is included within the definition of human rights under Human Rights Act, 1993 in the following words: "Human Rights" means the right relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenant and enforceable by Courts in India.

Reference to the Principle of human dignity has been made in the Preamble of the Indian Constitution, in the following words:

"We, the people of India, having solemnly resolved to constitute India into a sovereign socialist secular democratic republic and to secure to all its citizens: justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the nation."

The Preamble does not grant any power but it gives a direction and purpose to the constitution. It outlines the objectives of the whole Constitution.[79] Emphasizing upon the significance of the three concepts of liberty, equality and fraternity used in the Preamble, Dr. Ambedkar observed in his closing speech in the Constituent Assembley on 25,1949: "The principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality liberty would produce the supermacy of the few over the many. Equality without liberty, would kill individual initiative."[80]

In Kesavananda case, Sikri C.J., mentioned the following among many as the basic structure of the Constitution, "…The dignity of the individual secured by the various Fundamental Rights and the mandate

79 Jain, M.P., Indian Constitutional Law (2006) Fifth Edition, Wadhwa Nagpur, p.11.

80 B. Shiva Rao, The Framing of Indian Constitution: Select Documents, Vol. IV, 944.

to build a welfare state contained in the directive principles." The Supreme Court has emphasized that the words "fraternity assuring the dignity of the individual" have "special relevance in the Indian context" because of the social backwardness of certain sections of the community who had in the past been looked down upon.[81]

The Supreme Court of India has interpreted the right to life in the Indian Constitution to encompass a right to livelihood, including a right to health care and a right to food. It has done so by developing the idea of a right to life with human dignity. The expanded notion of the right to life has enabled the courts, in its PIL jurisdiction, to overcome objections on grounds of justiciability to its adjudicating the enforceability of economic social and cultural rights. Subsequently, rights to work, health, shelter, education, water and food are regularly litigated. Expressions such as "basic necessities of life" "bare minimum expression of the human self" and "human dignity" found in several of the judgements have explored the import of "life" in Article 21. In reading several of the related rights of dignity, living conditions, health into the ambit of the right to life, the court has overcome the difficulty of the justiciability of these as economic and social rights, which in their manifestation as Directive Principles of State Policy, are considered non enforceable.

In *Francis Coralie Mullin vs. Administrator, Union Territory of Delhi,*[82] the Court held that right to life means the right to live with basic human dignity. In the case, the petitioner, a British national, who was detained in the Central Jail, Tihar, in India, contended that her five year old daughter and her sister were not allowed to have interview with her for more than five minutes in a month. In the context of the detention order under Article 22 and its effect on Article 21, the Court posed the question: What is the true scope and ambit of the right to life guaranteed under this Article? The Court held that while arriving at the proper meaning and content of the right to life, we must remember that it is a constitutional right which we are expounding, and moreover it is a

81 Indra Sawhney vs. UOI, AIR 1993 SC 477.
82 (1981) 1 SCC 608 618, para17.

provision enacting a fundamental right and the attempt of the court should always be to expand the reach and ambit of the fundamental right rather than to attenuate its meaning and content. The Court further held that the fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. The Court observed that the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival, and held that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, free movement and commingling with fellow human beings are part of the right to live with human dignity and they are components of the right to life.

Olga Tellis v. Bombay Municipal Corporation[83] is a case in point. The judgement handed down in this case expanded the right to life guaranteed under Article 21 of the Constitution to include within its scope, the right to livelihood, which in this context translated into the right to be allowed to remain on the pavements. The Supreme Court held that "an equally important facet of the right to life is the right to livelihood because no person can live without the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation." Although the final orders in *Olga Tellis* found that the BMC Act of eviction of pavement dwellers was valid (under Article 14 and 19 of the Constitution) and that pavement dwellers should be evicted, the Supreme Court also laid down that this could be done only after arranging alternative accommodation for them. In a sense, therefore, by imposing

83 (1985) 3 SCC 545.

this strong condition of providing alternate accommodation before eviction, the Supreme Court was in fact upholding the right of the pavement dwellers to shelter.

The proactive role played by Indian courts is further exemplified in *Municipal Council Ratlam v Vardhichand and ors*[84] case. This case concerned a municipality that had failed to construct drains; filth and dirt had accumulated, and people could not remain in the locality due to the noxious nuisance. A magistrate passed an order, saying, "Construct a drain", but the municipality responded, "we have no money". It was appealed to the Supreme Court. The Court held, among other things, that the "right to life" of the person is affected; environmental pollution affects individual right to breathe fresh air, sanitary conditions are essential for the proper enjoyment of this right. The Supreme Court through Justice Krishna Iyer, upheld the order of the High Court and directed the Municipality to take immediate action within its statutory powers to construct sufficient number of public latrines, provide water supply and scavenging services, to construct drains, cesspools and to provide basic amenities to the public.[85] Justice Iyer observed "decency and dignity are non-negotiable facets of human rights and are a first charge on the local self governing bodies".[86]

In the case of *Bandhua Mukti Morcha v. Union of India* and others in respect of bonded labour and weaker section of the society. It lays down as follows: Article 21 assures the right to live with human dignity, free from exploitation. The state is under a constitutional obligation to see that there is no violation of the fundamental right of any person, particularly when he belongs to the weaker section of the community and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him. Both the Central Government and the

84 AIR 1980 SC 1622.

85 Law Commission of India, 168th Report on Proposal to Construct Environmental Courts, September 2003.Available at http://: www.lawcommissionofindia.nic.in/186threport

86 In the International Council on Human Rights Policy, Review Meeting Rights and Responsibilities of Human Rights Organisations, Geneva, 15 March 2005.

State Government are therefore bound to ensure observance of various social welfare and labour laws enacted by Parliament for the purpose of securing to the workmen a life of basic human dignity in compliance with the directive principles of the state policy.

In 2009, the High Court of Delhi had read section 377 to exclude consensual adult same-sex conduct, finding that the provision violated the rights of equality before the law, freedom of expression, and the right to a life of dignity and privacy.[87]

Similarly, in *Peerless General Finance and Investment Co. Ltd. vs. Reserve Bank of India*[88] the Court quoted Article 25 of Universal Declaration of Human Rights and held that right to life includes the right to live with basic human dignity with the necessities of life such as nutrition, clothing, food, shelter over the head, facilities for cultural and socio-economic well being of every individual. Article 21 protects the right to life. It guarantees and derives there from the minimum needs for existence, including a better tomorrow.

In cases were the State is failed to protect the dignity of person, it is bound to pay compensation, as is held by the Apex Court in, *S. S. Ahluwallia vs. U.O.I & Ors.*[89]**:** "The High Court of Delhi by its order dated July 5, 1996 held that in the expanded meaning attributed to Article 21 of the Constitution it is the duty of the State to create a climate where members of the society belonging to different faiths, caste and creed live together and therefore, the State has a duty to protect their life, liberty, dignity and worth of an individual which should not be jeopardized or endangered. If in any circumstances the State is not able to do so, then it cannot escape the liability to pay compensation to the

87 "India: Historic ruling against sodomy laws, the first step to equality", Amnesty International, available at http://www.amnesty.org/en/for-media/press-releases/india-historic-ruling-against- %E2%80%9Csodomy %E2 %80%9D-laws-first-step-equality-20090702; Amnesty International India Foundation, Vote for a New Law on Violence against Women in India.

88 (1992) 2 SCC 343 at 388.

89 2001 AIR SCW 1130

family of the person killed during riots as his or her life has been extinguished in clear violation of Article 21 of the Constitution".

In *Kapila Hingorani vs. State of Bihar*[90], the Court observed: The States of India are welfare States. Having regard to the constitutional provisions adumbrated in the Constitution of India, and in particular Part IV thereof laying down the Directive Principles of the State Policy, and Part IV-A laying down the Fundamental Duties, they are bound to preserve the practice of maintaining human dignity. It must oversee the protection and preservation of the rights as adumbrated in Articles 14, 19, 21 and 300-A.

The right to live with dignity has thus to be understood in terms of securing irreducible minimum entitlements which are essential prerequisites of such living with dignity. Such a right could be included within the fold of article 21 which guarantees right to life and personal liberty.

Conclusion

The major UN documents protecting rights explicitly state that human rights derive from the inherent dignity of the human person. Most constitutions contain guarantees of liberties and equality, and some explicitly recognize human dignity as well. In many jurisdictions around the world, fundamental rights are attributed to separate interests. Rights are put together like building blocks, either in a hierarchical manner or randomly. Mostly, it is when courts find either liberty or equality to be at stake that they turn to the principle of dignity as their basis to inform both the others. But this leaves dignity either in abstract isolation or narrowly defined. There should be universal standards of human dignity that transcend culture. For, unless we begin to recognise that humans are worthy of dignity and respect, we will not move forward in this journey.

90 (2003) 6 SCC 1.

Victim Compensation and the Law: Indian Perspective

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Abstract

Victim compensation refers to payment or reparations made to a crime victim. Victims of violent crime may suffer financial stress that is as devastating as their physical injuries and emotional trauma. Victim compensation works as a monetary restitution by governmental entities to people injured by violent personal crimes. The compensation amount comes from the collection of fines and fees assessed in court cases. A victim is always a victim, so compensation should not be dependent on the conviction of the accused. In cases involving abuse of power by the authorities it should be made mandatory to recover the compensation amount awarded personally from the official of the state who is responsible for such abuse of power. Laws should be enacted by the parliament adopting and incorporating the principles concerning payment of compensation to the victims by the international treaties and conventions so as to strengthen the legislation relating to payment of compensation. Compensation by the state to the victims of crime is the only proper remedy but it is very unlikely for such a scheme to materialize in India and other developing and poor countries. The fact however that ineffective means of preventing and controlling crime are the main factors leading to victimization. There is great need for the constant evaluation and improvement of law and enforcement procedures in order to reduce crime victimization to the minimum level. Govt. and non Govt. agencies have to perform effective roles in providing to victims both emergency and prolonged medical, psychiatric, and psychological and social services which are altogether lacking at present in the country.

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Keywords: *Compensation, Victims of crime, International Provisions, Human rights, Statutory provisions.*

INTRODUCTION

The idea of victim compensation has gained momentum particularly since the second half of 20th century and has emerged as an independent branch of criminology i.e, victimology. The idea of compensation to victim of any wrong is connected with the legal system in two ways. First, the legal system has to regulate the relationship between the victim and the wrong doer and secondly--- it has to regulate the relationship between the victim and the administration of justice.[1]

The object of civil law system is to provide compensation for private wrongs but whereas the system of criminal law aims at punishing the persons whose behaviour is morally culpable. The term "Compensation" means amends for the loss sustained. In law it applies, primarily to a transaction between two or more persons and doesn't enter into, or arise from a unilateral transaction, purpose & undertaking. More specially, with reference to injury or loss, "Compensation" has been defined as meaning amends; an equivalent given for property taken or for an injury done to another or an equivalent in money for loss sustained. Compensation is anything given to make things equivalent recompense, remuneration or pay[2] . It is counter- balancing of victims suffering's and loss that results from victimization. It is a sign of responsibility of the society which is civil in nature representing a non-criminal purpose and end[3].The rational or basis for compensation may be the following three perspective

1. As an additional type of social insurance.
2. As a welfare measure
3. A way of meeting an over locked governmental obligations to all cities[4].

1 Hall, Objectives of civil and criminal law, 43 l.rev .1943 p.753
2 State Of Gujrat V. Shantilal AIR 1969 SC634-44
3 V.V.Devasia,Criminology victimology and corrections p.236
4 Wright Marlin,Justice for victims and offenders p. 28

There is an apparent distinction between the words "compensation and damages". While the former is used by the Indian courts to denote the monetary redress that they offer to the victims of constitutional Tort, Damages is its equivalent in the western world. Therefore, a reference to these, means almost the same thing.

In Bhim Singh's case[5] – the court held that, what has been awarded, though only a nominal sum must be taken to represent the equivalent damages in the western world.

Victiomology is the scientific study of victims. It seeks to study the relationship between victims and offenders. victiomology focuses on the victims condition and the victims relationship to the criminal. The concept of victimology can be better understood if we analyse the meaning, issues and aims of victimology. In a narrow sense, victimology is the empirical, factual study of victims of crime and as such is closely related to criminology. In a broad sense, victimology is the entire body of knowledge regarding victims, victimization and the efforts of society to preserve the rights of the victim[6].The subject matter of victimology can be broadly classified into:-

1. Victim Typology
2. Victim participation in crime.
3. Compensation to victims of crime.

The first aspect, victim typology, attempts to classify the characteristics of victim based on psychological, biological and sociological factors. The second aspect of victimology, victim participation in crime, focuses attention on the degree to which the victim could be considered responsible for his own victimization. The third and the most important aspect of the study of victimology, compensation to victims of crimes, is concerned with its restitution or compensation to victims of crimes and the dependents for pecuniary loss, bodily injury or death resulting from the crime. Victimology claims that the offender has responsibility for the reparation of injury caused to the victim. It also emphasizes that if the

5 Bhim Singh v. State of J and K AIR 1986 SC, p. 494

6 Solomon,Raja,Focus of victimology 1994,p 4

offender is not in a position to indemnity for his act, state must come forward in making compensation to the victim. Victimology as a separate discipline deals with the study of the problem of victims of crimes and their rights to claim compensation. Which includes rehabilitation and restitution, from the offender or the authorities of the state.

COMPENSATORY JURISPRUDENCE TO THE VICTIMS OF CRIME AND ABUSE OF POWER : A NEW VISION.

For centuries an individual in society used to become the victim of the offences perpetrated by his fellow human being. These were designated as private offences. The state ultimately as a part of its responsibility to maintain law and order, comes to the rescue of such victims of crime and provide for sanctions against the wrong doer. In course of time several statutes have been passed by the state providing punishments for the offenders. The Indian Penal Code, 1860 is one of such oldest statute which takes care of punishing the offenders who perpetrate private criminal wrongs. In other words, there are several statutes to punish the offenders who perpetrate crimes against individual. The issue of victim compensation in the context of abuse of power by the state, has drawn the attention of several international institutes as well. Thus, The Economic and Social Council of United Nations in their draft guidelines provides:

"Victims of crime and other illegal acts involving abuse of power shall be entitled to indemnification by the state, organized entity or person in respect of crimes or other illegal acts committed by their agents or employees in the usual course of the performance of their duties and within the scope of their actual ostensible authority. Unless it is otherwise proved employees or agents of the state, organized entity or person shall even when committing crimes or other illegal abuses of power, be presumed to be acting in the usual course of the performance of their duties and within the scope of their actual or ostensible authority.

The instances of abuse of power by certain agencies of state particularly the police, the prison authorities and other executive authorities are on the rise. Abuse of power by the police as the

custodians of law, has many facets specific instances of abuse of power by the police may be classified as.

1. **TORTURE BY THE POLICE**

The Apex court is very conscious of its responsibility to protect the poor and helpless from the custodial torture. Any victim of custodial torture can move the court directly for redressal of his grievances merely by writing a letter. The S/C has started treating the letters of inmates as writ petitions and providing appropriate relief.

2. **ILLEGAL ARREST**:

Often the poor and innocent persons are picked up by the police not because they have committed any crime, but because they are poorly dressed, illiterate unemployed and are victim of extreme poverty. They are remanded to the police custody where they remain indefinitely as the investigations are never completed.

3. **CUSTODIAL RAPES**

The statistics pertaining to custodial rapes aren't fully available for obvious reasons, which make victim woman remain silent. The Notorious Mathura rape case is an example of such occurrences. There are several cases where the S/C and the other High Courts have awarded compensation in cases involving custodial rape.In Sri Bodhirattwa Goutham Vs Miss Subra Chakravarthy case[7].The S/C has awarded an interim compensation to the tune of Rs.1000 per month to the victim during the pendency of criminal case. In case involving rape of certain nuns the court has awarded Rs.2.5 Lakhs as compensation to the victims and other effected Nuns in the case who ever assaulted and molested were also paid compensation to the victims and Rs.1.00 Lakh was paid to each. Keeping in view the increasing incidents of custodial rapes, the criminal law has been Act, 1983 which creates a new class of offence namely custodial rape and provides punishment up to life imprisonment. This amendment has inserted new clauses in to Sec. 376 of I.P.C

4. **LOCK-UP DEATH/ CUSTODIAL DEATH**

7 Air 1996 SC p922

Sec 176 (1) of criminal procedure code 1973 specifically creates liability of the magistrate to enquire into cases of police custodial death in order to find out the cause of death so that any guilty persons can be punished. In the recent case of Delip singh Vs. State of Haryana[8].

It was held two constables guilty of causing death of the accused by heating and convicted them under Sec 304 (II) of the I.P.C 1860.Almost all state Govt's in the country have turned a blind eye to the torture and lock-up deaths out of 415 cases payment of compensation was ordered only in 12 cases and in six cases of these payment was known to have been made. Ironically the safeguards in the treatment of prisoners provided in the constitution and the statutes and the directives issued by courts have been systematically violated. III treatment of prisoners and denial of Fundamental rights to the prisoners is another instance of abuse of power by the state.[9]Unlawful detention of the citizens particularly as a preventive measure is another unconstitutional and undemocratic measure resorted by the state and thus amounts to abuse of power.

THE COMPENSATION SCHEME UNDER THE PROVISIONS OF Cr.P.C

It can be said that the criminal Pr. Code is the first and probably the oldest legislation in India to deal with the subject of compensation to victims of crime. The scheme of compensation envisaged in the code of Criminal Procedure 1973 (New Code) is contained in Sec's 357, 358 and 859 A of the code. The other provisions having some bearing on the subject are sections 237 and 250 of the code.

The new code of criminal P.C 1973, made certain improvements in the relevant provisions of the old Procedure code of 1898.in order to fulfill the object of sec 357 an elaborate victim compensation scheme has been laid down in sec 357 A, which has been inserted by an amendment of 2008 to the code of criminal procedure,1973.[10]

8 Air 1993 SC p 2302

9 Times of India, Feb 8,1995 p6

10 Sec 357 A, victim compensation scheme:

Sec-357 of Cr.P.C enables the passing of an order of compensation by the trial court, the Appellate court the High Court or the court of Session in revision, at the time of passing judgment, out of the fine imposed in four cases:-

1. a. To the complainant, for meeting expenses properly incurred in the prosecution.

b. To any person, who has suffered loss or injury by the offence, when he can recover compensation in a Civil Court.

c. To a person entitled to recover damages under the fatal Accidents Act when there is a conviction for causing death or Abatement thereof and

d. To a bonafide purchaser of property, which has become the swajeet of theft, criminal misappropriation, criminal breach of trust, cheating or

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1- Every state Govt. in co-ordination with central Govt. shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who requires rehabilitation.

2-Whenever a recommendation is made by the court for compensation, the district legal service authority or the state legal service authority as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub –sec 1

3-If the trial court is satisfied, that the compensation awarded under sec 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendations for compensation.

4-Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the state or district legal service authority for award of compensation.

5-On the receipt of such recommendations under sub-sec 4 the state or the district legal service authority, shall after due enquiry-award adequate compensation by completing the enquiry within two months.

6-The state or the district legal service authority, as the case may be t alleviate the sufferings of the victim, may order for immediate first aid facility or medical benefits to be made available free of cost on the certificate of police officer not below the rank of the officer in charge of the police station or the magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

receiving or dispersing of stole property and which is ordered to be restored to its rightful owner.

2. Where there is an appeal against any sentence or fine, no compensation shall be paid till the appeal period lapses.

3. In all cases where no fine is imposed, the court may order the payment of compensation to the victims of crime who have suffered any loss or injury.

Section 358 of Cr.P.C 1973 provides for payment of compensation to the persons who were groundlessly arrested as a special case. Sec- 359 of the Cr.P.C 1973deals with the principle not exactly concerned with compensation to the victims of crime and under this sec. the complainant victim is entitled to claim only the expenses incurred in the launching of the prosecution for the loss or injury suffered by him. Similarly Sec-250 of the Cr.P.C 1973 contains another provision for the payment of compensation to an accused person in cases where he is discharged or acquitted as a result of finding no reasonable ground existing for launching such prosecution. Again Sec-237 of the code contemplates the payment of compensation to victims of crime by the Sessions court in the cases involving defamation of a person of all the provisions of the code Sec-357 (3) confer wider powers on the court to award compensation irrespective of the fine amount imposed. A close study of the provisions of the CR.PC concerning compensation to victims of crime reveals that though limited in its nature, scope and application the provisions at least visualize a minimum scheme of compensation for the victims of crime.

Sec 357 (Sec 545 old) makes provision for compensation to victims of crime under old sec such compensation could be ordered only where the court imposed a fine and the amount was limited to the amount of fine. Under the New provision compensation can be awarded irrespective of whether the offence is punishable for any loss or injury the court shall have due regard to the nature of injury under Sec-359 (Sec-546-A. old) an order can be made unless whatever the nature of the penalty imposed, whereas under Sec357 (Sec-545, old) no order can be made unless a sentence of fine has been passed in both cases discretion is left to the

court, and also powers are exercisable by courts of Appeal and Revision. The converse case of payment of compensation to be accused when the court finds the accusation was false and either frivolous or vexatious, is provided for by Sec-250 (new)

CRITICISM:

Sec-357, Criminal Procedure Code is regarded as a progressive piece of legislation as it recognized the philosophy of compensation simplified to the victim even when no sentence or fine is imposed as per Sec-357 B.Sec-357 (1) (a) is a primary example with no justification for its existence- prosecution expenditure is entitled reimbursement, even at the cost of the innocent citizen. If this not unjust enrichment? Payment of compensation under Probation of offenders Act, 1958 and Criminal Procedure code 1973, are both subject to the courts discretion but payment under criminal procedure code is possible only when the act is both a tort and a crime. Victim compensation lacks proper motivation Sec-357 criminal procedure code as its stands today doesn't provide speedy or sure relief. With regard to the above provisions the following are the main points of criticism

Firstly→ The Provisions are based on the discretion of the court, they unlike the west don't create a statutory right to compensation in favour of the victim.

Secondly→ There is no effective or comprehensive machinery for compensation recoverability. Though Sec-421 and 431 of Cr.P.C provide for compensation recoverability procedures, for this the victim would again have to resort back to courts thus snuffing out all hopes of expedient recoverability.

Thirdly→There is no provision which directs the courts to provide reasons for not awarding compensation.

Fourthly→ There are no statutory provision which provide for a separate administrative body which compensates the victim in lieu of the accused being economically incapacitated in doing so.

It is also worth nothing that courts in India have rarely resorted to these statutory provisions to exercise their discretionary powers to compensate victims of crime. The law commission of India had an

admitted fact that they are not particularly liberal in utilizing these provisions.

VICTIM COMPENSATION AND INTERNATIONAL LAW

The victim of crime may be a forgotten man of the Cr. Justice system of a state but under the international law the concept of state responsibility has emerged which has recognized the circumstances in which and the principles whereby the injured becomes entitled to redress for the damages suffered, as a consequence of international delinquencies either perpetrated by the state or any of its subjects. The principle according which a state bears the international responsibility for its internationally wrongful acts resulting in damage to the property or persons have come to be well established in several judicial pronouncements, like

I)Wimbledon Case II)The case relating the factory of Chorzow iii)The case concerning Phosphate in Moroco. Iv)The I am alone Case.

The state may incur international responsibility either by direct injury to the rights of another state or by a wrong full act or omission which causes injury to an alien. Thus state responsibility arises not only in connection with the treatment of aliens but also as a result of unlawful acts of state responsibility including acts which endanger environment e.g, pollution, ultra-hazardous activities by nuclear vessels or space vehicles in the national peace(e.g aggression) denial of national independence and the violation of other norms of international law.

COMPENSATION TO THE VICTIMS OF HUMAN RIGHTS VIOLATIONS

Though basically states have assumed the responsibility to compensate the victims of crime to some extent, particularly for the violation of fundamental rights guaranteed under their constitution at this international level compensation to the victims of Human rights violations, has equally been accepted by the international community, as revealed by several international covenants dealing with the Human

rights. The basic British constitutional document, the Magna Carta 1215, speaks of certain basic rights both civil and criminal to name a few

1. Adherence to the principle of proportionality in awarding punishments for penal offences.
2. Prohibition against imposition of fines and penalties contrary to law.
3. Prohibition against imprisonment or dispossession except by the legal judgment of the peers in accordance with the law of the land, etc.

The French National Assembly, in the Declaration of the Rights of the Man and of the citizen adopted in 1789 announced that ignorance forgetfulness or contempt of the rights of the man are the sale causes of the public miseries and of the corruption of Govt's. and therefore set forth in a solemn declaration the natural inalienable and sacred rights of man. The Geneva Convention for the protection of the sick and the wounded, 1864, is one of the earliest attempts of the world community to internationalize human rights. Protection of the rights of workers by conventions concluded through the international labour organization (ILO) are some of the noticeable features in the evaluation of the international human rights law. The United Nations General Assembly on December 10,1948 unanimously passed a resolution approving the universal Declaration of Human Rights "as a common standard of achievement for all peoples and of nations. The basic philosophy that lay behind the international covenants is that realization of the rights incorporated in the universal Declaration of Human rights is possible only if every human being has civil and political rights as well as economic, social and cultural rights.

JUDICIAL APPROACH

The criminal procedure code reflects the general law concerning compensation to the victims of crime to some extent the relevant provisions of the code are considered below.Sec-357 of Cr.P.C is the main provision dealing with the compensation to crime victims, other provisions having some bearing on the subject are sections-237 250 and 358 of the code of criminal P. 1973. Sec-545 of the old Cr.P.C dealt with the same subject matter through it was some what narrower in scope.

Sub-Sec 3 of Sec-357 was added, as recommended by the law commission in its 41st Report and it provides. When the court imposes a sentence of which fine doesn't form a part, the court may, when passing judgment order the accused person to pay, by way of compensation such amount as may be ordered to the person who has suffered any loss or injury by reasons of the act for which the accused person has been sentenced. The court has thus a very limited discretion under Sec 357 (1) it can award compensation only out of fine, if imposed on the offender. The courts have however much more discretion under sub-sec (3) of Sec-357 though only if fine doesn't form a part of sentence. Theoretically, the power of the court is unlimited. A. Magistrate can order for higher compensation than the amount of fine he can impose.

In Mohammad Sah and others Vs. Emperor[11]. The offender was convicted under Sec's 32, 149 & 148 of the I.P.C. he was awarded one year imprisonment and a fine of Rs.500, out of which Rs.400 were awarded to the heirs of the victim. The Lahore High Court held imprisonment to be substantial and therefore, five to be unwarranted. The court further held that compensation in any case would not have been payable to the heirs in view of the blame- worthiness on the part of the deceased. He was himself the aggressor and had encroached upon the land of the offender.

In Guruswami V State of Tamil Nadu[12], where it was held that in ease of murder it is only fair and proper when compensation is provided for the dependant of the deceased.

In Sarwan Singh V. St of Punjab.[13] The court laid down that the amount of fine should be determined on the basis of various factors including nature of crime No. of injuries and the paying capacity of the offender

11 AIR 1934 Lah 519
12 1979 3 SCC 593:1995 SCC(Cri)1132
13 1978 4 SCC 111

In Hari Singh Vs. Sikhbir Singh[14] case the apex court recommended to all courts to exercise power of awarding compensation liberally to "meet the ends of Justice"

In Rudal Sah Vs. State. of Bihar[15] Supreme Court declared that it could award in appropriate cases, monetary compensation where there had been a violation of the guarantee of life and personal liberty under Art-21 of the Indian constitution by the state. In this case petitioner was detained in the prison for more than 14 years even after his acquittal. There have been many occasions where the liberty has been used as a licence to anarchy and the Govt's lawlessness. In Bhim Singh V. St. of J&K[16].The court observed.

" When a person comes to us with the complaint that he was arrested and imprisoned with mischievous or malicious intent and his constitutional and legal rights are invaded in appropriate cases we have jurisdiction to compensate the victim by awarding suitable monetary compensation".

Following Rudhal Sah case the Supreme court in People's Union for democratic rights V. State of Bihar awarded compensation to the victims of police firing while disposing off a position under Art- 32 of the constitution. In M.J. Cherians case- the S/C directed the state of U.P to pay Rs.2,50,000 as compensation to each victim of rape.In,Chairman Railway Board v. Chandrima Das[17] where a woman Haniffa Khatoon was gang raped by some persons at the Raij Yatri Niwas at Howrah Station on Feb 26, 1998.The Calcutta high court awarded Rs 10 lakh compensation to the victim on the ground that the incident had occurred in a building belonging to the railways.

In a recent case the Supreme court in Mahmood Nayyar Azam v. State of Chhatisgarh.[18] Involving a doctor who was falsely implicated in multiple criminal cases was photographed with a placard wherein self

14 1993 2 CRI 373
15 1977 2 SCC634
16 1985 4 SCC 677
17 2000 2 SCC 465
18 2012 8 SCC 1

humiliating words were written, and the same was circulated in the general public and used in revenue proceedings, in this backcloth the court granted him INR500000 as compensation for custodial humiliation.

CASES WHERE NO COMPENSATION IS PROVIDED UNDER THE SPECIAL LAW

1. **PREVENTION OF FOOD ADULTERATION ACT 1954.**

It is interesting to note that the importance legislation like the prevention of Food Adulteration Act 1954 doesn't have any provision for claiming compensation directly from the offender. This being the ease the victims of food adulteration have either to rely upon the Cr.P.C or the General Civil laws to claim compensation for the loss or injury by them.

2. **PROTECTION OF CIVIL RIGHTS ACT, 1955.**

The protection of Civil Rights Act, 1955 is a significant Social legislation which aims at protecting the civil rights particularly of those sections of society who were once branded as the untouchables. Again like several other social legislations the protection of civil rights act also fails to provide for any scheme of compensation to the victims of offender.

3. **DOWRY PROHIBITION ACT, 1961**

The dowry prohibition Act 1961 is a progressive piece of legislation which is penal in nature and punishes both the giver and receiver of dowry. No provision exists in the Dowry prohibition act for payment of compensation to the victims for dowry offences.

4. **ENVIRONMENT PROTECTION ACT 1986**.

Though the Environment Protection Act was passed with laudable objectives it could not be effective for the inherent loopholes presence in it. The Act proves to be helpless not only in averting pollution but also in providing compensation to the victims of environmental pollution.

Thus a review of the special laws which directly or indirectly deal with the subject of compensation to the victims of crime reveals that on the whole, special laws are not adequately taking care of victims

suffering's and foes and are not food-proof in their coverage of victim compensation schemes.

Conclusion

A victim is always a victim, so compensation should not be dependent on the conviction of the accused. Where the accused could not be apprehended or is acquitted by the court the victim should not be deprived of getting compensation if his case is genuine. A careful peep into the Indian criminal justice system and criminal process reveals that victims of crime in India are neither compensated nor allowed to participate effectively in the investigatory, prosecutor and sentencing process. Thus a comprehensive legal code on the pattern of United Kingdom for victim compensation is a dire necessity, providing for fair treatment, assistance and adequate compensation to victims of crime. Only on embarking on this step, justice in its more altruistic forms can be achieved.

Suggestions

The Malimath committee in its report "criminal justice reform in India", has made various recommendations to reform the position and role of the crime victim. The rights of the victim to participate in the criminal trials will ensure their access to justice. The proposal for a victim compensation law enshrining the states obligation to compensate victims even when the victim is not apprehended is a step towards a real protection of victims of crime and of human rights violations. Indeed ,any criminal legislation should be based on the respect of the rights of the accused and the victim. Hence a comprehensive legal code should be enacted providing for fair treatment, assistance and adequate compensation to victims of crime. It should be made mandatory for the state to pay compensation to the victims of crime of not only the private criminal wrongs but also for the criminal acts perpetrated by its agencies.

In India there is an urgent need to establish a "compensation Board" and of quick disposal of cases of victims of crime and lock up deaths in police custody. A victim is always a victim, so compensation

should not be dependent on the conviction of the accused. In cases involving abuse of power by the authorities it should be made mandatory to recover the compensation amount awarded personally from the official of the state who is responsible for such abuse of power. Laws should be enacted by the parliament adopting and incorporating the principles concerning payment of compensation to the victims by the international treaties and conventions so as to strengthen the legislation relating to payment of compensation.

Legislation As A Source Of Law

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Abstract

The legislation as a forceful source of law is deliberated concept. Legislation in the widest sense means to make new rules for human conduct and includes executive fiat, judicial legislation and Parliamentary legislation. The term is used sometimes to include every expression of the will of the legislature whether it lays down a legal rule or something else, such as declaration of war or peace or ratifying a treaty with a foreign state; alteration of the calendar or establishment of a uniform time throughout the realm or alteration of coinage. To legislate is to make new law in any fashion. Legislation is synonym to laws that are enacted by a politically representative body in its legislative capacity through the formal legislative process. The authors have tried to express from birds eye view how Legislation is considered as important source of law and how it nourishes the legal system of a country like India. The authors have highlighted the main components of legislation in order to make its readers to understand the concept easily by elaborating meaning, scope, nature kinds, distinguishing legislation and other sources of law and judicial delineation on it.

Keywords: *Legislation, Supreme legislation, subordinate legislation, colonial, customary, local etc.*

1. INTRODUCTION

i. MEANING AND DEFINITIONS

The term legislation is derived from two Latin words, legis meaning law and latum meaning to make, put or set. Etymologically, legislation means the making or the setting of law. The common meaning of legislation is the making of law. It may be defined as the promulgation

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of legal rules by an authority which has the power to do so.The term legislation is used in different senses. In a wide sense it includes all methods of law making and therefore would take in judge-made laws also. However, in strict sense, legislation is the laying down of legal rules by the sovereign or sub-ordinate legislator. According to Sir Henry Maine legislation is the last ameliorative agency of social reform and social change after legal fiction and equity. Legislation in its popular and non-technical sense means the enactment of legislature-whether it takes the form of an autocratic prince or of a parliamentary assembly, is the assumed organ of the entire society and is empowered by the community to impose obligations as it deems fit on the members of the community.[1] Legislation, in its strict sense, means the making of rules and laws to be followed and enforced by the courts of the state. These rules or laws can only be made by a competent law-making body, i.e. a body which, under the constitution of the state, is empowered to make laws. Legislation is that source of law which consists in the declaration of legal rules by a competent authority. The term is sometimes used in a wide sense to include all methods of law-making. To legislate is to make new law in any fashion. In this sense, any act done with the effect of adding to or altering the law is an act of legislative authority.[2] In its most significant present day sense, the term legislation is applied to the deliberate creation of legal precepts by an organ of government which is set up for this purpose and which gives articulate expression to such legal precepts in a formalized legal document. These characteristics of legislative law distinguish it from customary law, which manifests its existence through actual observance by the members of a group or community unaccompanied by authoritative approval by a governmental organ (at

1 Ancient law, 24-28 Ed. Raymand Firth 1963)

2 Fitzgerald, P.J: Salmond on Jurisprudence. (Twelfth Edn. Indian Economy Reprint to 2014).Universal Law Publishing Co. Pvt .115

least until it receives formal recognition in a judicial decision or legislative enactment).[3]

Legislation in its ordinary sense may include the law made by any source, such as precedents, customs, conventional law, etc. Thus, when judges establish a new principle by means of a judicial decision, they may be said to exercise legislative and not merely judicial power.[4]

Prof Grey defined legislation as nothing but the formal utterances of the legislative organs of the society.

Broadly, the term is used in three senses: Firstly, in its broadest sense, it includes all methods of law making. In this sense it includes judge-made rules of law, and even the particular rules of law or the rights created at law between parties to contract. In the second sense, legislation includes every expression of the will of the legislature, whether directed to the making of law or not. Every will of legislature, in this sense, is an instance of legislation, irrespective of its purpose and effect. The legislature does not confine its action to the making of law, yet all its functions are included within the term 'legislation', for example, the legislature may enter into a treaty with a foreign state. In this example, there is no creation of new rule of law. Thirdly, legislation is used in strict sense. In this sense it means making of rules and laws to be followed and enforced in the courts of the state. These rules or laws can only be made by a competent law making body, i.e., a body which, under the constitution of the state is empowered to make laws. This sense is more popular and while considering legislation as a source of law, we take the third meaning of the term legislation.[5]

Legislation in the widest sense means to make new rules for human conduct and includes executive fiat, judicial legislation and Parliamentary legislation. The term is used sometimes to include every

3 Bodenheimer, Edgar; *Jurisprudence: The Philosophy and Method of The Law*, (Seventh Indian Reprint, 2011). Universal Law Publishing Co. Pvt. Ltd. P. 326

4 See supra note 2 at 115

5 Aggarwal, Nomita; *Jurisprudence (Legal theory*). (Ninth Edition, 2012) Central Law Publications, 107, Allahabad p 136

expression of the will of the legislature whether it lays down a legal rule or something else, such as declaration of war or peace or ratifying a treaty with a foreign state; alteration of the calendar or establishment of a uniform time throughout the realm or alteration of coinage.

According to Austin-"Legislation includes activities which result into law-making or mending, transforming or inserting new provisions in the existing law". Legislation is the making of law or creating of new legal norms by a formal and express declaration by some authority (called legislature) which is recognized by the courts of law as adequate for the purpose.[6] Blackstone pointed out that the law which has its source in legislation may be termed as enacted law and all other forms may be distinguished as un-enacted laws. To some writers, notably Bentham and Austin, legislation signifies a form of law-making. The term should, however be restricted to that process of legal evolution which consists in the formulation of rules by the authority appointed by the constitution for the purpose. Legislation is an advanced method of legal development and is the characteristic mark of mature legal systems. In technical sense the term legislation means a statute which is enacted by a legislative organ as distinguished from other organs which designated as organs of executive or judicial power. Legislation is a primary source of law, comprising of Acts, also referred to as statutes, and delegated or subordinate legislation. According to Holland: "the making of general orders by our judges is as true legislation as is carried on by the crown." Legislation is that source of law which consists in the declaration of legal rules by a competent authority. When judges by judicial decisions lay down a new principle of general application of the nature specifically reserved for the legislature they may said to have legislated, and not merely declared the law. It is not difficult to perceive the dividing line between permissible legislation by judicial directives and enacting law-the field exclusively reserved for the legislation.[7]

ii. NATURE OF LEGISLATION

6 Webster's new international dictionary (1957).

7 P.Ram Chander Kumar v. State of Karnatka, (2000) 4 SCC 578

All Acts passed by legislature do not necessarily mean formulation of rules by it. The legislature may ratify, may alter the coinage, declare war, annex or abandon territories through passing of Acts. In a broad sense these Acts will also come under legislation, but, in the sense in which we are interested, that is, legislation as source of laying down legal principles, these Acts are not legislation.[8] Law originating in legislation was included by the Roman lawyers under the description of *Jus Scriptum* which the contrasted with the customary law or *jus non scriptum*.[9]

It is said to be supreme legislation, when the authority under which the law is enacted is a supreme authority or a sovereign law-making body, like a legislature of an independent and sovereign state. Legislation tends with advancing civilization to become the nearly exclusive source of law. It may be the work not only of an autocrat or of a sovereign Parliament, but also of subordinate authorities permitted to exercise the function. The making of general orders, or of by-laws by a railway company, is as true legislation as is carried on by the crown and the estates of the realm in Parliament.[10]

Legislation which has been defined by various writers as any form of law-making is, however, restricted to a particular form of law-making. As observed by Salmond, "Legislation is that source of law which consists in the declaration of legal rules by a competent authority.[11]" Such a competent authority is styled as "legislature" of a country and it members are called "legislator". The law-making by the legislators is distinguishable from law-making by the courts. Though the judges are also said to make laws through their decisions, it is not legislation in the strict sense of the term, for it is known as indirect legislation or judge-made law.

8 Sarkar,A.K; *Summary of Salmonds's Jurisprudence*. (Third Edition, Tenth Reprint, 1997). Bombay, N.M Tripathi Private Ltd.p 53

9 Subbarao Venkata, G.C; Jurispendence & legal theory. (9thEdn., Reprint,2001). Eastern Book Company, Lucknow. P.113

10 Menon N.R Mdhava, Holland on Jurisprudence (thirteenth edition-Indian economy reprint 2008) Universal Law Publishing Co. Pvt. Ltd. p 76

11 Salmond, Jurisprudence, 12th ed., p. 115

There is a difference between law making by the legislature and by courts. Legislatures lay down rules for the future (of course, sometimes, retrospective effect is given to certain statutes) and are not concerned with an actual dispute. The court is concerned with the actual dispute and applies the rule that it formulates to the case on hand. The rule so formulated becomes binding till altered or abrogated by a statute or by some higher court. The court is concerned with the immediate; legislature with the future. For the court law making is incidental; for the legislature it is the central function.[12]

In England, a distinction is made between statute law or written law and common law. Only the former is called legislation. In India, however, there is no common law. Here legislation or the enacted law can be distinguished from customary and personal law. In modern times, legislation has become the most important source of law. It can be distinguished from other sources of law.

Austin and Bentham contend that legislation is always superior to precedent. A statute is made after due deliberation and not in the haste in which a judge dispose of his case. Other grounds have also been given in support of the superiority of statutes. It is certain, clear, comprehensive, and easily accessible. It passes through the scrutiny of a great number of men before it becomes law.[13] Prof Dias observed that legislation by Act of Parliament may be described as law made deliberately in a set form by an authority which the courts have accepted as competent to exercise that function.[14]

Among the sources of law, the most important, today, as so recognized, is that of legislation. The rules of justice and right were earlier enforced, by the state which did not legislate much. Rules which were customs immemorial or which were rooted in faith or religious principles, were enforced by the state. All over the world, religion had

12 Supra note 8 at 53

13 Tripathi, Bijai Narain Mani; *Jurisprudence (Legal theory).* (Eighteenth Edition, Reprint 2010) Allahabad Law Agency. p 232

14 Dias, jurisprudence (1964), p.77; 4th edn, (1976), p 218

occupied a predominating part in the declaration of law. Even the savage had his so called law rooted in magic. His religion was belief in spirits.[15]

Law in the legislative sense means the assent of the three-fold, the House of Commons, the House of Lords and the King. Otherwise, it is not an Act of Parliament or law binding upon the courts. In India the principle as laid down in the *Stockdale v Hansard* can be applicable to Parliament and State legislatures also. A mere opinion of formal resolution of the legislature is not law so it is not submitted to the executive for its approval and passed with the solemnities required for the enactment of the statute. Legislation from the point of view of Indian legislative practice, is law which is enacted by a competent authority authorized by the constitution to make such laws as well as rules, by-laws and regulations made by virtue of statutory powers. Legislation, therefore, does not include administrative orders which are traceable not to any law made by the legislature but drive their force from executive authority.[16]

The view of analytical school is that typical law is a statute and legislation is the normal process of law making. The exponents of this school do not approve of the usurpation of the legislative functions by the judiciary. They also do not admit the claim of custom to be considered as a source of law. There view is that the legislation is the least creative of the source of law.[17]

James Carter says: "it is not possible to make law by legislative action. Its utmost power is to offer a reward or threaten a punishment as a consequence of particular conduct and thus furnish an additional motive to influence conduct. When such power is exerted to reinforce custom and prevent violations of it, it may be effectual and rules or commands thus enacted are properly called law; but if aimed against

15 Sethna M.J.; Jurisprudence (Third revised edition, 1973), Lakhani Book Depot, Bombay 4 p. 218

16 Dhyani, S.N; Jurisprudence (A Study of Indian Legal Theory).(Second Edn. 1985) . Metropolitan Book Co. (Pvt.) Ltd. New Delhi. P.174

17 Mahajan, V.D; *Jurisprudence and Legal theory.* (Fifth Edition, Reprint, 2012). Eastern Book Company, Luckhnow. P. 159

established custom they will be ineffectual. Law not only cannot be directly made by human action, but cannot be abrogated or changed by such action."[18] According to this view, legislation has no independent creative role at all. Its only legitimate purpose is to give better form and make more effective the custom spontaneously developed by the people.

The extreme views of the analytical school and historical school requires modification. The error of the analytical school lies in regarding legislation as the sole source of law. Custom and precedent have equally valid claims to recognition as material sources of the law. The error of historical school lies in the supposition that legislation can never be a source of new law. A Dean Pound points out, there are two types of legislation-an organization type such as the historical school conceived, and a creative type. The existence of the latter can hardly be doubted in these days of abnormal legislative activity. Enactments like the Workmen's Compensation Acts are sufficient to dispel any lingering doubts on this point.[19]

The term is used sometimes to include every expression of the will of the legislature whether it lays down a legal rule or something else, such as declaration of war or peace or ratifying a treaty with a foreign state[20], alteration of the calendar or establishment of a uniform time throughout the realm or alteration of coinage.[21]in this use, every Act of Parliament is an instance of legislation, irrespective altogether of its purpose and effect. The legislature does not confine its action to the term legislation. An Act of Parliament may do no more than ratify a treaty with a foreign state, or alter the calendar, or establish a uniform time throughout the realm, or make some change in the style and title of the reigning sovereign, or alter the coinage, or appropriate public money, or declare war or make peace, or grant a divorce, or annex or abandon territory. All this is legislation in a wide sense, but it is not that

18 Carter; Law, its origin, growth and function, p.130
19 Supra note 9 at 113
20 Supra note 13 at 241
21 Dwivedi, S.P; jurisprudence and legal Theory. (5thEdn. 2007). Central Law Publications. p. 341

declaration of legal principles with which, as one of the sources of law, in the sense of legal rules, we are here alone concerned.[22]

A law that has its source in legislation may be most accurately termed enacted law, all other forms being distinguished as un-enacted. The more familiar term, however, is statute law as opposed to the common law; but this, though sufficiently correct for most purposes, is defective, inasmuch as the word statute does not extend to all modes of legislation, but is limited to Acts of parliament.[23]Blackstone, however, used the expression 'written and unwritten law' to show the distinction in question. The distinction so made by Blackstone is deduced from Romans who termed *jus non scriptum* for unwritten law and *jus scriptum* for written law. Though the distinction is important to some extent, it will not be always correct to call legislation as written law, since law from the very beginning is written reason.

iii. LEGISLATION AND OTHER SOURCES OF LAW

As customs had an important place in the early societies for governing human relation in modern times its place has been taken by legislation. In modern technological societies new problems of complex character have emerged which need urgent answers to satisfy human needs and human wants. This can be done alone quickly and peacefully through legislation which can bring about revolution through peaceful social evolution and gradual change. Customs are neither coherent nor definite nor clear nor precise nor a convenient instrument of social change. Much is left to the judiciary to recognize the customs provided it does not offend public policy or public interest. Sometimes precedents produce sound law, but at times, bad or fallacious judgments are responsible for bad law by production of unsound precedent. If a precedent is unsound, it is very difficult to remedy the defect and the procedure is a lengthy one. At first the trial judge in the same High Court must decide the case at hand according to the precedent. The aggrieved party may then go in appeal and the appellate court may give the right

22 Supra note 2 at 115
23 Ibid at 116

judgment. The defects of legislation can more readily be got over by a proper judicial interpretation of statute or by amendment of the Act. It is this abrogative power and amending facility that gives legislation superiority over precedents.[24]Precedents are not effective weapon to bring quick social changes. Traditionally both custom and judicial precedents lag behind social needs and fail to meet them. Hence legislation is the only course left to meet the needs of the society. Holmes rightly observes 'legislation of today is to meet the social needs of yesterday'. It, therefore, continually attempts to adjust the legal system of a society which is constantly outgrowing that old system. It always marches on to bridge the gulf between the existing law and the current needs of the society. It is in this way legislation can give direction, form and continuity to social change which is not possible through customs and judicial precedent.

Early law is conceived as jus, the principles of justice, rather than lex, the will of the state. The function of the state in its earlier conception is the enforcement of law, the law in the sense of immemorial customs sanctioned by religious faith or practice and sometimes claiming origin in the divine being. This primitive alliance of law, religion and custom gradually gave place to the idea that law depended for its material contents on the tacit or express will of the state, that political rulers could change and subvert the laws. Thence started the beginning of this most powerfull instrument of the state, namely the making of law. Today, in advanced civilization legislation is considered the best form of law making and the other instruments are considered as the relics of the infancy of law.[25]

Finally the statute law is greatly superior to case law in point of form. The production of legislation assumes the form of abstract propositions, but that of precedent is merged in the concrete details of the actual cases to which it owes its origin. Statute law is, in general , brief, clear, easily accessible and knowable, while case law is buried

24 Supra note 5 at 142
25 Supra note 8 at 56

from sight and knowledge in the huge and daily growing mass of the records of bygone litigation. Case law is gold in the mine-a few grains of the precious metal to the ton of useless matter-while statute law is coin of the realm ready for immediate use.[26]

iv. KINDS OF LEGISLATION

Legislation is of two kinds;

i. Supreme Legislation; and
ii. Subordinate Legislation

This classification has been given by Salmond which is based upon British legislative system and practice. According to him legislation is either supreme or subordinate. In England Parliament is said to be a supreme law making body and all legislation directly emanating from British Parliament is the example of supreme legislation-for laws enacted by the parliament cannot be declared illegal or ultra vires by the courts in England. The maxim that king can do no wrong' robbed the king of his prerogatives. The House of Lords also submitted to the supremacy of the parliament and observed:[27] *"We sit there as servants of the Queen and the Legislature. Are we to act as regents over what is done by Parliament with the consent of the Queen, Lords and Commons? I deny that any such authority exist……"*with this back ground in view Salmond divided legislation into these two categories.

a. SUPREME LEGISLATION

Legislation is said to be supreme legislation when the authority under which the law in enacted is supreme authority or a sovereign law-making body, like a legislature of an independent and sovereign state. It is supreme because no other authority can annual, modify or control it. The laws enacted by the parliament in England are example of supreme legislation. The laws enacted by parliament of India and USA cannot be called supreme legislation because the validity of its laws can be challenged in a court of law, an Act, or portion it, passed by legislature

26 Supra note 2 at 129
27 Lee v. Bude and Torrinaton Junction Rail Co.,(1871) L.R. 6 C. P. 576

may be declared ultra vires by the court. The British Parliament, in every sense, is a sovereign law making body, because there is no restraint on its absolute authority to make laws. Its laws cannot be questioned in the British Courts.[28] The supreme legislation is by the sovereign power of the state. Therefore, any other authority within the state can, in way, control or check it. A classical exposition of this principle can be found in Dicey's book, 'The Law of the Constitution'. There is no legal limitation upon its power. Indian parliament is also supreme. Though there are certain constitutional restrictions upon its power, it is not subject to any other legislative authority within the state.[29] Broadly speaking , it must function within constitutional competence and without infringing fundamental rights. If any law made by the parliament is in contravention of the constitutional competence and is in violation of Part III of the constitution, it will be the subject matter of judicial scrutiny.

b. SUBORDINATE LEGISLATION

Subordinate legislation is that which proceeds from any authority other than the sovereign power, and is, therefore, dependent for its continued existence and validity on some superior or supreme authority. All other powers exercised by agencies other than British Parliament are the forms of sub-ordinate legislation. These bodies exercise rule-making powers as a delegate of the Parliament and remain subservient to Parliament. Legislation6 is said to be subordinate when the legislature is a subordinate law making body deriving its power from the sovereign authority, i.e. a higher and paramount legislature. [30] Subordinate legislation owes its existence, validity and continuance to the supreme authority.[31] It is subordinate in many sense; it can be repealed, altered or amended by the supreme legislation.[32] Delegated legislation refers to laws made by an authority who have been delegated law-making powers by an Act of Parliament. It comprises of regulations,

28 Supra note 5 at 136
29 Supra note 13 at 234
30 Supra note 15 at 216
31 Supra note 29 at 234
32 Supra note 8 at 55

rules, by-laws, ordinances and may be referred to collectively by a variety of names; statutory rules, statutory instruments or regulations. Many factors have been responsible for the growth of delegated legislation. The concept of the state has changed and instead of talking of a police state, we think in terms of welfare state. This change in outlook has multiplied the functions of the government. This involves the passing of more laws to achieve the ideal of a welfare state.[33]

v. TYPES OF SUBORDINATE LEGISLATION

a. **COLONIAL LEGISLATION:** The countries which are dependent and are under the control of some other nation are devoid of supreme law-making power. Laws made by them are always subject to the supreme legislation of the country under whose control they are. Britain has had many colonies and dominions, the powers of self-government conferred upon them are subject to the control of the imperial Parliament. The parliament at Westminster may repeal, alter, or supersede any colonial legislation. For instance, though the Parliament of the Dominion of New Zealand exercises throughout that country many of the ordinary powers of a sovereign assembly, yet the dominion Parliament will be found to be non-sovereign legislative body and bears decisive marks of legislative subordination. The action of dominion Parliament is restricted by law which it cannot change; and are changeable only by imperial Parliament. Again, New Zealand Acts , even when assented to by the Crown, are liable to be treated by the courts in New Zealand and elsewhere throughout the British Dominions as void or unconstitutional on the basis of their coming into clash with the laws of imperial Parliament which the colonial legislature has no authority to touch.[34]

In colonies and other dependencies the power of the local legislature is derived from and controlled by the imperial legislature. But in some cases it has been held that within its delimited field the

33 Supra note 17 at 162

34 Dicey, An introduction to the study of the law of the constitution, pp 103-104; also Jenkyns, British Rule and jurisdiction beyond seas (1902), p. 70

dominion or colonial legislature is supreme and it possesses even power of delegation. The countries which are not independent, and are under the control of some other state have no supreme power to make law. Such countries are of various classes; as colonies, dominions, protected or trust territories etc. the laws made by them are subject to the supreme legislation of the state under whose control they are. Thus, it is subordinate legislation.[35]

Formerly Britain had a vast empire with numerous colonies. The colonies had written constitutions which were the Acts of the Imperial Parliament. The legislatures of the colonies were the creations of the British Parliament and were bound by the statutes so enacted. Parliamentary omnipotence was expressly declared by the Colonial Laws Validity Act, 1865 which provided that the dominion courts are bound by the Acts of the Imperial Parliament in case of conflict between the Act of the parliament and the Act of the Dominion legislature. There was however, a convention that the Imperial Parliament should not legislate for the self-governing dominions except on request and consent. This convention was enacted as law by section 4 of the Statute of Westminster 1931. In theory Parliament retains the legislative supremacy over the dominions yet in practice and reality Parliament would not dare to legislate for the British self-governing territories which are now the members of the British Commonwealth of Nations. In fact, no dominion, any longer recognize the supremacy of the British Parliament. By mere fiction, however, supremacy of the British parliament over British dominions still exists, of course the maxim of *delegates non potest delegare* (a delegate cannot delegate) does not apply so far as colonial legislatures are concerned. Hence, colonial legislature can further delegate its legislative power to other bodies which themselves are dependent upon colonial legislature.[36] The power of self government entrusted to the colonies and other dependencies of

35 Supra note 13 at 235

36 Hodge v. Queen (1884) 9 App. Cas. 117 at 132, Inre Delhi laws Act case, AIR 1951 SC 332

the crown were subject to the control of the Imperial legislature. But in some cases it has been held that within its delimited field the dominion or colonial legislature is supreme and it possesses even power of delegation.

b. **EXECUTIVE MADE LAW:** A government consists of three branches or organs: Legislative, executive and judiciary. These three organs may be separated and independent of each other. Sir Ivor Jennings has defined Administrative law as the law relating to administration which determines the organization, powers and duties of administrative authorities in the state.[37]The legislature not infrequently makes a skeleton enactment conferring upon the executive a rule-making power for carrying out the intentions of the legislature. The rules made in pursuance of this power of delegated legislation have the force of law. They are liable, however, to be superseded by the legislature if it so minded. Thus this kind of legislative power possessed by the Executive is a species of subordinate legislation.[38]

Modern states are of vast complexity**.** Statutes today cannot cope with all the details that may be involved in their implementations. They frequently entrust the executive government with the function of supplementing statutory provisions by framing detailed rules and regulations. It is also the prerogative of the executive government, when territories are conquered or annexed, to frame laws for their governance.[39]

The essential function of the executive is to conduct the administrative departments of the state, but it combines with certain subordinate legislative powers which have been expressly delegated to it by Parliament or pertain to some department of the executive government the duty of supplementing the statutory provisions by the issue of more detailed regulations bearing on the same matter. This is

37 Mittal, Himanshi; *Jurisprudence.* (2013, Edition). Universal Law Publishing Co. Pvt. Ltd. New Delhi –India. P 111

38 Supra note 9 at 114

39 Singh Vishal; *Jurisprudence.*-II(Fifth Ed. Reprint 2014-15, Singhal Law Publications. Delhi -84 p. 162

now known as delegated legislation a principle which has been recognized by most of the countries of the world.

Sometimes Parliament authorizes the Minister of the crown to legislate to give effect to the intentions of this legislature. Such legislation takes the form of (i) the statutory order in council and (ii) the departmental regulation. Both are called statutory instruments appear in the form of 'rules', regulations, orders, warrants, schemes, notifications, by-laws and are subject to parliamentary and judicial control.

c. **JUDICIAL RULES:** The judiciary too possesses delegated legislative powers. The higher judiciary often frames rules for the regulation of their own procedure and also that of the subordinate judiciary. Legislative power of rule making is delegated to the judiciary and the superior court is authorized to make rules for regulation of their own procedure in exercise of their power. In India, the Supreme Court and the High Court's both have the power to make rules for their respective procedures and administration.[40]Supreme Court has the inherent power to regulate its proceedings relating to the conduct of a person appearing before it, in and out of court, in so far as such conduct has a bearing on their professional relations and ethics. Apart from this inherent jurisdiction, the Constitution in Article 145 itself authorized the court to make rules for regulating generally "the practice and procedure" of the court, which must be construed in its fullest amplitude and must include regulating the conduct of all persons appearing before the court, in relation to the business of the court.[41]

d. **LOCAL LAWS:** Local bodies are given powers to make bye-laws concerning their local matters. By-laws made by local bodies are municipal corporations, Municipal Boards, Zila Parishads. There is more scope for granting very wide powers to Panchayats. Thus, there is a possibility of exposition of this kind of subordinate legislation in our country. Municipal bodies enjoy by delegation from the legislature a

40 See Articles 145 and 227 of the Indian Constitution.

41 The conduct of Advocates and their assistants in relation to the business of the court must form the subject matter of regulation by the rules of the court, see Inre Sant Ram, AIR 1960 SC 932 at 934

limited power of making regulations for the area under their jurisdiction-concerning water, land, house –tax and other forms of rules. These bodies are delegated powers by the Act which brings them into being to frame bye-laws for carrying out various activities entrusted to them. According to Allen; " By a series of enactments, notably the public Health Acts, 875-1976, the Municipal Corporations Act, 1882 and the Local Governments Acts, 1888-1933, local authorities-county, borough, rural and urban district councils-have powers to enact bye-laws binding upon the public generally , for public health and for good order and government'. Offences against those by-laws are punishable on conviction by summary process by fines usually not exceeding L5. The range of subjects dealt with is immense: to take the commonest, we may note building, advertisements, care of the sick, cleanliness of dwelling-houses, housing of the working class…..and the conduct generally of persons in public places. All these matters, and their many analogs in local government, count for no less in the daily lives of ordinary citizens than the enactments of Parliament. The far-off dignity of the House of Commons, though to the instructed it may symbolize the majesty of the constitution, to the plain law-abiding man is but a name compared with the immediate discipline of magistrates, policemen, and inspectors."[42]

e. **AUTONOMOUS LAWS:** The great bulk of enacted law is promulgated by the state in its own person, but in exceptional cases it has been found possible and expedient to entrust this power to private bodies. When the supreme authority confers powers upon a group of individuals to legislate on the matters entrusted to them as a group, the law made by the latter is called autonomic law and the body is known as autonomous body.[43]The law gives to certain groups of private individual's limited legislative powers touching matters which concern themselves. A university may be given power to make rules binding upon its members. A registered company may also be given certain powers. These rules too

42 Supra note 17 at 161
43 Supra note 31 at 234

are made by them in accordance with an Act of parliament hence these constitute examples of subordinate legislation.

The power is given for the sake of convenience and also because of an awareness that legislation is not a function exclusively of or limited to state. Within the state certain groups, organizations, special interests, will surely make their own rules for better management of their own affairs. The state recognizes these rules even though they emanate from private groups.[44]

vi. DELEGATED LEGISLATION

Another kind of subordinate legislation is executive legislation or delegated legislation. It is true that the main function of the executive is to enforce laws but in certain cases, the power of making rules is delegated to the various departments of the government. This is called subordinate or delegated legislation. In India it was observed in *M/s Tata Iron and Steal Co. Ltd. versus Their Workmen*[45] that the delegation of legislative powers is however permissible only when the legislative policy and principle is adequately laid down and the delegate is only empowered to carry out the subsidiary policy within the guidelines laid down by the legislature. This term has two senses-

(1) It means the exercise of power that is delegated to the executive to make rules.

(2) It means the output or the rules or regulations etc. made under the power so given.

vii. REASONS FOR DELEGATED LEGISLATION

(a) **WANT OF TIME:** The Parliament is so much occupied with matters concerning foreign policy and other political issues that it has not time to enact social legislation. Therefore, Parliament frames only the broad rules and principles, and the departments are left to make rules. If it devotes its time in laying down minor and subsidiary details of every legislation by making all the rules required under it, whole of its time

44 Supra note 8 at 56

45 AIR 1972 SC 197

would be consumed in dealing with a few Acts only and it would not be able to cope with the growing need of legislation.

(b) **EXPERIMENTATION:** Some Act of Parliament provide for their coming into operation in different localities or different dates according to their suitability and as a matter of experiment. For this purpose, the ministers are given powers to make orders about the date of its application.

(c) **TECHNICALITY OF THE MATTERS:** With the progress of the society things have become more complicated and technical. All the legislators may not know them fully and hence, they cannot make any useful discussion on it. The legislators not being experts or technicians cannot work out details of such laws. Therefore, after framing of the general policy by the Parliament, the government departments or other bodies who know its technicalities may make laws.[46]Thus, once the Parliament decides to restrict the use of dangerous drugs, it must be left to the Medical experts to decide as to which drug should be taken dangerous. It may not be laid down by the Parliament. Moreover, such a list may have to be changed when new aspects are unfolded by research.

(d) **LOCAL MATTERS:** There are matters which concern only a particular group of profession. Any legislation on these matters needs consultation with the people of that particular locality, group or profession.

(e) **FLEXIBILITY:** To adopt the law according to future contingencies or any other adjustments which are to be made in an Act in future can be done efficiently and effectively only when a small body is given the powers to do so. As observed by Wade and Phillips that delegated legislation meets the needs of times "that something less cumbrous and more expeditious than an Act of Parliament shall be available to amplify the main provisions, to meet unforeseen contingencies and to facilitate adjustments that may be called for after the scheme has been put into operation.[47]

46 Supra note 13 at 249

47 Wade & Phillips , Constitutional Law p. 608 (1965)

(f) **EMERGENCY:** During the times of emergency, quick and decisive action is very necessary, and at the same time, it is to be kept confidential. The parliament is not at all fit to serve this end. Therefore, the executive is delegated the power to make rules to deal with situations. In England, the Defence of Realm Act, 1914-15, The Emergency Powers Act, 1920 and the Emergency Powers (Defence) Act, 1939-40 are examples of such delegation during the First and Second World Wars.[48]A modern society is many times faced with situations when there is a sudden need of legislative action. There may be threats of war, epidemics, floods, economic depression and the like. These situations cannot be met adequately in the want of the executive having stand by powers. The legislature cannot meet at short notice and turn out legislation on the spur of moment. It is, therefore, thought necessary to arm the government with powers to take action at a moment's notice by promulgating necessary rules and rules and regulations in accordance with needs of the situation.[49]

viii. DANGERS OF DELEGATED LEGISLATION

Prof Keith described the dangers of the delegated legislation, important of them are-

(a) Legislation may be passed in a skeleton form and wide powers of action to make laws and to impose tax may be delegated.

(b) Parliament gets inadequate time to scrutinize the regulations.

(c) Some of the regulations attempt to deprive the subjects of recourse to the law courts for protection.

(d) The procedural advantages of the crown against the subject has improved the position to some extent but renders it difficult for him to obtain redress for illegal actions done under the authority of delegated legislation.

Keeton has summarized the dangers under two heads;

a. Excessive power may be delegated.

48 Supra note 13 at 249

49 Supra note 21 at 348

b. The Government Departments may assume a wider legislative competence than what the Parliament has granted.[50]

ix. SAFEGUARDS AGAINST THE DELEGATED LEGISLATION

In order to ensure that delegated legislation is not misused, it has been subjected to three-fold controls, namely;

(a) PROCEDURAL CONTROL: it is not always possible for the parliament to exercise effective control over delegated legislation. Certain procedural safeguards are necessary to keep a constant watch over the exercise of power by the executive or administrative authorities. The methods of procedural control may include[51]

i. Prior consultation of interests which are likely to be attached by the proposed delegated legislation.

ii. Prior publicity of proposed rules and regulations, and

iii. Publication of delegated legislation being made mandatory.

It is necessary that due publicity should be given to the delegated legislation, because without such publicity it may be declared ultra vires. In India there is no provision regulating publication of delegated legislation. But it has however been admitted by the Supreme Court that the enforcement of rules which have not been published is against the rules of natural justice.

In *Harla versus State of Rajisthan*, the accused had been convicted for an offence under the Jaipur Opium Act, 1924, the resolution enacting this law had not been made public by any means. The Court while quashing the conviction ruled; " in the absence of any special law or custom, we are of the opinion that it would be against the principles of natural justice to permit the subjects of a State to be penalized by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge.[52]

The publication of rules was emphasized by the Supreme Court in *Narendra Kumar Case*, the court in this case held that publication of

50 Elementary principles of jurisprudence

51 Mittal, Himanshi; *Jurisprudence.* (2013, Edition). Universal Law Publishing Co. Pvt. Ltd. New Delhi –India. P 113

52 AIR 1951 SC 467

sub-delegated legislation is necessary to give it legal force when a parent statute contains a provision requiring a notification to the rules in the official gazette.[53]

Ayangar,J., in *State of Maharashtra versus M.H.George*, formulated guidelines regarding the mode of publication of delegated legislation thus; (i) where there is statutory requirement as to the mode or form of publication and they are as such that, in the circumstances, the courts hold to be mandatory, a failure to comply with those requirements might result in their being no effective order the contravention of which could be the subject of prosecution, (ii) where there is no statutory requirement, it is necessary that it should be published in the usual form, that is, by publication within the country as generally adopted to notify all the person's the making of rules, and (iii) in India, the publication in the official gazette, viz., Gazette of India, is the ordinary method of bringing a rule or subordinate legislation to the notice of the person concerned.[54]

Public opinion can be a good check on the arbitrary exercise of delegated statutory powers. Public opinion can be enlightened by antecedent publicity of the delegated laws.

(b) PARLIAMENTARY CONTROL: In England, when a bill that provides for the delegation of power is before the House, the House may modify, amend or refuse altogether the powers proposed to be delegated in the bill. India also follows more or less the same method. This control is exercised through the committee on subordinate legislation of both the Houses of parliament which maintains vigilance on Government's rule making power and scrutinizes the rules framed by the executive.

The Government have setup a select committee on Statutory Instrument since 1944 to examine every instrument laid down before the House of Commons with a view to determine whether the special attention of the House should be drawn to it on certain specified grounds. An Act was also passed in 1946, i.e., 'Statutory Instrument Act', which provides that

53 AIR 1960 SC 430
54 AIR 1965 SC 722

a copy of the instrument shall be laid before the House before it comes into operation. Apart from these, there are other methods also through which the Parliament can exercise control. It is submitted that in practice these safeguards have not proved effective, and thus, substantial control is not exercised.[55]

(c) JUDICIAL CONTROL: While Parliament control is direct, the control of courts is indirect. Courts cannot annul subordinate enactments, but they can declare them inapplicable in particular circumstances. The rule or order frowned on by the courts, though not actually abrogated, becomes a dead letter because in future no responsible authority will attempt to apply it. If it is applied, nobody will submit to it.[56] In England, as the Parliament is supreme, it can delegate any amount of power. Therefore, the judicial control is confined within very narrow limits. The court in these matters interferes under the doctrine of ultra vires, or under their writ jurisdiction. The main ground on which this interference is made is that the authority to whom the power is delegated has exceeded. The grounds on which courts declares a bye-law ultra vires are that it is unreasonable, or repugnant to the fundamental laws of the country[57], or is vague, or it has been made and published in accordance with the rules prescribed for the same. But in modern times, there is a tendency to oust the jurisdiction of the courts and this is expressly in the statute which delegates the power. Thus the courts too have not remained very effective in controlling delegated legislation.[58]

(d) TRUSTWORTHY BODY: An internal control of delegated legislation can be ensured if the power is delegated only to a trustworthy person or body of persons.

(e) Other Controls, and Safeguards: Certain other safeguards which have been suggested[59] and to some extent, have been adopted in practice also are: the delegation should be made only to trustworthy bodies;

55 Supra note 13 at 250
56 Supra note 17 at 163
57 Supra note 51 at 113
58 Supra note 13 at 250
59 See C.T. Carr, 'Delegated Legislation'

expert advice should be taken and the persons whose interests (professional organization etc) to be affected by the concerned delegated legislation should be consulted before making any rule regarding them. Authors, lawyers and judges have often vigorously attacked delegated legislation in their writings, opinions and judgments respectively which have, to some extent, discouraged delegated legislation. Hawart's 'New Despotism', or Lord Atkin's Judgment in Liversidge versus Anderson[60], are the instances of such checks.

x. ADVANTAGES OF LEGISLATION

(a) DIRECT AND UNAMBIGUOUS: Statute law is direct and unambiguous. It is brief, clear, easily accessible and knowable. While no one but a lawyer can unravel a rule of law from the mass of decisions cited in support and even among lawyers often there is divergence of opinion as to rule that is laid down.[61]

(b) DIVISION OF LABOUR: Legislation allows advantageous division of labour. The legislature becomes differentiated from the judiciary, the duty of the former being to make law and that of the latter to interpret and apply it. The legislative and judicial functions are separated and consequently both of them are done better by different organs.

(c) CONCISE AND DEFINITE: Statute law is concise and definite contrasted with case-law which is bulky and voluminous, the principles of law are embedded in the voluminous literature of the law reports and to collect them and arrange them in a systematic manner is no easy task. As Salmond observes, "case-law is gold in the mine-a few of the precious metal to the ton of useless matter-while statute law is coin of the real, is ready for immediate use."[62]

(d) DECLARATION BEFORE APPLICATION: Another advantage of the legislation is that the formal declaration of it before the commission of the acts to which it applies is generally a condition precedent to its

60 (1942) A.C. 206
61 Supra note 5 at 142
62 Ibid

application in courts of justice.[63]Would it be fair to keep the citizens in dark about their legal rights, duties and liabilities, and then to cast any alw on them? This disadvantage of precedent lies in that it may come unexpected. A precedent for the first time declares the law on a point is; till then the parties to the litigation were in doubt about the law. Now a precedent may come as an unpleasant and unexpected surprise to a party and cause him damage. Enacted law, the product of legislation, on the other hand, declares beforehand what the rights and liabilities of the parties will be, and thus leads to greater justice to the parties also. But even with regard to legislation, when the statute concerned has something ambiguous in it, as sometimes it has, a judicial decision will have to remove the ambiguity. Even statutes may have, or may be given, retrospective effect.[64]

(e) CONSTITUTIVE AND ABROGATIVE: Statute alone can both create and destroy rules of law. Whereas case law can only be constitutive. When a judge formulates a new rule for guidance in future cases, he cannot overrule it, as and when he happens to change his mind. That must be done by a superior tribunal or by a full bench of the same court. Whereas in the case of a statute there is no such restriction at all, and the legislation can repeal today what it enacted yesterday.[65]The obvious superiority of legislation over precedent arises from its abrogative power. Legislation is the easiest instrument of excision and is resorted to for abolishing existing law and substituting something better in its place. Precedent, on the other hand can create new law only so far as the new law is not in conflict with the old. Judicial decisions cannot brush aside a settled rule of law however pernicious it may be in practice. As C.J. Holmes said: "A common law Judge could not say ' I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court." It is only by legislation that settled law can be effectively

63 Tandon, M.P; Jurisprudence (Legal Theory). (17th Edn. 2006). Allahabad law Agency. P.183
64 Supra note 15 at 219
65 Supra note 5 at 143

altered.[66] Legislation is not only a source of law but also the most effective instrument of abolishing the existing law. Abrogative power is necessary for legal reform and this virtue is not possessed by precedent which can produce a new law but cannot reverse that which is already law. Legislation is a necessary instrument not only for the growth of law but also for its reform.

(f) SUPERIOR TO CASE LAW: Statute law is greatly superior to case law in point of form. The product of legislation assumes the form of abstract propositions, but that of the precedent is merged in the concrete details of the actual cases to which it owes its origin.[67]

xi. DIFFERENCE BETWEEN LEGISLATION AND CUSTOM

i. The existence and authority of legislation is essentially *de Jure* whereas customary law exists *de facto.*

ii. Legislation grows out of the theoretical principles but customary law grows out of practice and long existence.

iii. Legislation is considered to be a superior and more authoritative source of law than customs.

iv. Legislation is the mark of advanced society and a mature legal system. Customary law is the mark of primitive society and an undeveloped legal system.

v. Legislation is the modern source of law while custom is the oldest source of law.

vi. Legislation is complete, precise, in written form and easily accessible whereas customary law is mostly unwritten and is difficult to trace.

vii. Legislation results out of deliberations but customs grows within the society in natural course.

viii. Legislation is jus scriptum but customary law is jus non scriptum.

ix. Legislation expresses the relationship between men and the state but customary law is based on relationship between men inter-se.

66 Supra note 9 at 121

67 Tandon, M.P; Jurisprudence, P.184

x. The authority of legislation lies in the express will of the state. Customs are generally based on the will of the people. They have an implied authority of the state.

xii. DIFFERENCE BETWEEN LEGISLATION AND PRECEDENT

i. The legislation has its source in the law-making will of the state whereas precedent has its source in judicial decisions.

ii. In precedents rules and principles are laid down by inductive method. In legislation, the deductive method is resorted to. The courts take the rules from the statute and apply it to particular cases.

iii. Legislation is imposed on courts by the legislature but precedents are created by the courts themselves.

iv. The vary aim of the legislation is to a make law. The main purpose of the precedents is to interpret and apply the law.

v. Legislation denotes formal declaration of law by the legislature whereas precedents are recognition and application of new principles of law by courts in the administration of justice.

vi. Legislation is generally prospective whereas precedent is retrospective in nature.

vii. Legislation is declared or published before it is brought into force but precedent comes into force at once i.e., as soon as decision is pronounced.

viii. Legislation can make rules of law by way of anticipated circumstances whereas the court must await the arrival of a concrete case before it.

ix. Legislation has abrogative power also. It not only creates law but it can abrogate an existing law. But when a rule is established as law, a precedent cannot abrogate it.

x. A precedent may check the operation of a rule only when it is not "law". But when a rule is set as law, it cannot be abrogated by a precedent. Whereas legislation has the absolute abrogative power

Conclusion

Legislation in the widest sense means to make new rules for human conduct and includes executive fiat, judicial legislation and Parliamentary legislation. In modern technological societies new problems of complex character have emerged which need urgent answers to satisfy human needs and human wants. This can be done alone quickly and peacefully through legislation which can bring about revolution through peaceful social evolution and gradual change. It is not always possible for the parliament to exercise effective control over delegated legislation. Certain procedural safeguards are necessary to keep a constant watch over the exercise of power by the executive or administrative authorities. While Parliament control is direct, the control of courts is indirect. Courts cannot annul subordinate enactments, but they can declare them inapplicable in particular circumstances.

Judicial Review of Parliamentary Privileges in India

Farah Deeba*

Abstract

The Parliamentary and Legislative Privileges are ordinarily the matters immune from judicial scrutiny but in certain circumstances the Privileges have been subjected to Judicial Review. The conflict between the Legislature and the Courts often arises when parliamentary privileges are subjected to judicial review by the court but the Legislature and the Parliament resists the same by pleading that privileges are immune to judicial review. The institutional battle on the point whether Parliamentary Privileges are immune from judicial scrutiny or not, has in many cases raised issues of great constitutional importance. The role of the present article is to examine, this aspect of Judicial Review of Parliamentary Privileges in India.

Keywords: *Parliamentary Privileges, Judicial Review, Role of Courts in India, Preventive Detention, Contempt of House, Fundamental Rights, Criminal Abuse, Immunity, Writs on Legislature.*

INTRODUCTION:

Indian history of Parliamentary Privileges starts mainly from the British period. The Government of India Act, 1919 for the first time provided a qualified privilege of freedom of speech to the House of Legislatures. In addition to freedom of speech, immunity from liability for publication of any matter in the official proceedings was also granted under the Government of India Act, 1919. By an Amendment in the Civil Procedure Code in 1925, members of legislature were exempted from arrest or detention under civil process during meetings of the legislature or of any of its committees for 14 days before and after such meeting. By a similar, amendment in the Criminal Procedure Code, members were exempted from serving as jurors or assessors[1].

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1 Belavati, "*Theory and practice of parliamentary procedure in India*" (1998) P. 232.

The Govt. of India Act 1935, which is regarded as a second mile stone on the high way leading to a full responsible government, under Section 28 declared the following privileges:

1) Subject to the provisions of the Act and to the rules and standing orders regulating the procedure of the Federal Legislature/there shall be freedom of speech in the legislature and no member of the legislature shall be liable to any proceeding to any court in respect of anything said or any vote given by him in the legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either chamber of legislature of any report, paper, votes or proceedings.

2) In other respects, the privileges of members of the chambers shall be such as may from time to time be defined by Act of the Federal Legislature and until so defined, shall be such as were immediately before the establishment of federalism enjoyed by members of the Indian Legislature.

3) The provisions of the sub-sections (1) & (2) of this Section shall apply in relation to persons who by virtue of this act have the right to speak in and otherwise take part in the proceedings of the chamber as they apply in relation to members of the legislature.

On the coming into force of the Indian Independence Act 1947 orders were passed by the Governor General in the exercise of powers conferred on him by Clause 1 (c) of Section 9 of the Act of 1947 to amend the Govt. of India Act 1935. First of all, Act of 1947 declared clauses (3) & (4) of Section 28 to make equal the immunities of the members of the House of Indian Legislature with those of the members of the House of Commons of United Kingdom; though the full powers and privileges of the House of commons as a body, were not vested in the legislature as a body, which had placed fetters on the lawmaking powers of the central legislature of its privileges[2].

When India became free and the new constitution commenced, these privileges were expressly conferred on the union legislature under

2 Qureshi M. I, "Indian Parliament- Powers, Privileges, Immunities" (1994) P. 55.

Article 105 and on state legislatures under Article 194 of the constitution of India.

Article 105 reads as:

1. Subject to the provisions of this constitution and to the rules and standing orders regulating the procedure of parliament, there shall be freedom of speech in Parliament.

2. No member of Parliament, shall be liable to any proceedings in any court in respect of anything said or any vote given by him in parliament or any committee thereof and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament, of any report, paper, votes or proceedings.

3. In other respects, the power, privileges and immunities of each House of Parliament and members of the committee of each House shall be such as may be from time to time be defined by parliament by law, and until so defined shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the constitution.[3]

4. The provisions of clause (1), (2) and (3) shall apply in relation to persons who by virtue of this constitution have the right to speak and otherwise take part in the proceedings of a House of Parliament or any committee thereof as they apply in relation to members of parliament.

Under Article 194, in the matter of privileges the position of state legislatures is the same as that of the Houses of Parliament. Therefore, what is said in the context of Article 105 applies *mutatis - mutandis* to the state legislatures as well.

Clause (1) and (2) of Article 105 relate to the freedom of speech and expression of members of parliament and the right of publication of parliamentary proceedings. With regard to other matters there is no specific provisions in the Article but it is provided that provision may be made by law by parliament and until then the privileges shall be those of that House and of its members and committees immediately before the

3 Amended by Constitution (44th Amendment) Act, 1978.

coming into force of Section 15 of the Constitution (44th Amendment) Act, 1978.

ROLE OF INDIAN COURTS IN MATTERS INVOLVING PARLIAMENTARY PRIVILEGES:

Parliament has not passed any law defining its privileges, and the constitution specifically grants only a few privileges. Therefore, the main question, which arises, is whether the privilege claimed by the House is one, which was enjoyed by the House of Commons on January 26, 1950.

The matter was put in the right perspective by the Supreme Court in *Search Light case I,*[4] on the one hand, the court decided the general question whether a breach of privilege occurs when a newspaper prints a report on a member's speech including the portions ordered to be expunged by the Speaker. The court answered the question in the affirmative. But, on the other hand, when the question arose whether the expunged portion had been printed by the newspaper or not, the court refused to express any opinion on this controversy saying that "*it must be left to the House itself to determine whether there has, in fact been any breach of its privilege*".

Subsequently, in the *Keshav Singh case*[5], the U.P. Legislative Assembly claimed an absolute power to commit a person for its contempt and a general warrant issued by it to be conclusive and free from judicial scrutiny.

Keshav Singh printed and published a pamphlet against the member of the State Legislative Assembly. The House adjudged him guilty of committing its contempt and sentenced him to be reprimanded. On March 16, 1964, when the Speaker administered a reprimand to him, he behaved in the House in an objectionable manner. Accordingly, the House directed that he be imprisoned for seven days for committing Contempt of the House by his conduct in the House at the time of his being reprimanded by the speaker.

4 M.S.M. Sharma V. S. K. Sinha (I); AIR 1959 SC 395.
5 AIR 1965 SC 745.

On March, 19, 1964, Advocate Solomon presented a petition under Article 226 to the Allahabad High Court for a Writ of Habeas Corpus on behalf of Keshav Singh alleging that his detention was illegal as the house had no authority to do so; he had not been given an opportunity to defend himself and that his detention was *mala-fide* and against natural justice. The court passed an interim bail order releasing Keshav Singh pending a full hearing of the petition on merits. Instead of filing a return to Keshav Singh's petition, the House resolved peremptorily that Keshav Singh, Advocate Solomon and the two judges of the Allahabad High Court who had passed the interim bail order, had committed contempt of the House and that they be brought before it in custody.

The judges moved petition under Article 226 in the High Court asserting that the resolution of the House was unconstitutional and violated the provisions of Article 211[6] and in ordering release of Keshav Singh on the habeas corpus petition, the judges were exercising their jurisdiction and authority vested in them as judges of the High Court under Article 226. A full bench consisting of all the 28 judges of the High Court ordered stay of the implementation of the resolution of the House till the disposal of the said petition.

Thereafter, the House then passed a clarificatory resolution saying that its earlier resolution had given rise to misgivings that the concerned persons would be deprived of an opportunity of explanation; that it was not so and that the question of contempt would be decided only after giving an opportunity to explain to the judges. The warrants of arrest against two judges were withdrawn, but they were placed under an obligation to appear before the House and explain why the House should not proceed against them for its contempt. The High Court again granted

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6 **Article 211: Restriction on Discussion in the Legislature:**
No discussion shall take place in the legislature of a state with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his duties.
Article 121; Restriction on Discussion in Parliament:
No discussion shall take place in parliament with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the president praying for the removal of the judge as hereinafter provided.

a stay order against the implementation of this resolution. Thus, there emerged a complete legislature-judiciary deadlock.

At this stage, the president of India referred the matter to the Supreme Court for its advisory opinion under Article 143[7]. By a Majority of 6 to 1, the court held that the two judges had not committed contempt of the legislature by issuing the bail order. The judges had jurisdiction and competence to entertain Keshav Singh's petition and to pass the orders as they did. The Assembly was not competent to direct the custody and production before itself of the advocate and the judges. The Keynote of the court's opinion is the advocacy of harmonious functioning of the three wings of the democratic state, viz., Legislature, Executive and the Judiciary. They emphasized that these three organs must function "*neither in antinomy nor in a spirit of hostility, but rationally and harmoniously*". Only a harmonious working of the three constituents of the democratic state will help the peaceful development, growth and stabilization of the democratic way of life in this country. The existence of a fearless and independent judiciary being the basic foundation of the constitutional structure in India, no legislature has power to take action under Article 194(3) or 105(3) against a judge for its contempt alleged to have been committed by the judge in the discharge of his duties[8].

Further the court also held that the right of the citizens to move the judicature and the right of the advocates to assist that must remain uncontrolled by Article 105(3) or Article 194(3). It is necessary to do so for enforcing the fundamental rights and for sustaining the rule of law in

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7 **Article 143: Power of President to Consult Supreme Court-**
1. If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of Supreme Court upon it, he may refer the question to that court for consideration and the court may, after such hearing as it thinks fit, report to the President its opinion thereon.
2. The President may, not withstanding anything in proviso to Article 131, refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it think fit, report to the President its opinion thereon.

8 AIR 1965 SC. 746.

the country. Therefore, a House could not pass a resolution for committing a high court for contempt[9].

Further the court rejected the contention of the Assembly that it had absolute power to commit a person for its contempt and a general warrant issued by it would be conclusive and free from judicial scrutiny. The court declared that the House of Commons enjoyed the privilege to commit a person for contempt by a non-justifiable general warrant, as a superior court of record in the land and not as a legislature. Therefore, parliament and the state legislatures in India, which have never been courts, cannot claim such a privilege[10].

It is submitted that even if the House of commons has this privilege as a legislative organ, parliament and the state legislatures in India cannot still claim it because of the existence of the fundamental rights and the doctrine of judicial review, particularly, Article 32[11]; which not only empowers the Supreme Court but imposes a duty on it to enforce fundamental rights, and Article 226 which empowers the High Court to enforce these rights. Thus, a court can examine an un-speaking warrant of the House to ascertain whether contempt had in fact been committed. The legislative order punishing a person for its contempt is not conclusive. The court can go into it[12].

The *Keshav Singh* case represents the high-water mark of legislative - judiciary conflict in a privilege matter in India. The

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9 Ibid at 746.

10 Ibid at page 748.

11 Article 32: Remedies for Enforcement of Rights Conferred by this Part- [Part III Constitution] -

1. The rights to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed.

2. The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, which ever may be appropriate, for the enforcement of any of the rights conferred by this part.

3. Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

4. The right guaranteed by this Article shall not be suspended except as otherwise provided for by this constitution.

12 M. P. Jain, “Indian Constitutional Law" (Fifth Edition 2005) p. 106.

relationship between the two institutions was brought to a very critical point. However, the Supreme Court's opinion in Keshav Singh seeks to achieve two objectives -

First *and foremost it seeks to maintain judicial integrity and independence, for if a House were to claim a right to question the conduct of a judge, then judicial independence would be seriously compromised; the constitutional provisions safeguarding judicial independence largely diluted and the rule of law neutralized. The constitution has sought to preserve the integrity of the judiciary, and by no stretch of imagination could this be compromised in any way. The Supreme Court has sought to promote this value through the Keshav Singh pronouncement.*

Secondly**,** *the court, seeks to concede to the House quite a large power to commit for its contempt or breach of its privileges for, even though the judiciary can scrutinize legislative committal for its contempt, in actual practice, this would not amount to much as the courts could interfere with the legislative order only in very extreme situations*[13].

As the law relating to legislative privileges stands today, a House has power to decide whether or not its contempt has been committed; courts would not interfere with its internal working, or when it imposes a punishment short of imprisonment; in case of imprisonment, courts would interfere only in case of malafides or perversity on the whole, powers of the House are so broad as to even enable it to enforce its own views regarding its privileges. The courts have exhibited an extreme reluctance to interfere with the proceedings of a House in privilege issues. The review power claimed by the Supreme Court in Keshav Singh is extremely restrictive and it would be extremely difficult in practice to get much of a relief from the courts in case of committal by a House for its contempt[14].

In the Keshav Singh case, the Allahabad High Court considering the petition on merits, after the Supreme Court's opinion threw it out and refused to interfere with the judgment of the House. The High Court

13 Ibid at p. 106-107

14 Subhash C. Kashap, "Parliamentary Procedure-Law, Privileges, Practice and Precedents" (Vol-2, 2003) p. 1076.

rejected the arguments that the fact found by the Assembly against the petitioner did not amount to contempt of the Assembly. The Court refused to go into the question of the "Correctness, propriety or legality of the commitment." The court observed:

"This court cannot, in a petition under Article 226 of the constitution, sit in appeal over the decision of the legislative assembly committing the petitioner, for its contempt. The legislative Assembly is the master of its own procedure and is the sole judge of the question whether its contempt has been committed or not."[15]

The courts have taken the view that since a House has power to initiate proceedings for breach of its privileges, it must be left free to determine whether in fact breach of its privileges has occurred or not.

JUDICIAL DECISIONS IN VARIOUS CASES ON PRIVILEGE MATTERS IN INDIA:

Lets us examine the judicial decisions involving various situations in which the claim of protection under the Parliamentary Privileges was in issue before the Courts in India.

A) Preventive Detention:

The privileges of freedom from arrest is limited to civil causes and has not been allowed to interfere in the administration of criminal justice. The preventive detention partakes more of a criminal than of a civil character. The Preventive Detention Act only allows persons to be detained who are dangerous or are likely to be dangerous to the State. It is difficult to contend that an order of preventive detention is of a civil character. They are orders made when persons are suspected of serious criminal activities directed at the welfare of the state and of the community. It is true that such orders are made when criminal charges possibly could not be established, but the basis of the orders are a suspicion of nefarious and criminal or treasonable activities. Such a reasoning was espoused in cases viz; *Pillalamarri Venkateshwarht*[16]; *Ansumali Mazumdar and Other v. The State of West Bengal and*

15 Ramchandran V.G., "*Codification of Privileges of the Legislature Indian Advocate*" Volume-5 (1965) p. 23-24.

16 AIR 1951 Madras 269.

Others[17]; *K Ananda Nambiar v. Chief Secretary to Government of Madras*[18]*; In Ansumali Majumdar v. State of west Bengal*[19].

B) Members Right to Attend The Session Of The House While Under Arrest Or Detention:

The issue was whether a member of a Legislative Assembly arrested and detained under due process of law can have a privilege to attend session of the Assembly arose in the case titled *Kunjan Nadar v. The State of Travancore-Cochin*[20]. There is no statutory provision granting the privilege or immunity invoked by the petitioner and it is clear from May's Parliamentary Practice[21] that the privilege of freedom from arrest is not claimed in respect of criminal offences or statutory detention and that the said freedom is limited to Civil causes, and has not been allowed to interfere with the administration of Criminal Justice or emergency legislation.

C. The Power of Legislature to Commit Persons for Contempt:

In the case titled *Homi D. Mistry v. Nafisul Hasan, Speaker Uttar Pradesh legislative Assembly*[22]. In this case Blitz, a weekly news-magazine of Bombay, publish in its issue dated the 29th September, 1951, a news item under the caption: "*Speaker vetoes discussion on Biltz in Assembly*".

The Committee of Privileges summoned Shri Dinshaw Homi Mistry Acting Editor of the 'Biltz', to appear before the Committee on the 21st December, 1951 to clarify his position. Shri Mistry, however, neither replied to the letter nor appeared before the Committee. The committee felt that by ignoring their order Shri Mistry had "aggravated the seriousness of his offence". The Committee was of the opinion that he (shri Mistry) deserved the "Maximum punishment" and recommended that he might be "awarded imprisonment for such period as the House might decide"

17 AIR 1952, Calcutta 632.
18 AIR 1966 SC 657.
19 AIR 1952 Cal. 632 SB.
20 AIR 1955, Travancore-Cochin 154
21 May's Parliamentary Practice, (Fifteenth Edition, 1950) p. 78.
22 ILR 1957 Bombay 218.

In pursuance of the said warrant, Shri Mistry was arrested in Bombay on the 11th March, 1952, taken to Lucknow and kept in custody till he was released on the 18th March, 1952 in pursuance of the judgment of the Supreme Court delivered on the same date on a habeas corpus petition filed in this behalf on the ground that Shri Mistry was not produced before a Magistrate within 24 hours of his arrest contravened the provisions of Article 22(2) of the Constitution and therefore Shri Mistry was entitled to his release.[23]

Immediately after his release another notice, was served on Shri Mistry, in which the Speaker required him to present himself at the Bar of the House on the 19th March, 1952. Shri Mistry, however, did not present himself at the Bar of the House on the appointed day, whereupon, the U.P. Vidhan Sabha adopted the following resolution on January 18, 1952 and adjudged Mr. Homi Dinshaw Mistry to be guilty of contempt of the House. No further action was, however taken by the U.P. Vidhan Sabha in the matter.

Subsequently, in 1952 Shri Mistry filed a civil suit in the Bombay High Court against Shri Nafisul Hasan, the then Speaker of Uttar Pradesh Vidhan Sabha, the State of U.P., the Commissioner of Police for the Greater Bombay area who aided in the arrest and detention of the plaintiff and, the State of Bombay, claiming damages for wrongful arrest and detention.

The acting Chief Justice Coyajee of the Bombay High Court, in his judgment delivered on the 15th November 1956, dismissed the suit and decided that the immunity is an absolute one and officers are protected even if the warrant is wrongly executed by others.[24]"

D. Power of Courts to Issue writs on Legislatures -

The question whether a court of law has the power to issue a writ against a legislative body preventing it from passing a legislation was in issue in *Hem Chandra Sengupta & Others v. Speaker, Legislative Assembly of West Bengal and others*[25].

23 G.K Reddy v. Nafis ul Hasan and the State of Uttar Pradesh, AIR 1954 S.C. 636.

24 ILR, 1957, Bombay 219.

25 AIR 1956 Calcutta 378.

In January, 1956 (around 23 January) the Chief Minister of west Bengal and Bihar made a joint declaration from New Delhi, popularly known as '*Roy Sinha declaration'*, proposing a merger of the two States of West Bengal and Bihar.

Opposing the proposed merger of the Bihar with the State of West Bengal, Shri Hem Chandra Sengupta and others filed a petition in the High Court of Calcutta.

The High Court of Calcutta in their judgment delivered on 17th April 1956 *inter alia* held that in such matters and within their allotted spheres, they are supreme and cannot be called into account by the Courts of the land. The court cannot at this stage be called upon to interfere as no law has been passed and not even a Bill has been initiated.

E. Jurisdiction of Courts to Entertain Petitions against Speaker Re. Violation of Fundamental Rights :-

The question whether a court of law can take cognizance of a complaint against the Speaker of a Legislative Assembly on the ground that action taken by him under Rules of Procedure and Conduct of Business of the Legislative Assembly was discriminatory and violative of Fundamental Rights was in issue in the case *R. Sudarsana Babu v. Sate of Kerala and others*[26].

In this case, during February, 1983 one Shri R. Sudarsana Babu, who was a staff correspondent of 'Deshabhimani' a Malayalam Newspaper was denied the press pass (a facility which he had been enjoying for 3 years) allegedly on the direction of the Speaker, Kerala Legislative Assembly, without assigning any reason and also without informing him.

Before the issue of notice to the respondents, the Advocate general filed a statement in court on 10th. March, 1983 on behalf of the first respondent, viz.; the State of Kerala suggesting that the names of the second and third respondent's viz., the Speaker and the Secretary, Kerala Legislature Assembly be removed from the list of respondents.

26 ILR (Kerala) 1983, 661.

The Hon'ble judge, in his decision dated 25 March 1983 observed *inter alia* as follows:

"I am not disturbed by the forebodings of a possible confrontation between the court and the legislature, the confrontation if any) is between Babu and the legislature, the former asserting some constitutional rights and the latter declining to recognize the same. Under our federal scheme, it is the duty of the court to police the boundaries of the Constitution. In discharging that function, the court may allow some latitude to the chosen representatives of the people and their agencies, in a matter pertaining exclusively to the jurisdiction and when nothing else is at stake. But that is something to be decided with notice to the parties, and not at the admission stage. On the averments made and the grounds raised in the writ petition, I was satisfied that the petitioner's case required further examination and that was why notice was ordered on 7-3-1983. Despite the persuasive arguments of the learned Advocate General, I am unable to hold, as at present advised that constitutional propriety precludes this court form enforcing its own rules. Office will therefore take immediate steps under rule 149 (of the High Court Rules.)

The first respondent, viz., the State of Kerala filed an appeal against the order of the single judge which upon hearing by a full bench was dismissed on 5th August 1983.

E. Immunity of members against any proceedings in courts in respect of anything said in the House.

On 2 April 1969 Shri Narendra Kumar Salve, M.P., moved a calling attention motion in Lok Sabha regarding reported statement of the Shankaracharya of Puri on untouchability and his reported insult to the National Anthem. A discussion took place in the House on this Calling Attention motion that day.

Thereafter, Shri Tej Kiran Jain and others who claimed to be admires of Shankaracharya filed a suit titled *Tej Kiran Jain and Others v. N. Sanjiva Reddy and others*[27] in the High Court of Delhi for recovery of Rs. 26,000 as damages against Shri N. Sanjiva Reddy[28], Speaker,

27 AIR 1970 SC, 1573.

28 He resigned from the office of the Speaker on 19-7-1969.

Fourth Lok Sabha, Shri Narendra Kumar Salve, Shri B. Shanfaranand, Shri S.M. Banerjee and Shri Y.B. Chavhan, members, it was alleged by the plaintiffs that during the course of the discussion on the calling attention motion certain remarks were made by the defendants which were defamatory and calculated to lower the dignity of the Shankaracharya.

The High Court of Delhi dismissed the suit in *limine* by holding that same is barred under Clause (2) of Article 105. An SLP was filed against the judgment of the Delhi High Court and the Supreme Court in its judgment dated 8th May, 1970 upheld the judgment of the Delhi High court and observed as under:-

"*The Article 105 (2) means what it says in language, which could not be plainer. The article confers immunity inter alia in respect of anything said .... In Parliament. The word anything is of the widest import and is equivalent to everything. The only limitation arises from the words in Parliament, which means during the sitting of Parliament and in the course of the business of Parliament. We are concerned only with speeches in Lok Sabha. Once it was proved that Parliament was sitting and its business was being transacted anything said during the course of that business was immune from proceedings in any court. This immunity is not only complete but is as it should be. It is of the essence of parliamentary system of Government that people's representatives should be free to express themselves without fear of legal consequences. What they say is only subject to the discipline of the rules of Parliament, the good sense of the members and the control of proceedings by the Speaker. The courts have no say in the matter and should really have none.*"

F. Criminal Abuse of Constitutional Privileges

The question of criminal abuse of the legislative privileges was in issue in the case titled *P.V. N. Narsimma Rao Vs State (Popularly Known as JMM Bribery Case)*[29]. In 1991 election to the Lok Sabha, Congress (I) Party remained fourteen members short of the majority and it formed a minority Government with P.V. Narasimha Rao as the Prime

29 1998 4 SCC 626.

Minister. The said government had to face a motion of no-confidence on 28-7-1993 and it somehow managed to defeat the motion by mustering the support of 265 members as against 251. One Ravinder Kumar of the Rashtriya Mukti Morcha filed a complaint (FIR) with the CBI alleging that a criminal conspiracy was hatched pursuant to which certain members of Parliament belonging to Jharkhand Mukti Morcha and certain others owing allegiance to Janta Dal (Ajit Singh Group) agreed to and did receive bribes from P.V. Narsimha Rao and others to give votes with a view to defeat the no-confidence motion.

A criminal prosecution was launched against the bribe giving and bribe taking Members of Parliament under Prevention of Corruption Act, 1988 and under Section 120-B of the Indian Penal Code. The Special Judge took cognizance of the offences of bribery and criminal conspiracy. The persons sought to be charged filed petitions in the High Court for quashing the criminal proceedings. The High Court at Delhi dismissed the petitions.

The Constitution Bench of the Supreme Court by a majority of three to two answered the first question in the affirmative, except in the case of A-15 Ajit Singh (Who, unlike other co-accused did not cast his vote on the no-confidence motion), holding that the bribe-taking Members of Parliament who voted on the no- confidence motion are entitled to immunity from criminal prosecution for the offences of bribery and criminal conspiracy conferred on them by Article 105(2) of the Constitution. The Court in answer to the second question, ruled that a Member of Parliament is a "public servant" within Section 2(C) of the 1988 Act. It also concluded that since there is no authority to grant sanction for prosecution of the offending persons for certain offences, they cannot be tried under the Prevention of Corruption Act, 1988 for such offences.

The decision of the majority, it is submitted with respect, is in serious discord with the letter, the ideals, and aspirations of the Constitution while the minority opinion is in harmony with them. The decision in the JMM bribery case, it is submitted in all humility, required immediate correction by a competent Bench of the Hon'ble Supreme Court. Fortunately, the legal position was reversed in a subsequent

decision in *Raja Rampal Vs Hon'ble Speaker Lok Sabha and Ors (Popularly called CASH FOR QUERY CASE)*.[30]

In *Raja Rampal Vs Hon'ble Speaker Lok Sabha and Ors*[31] a private channel had telecast a programme on 12-12-2005 based on sting operations conducted by it depicting 10 MPs of the House of People (Lok Sabha and one of the Council of States (Rajya Sabha) accepting money, directly or through middlemen, as consideration for raising certain questions in the house or for otherwise espousing certain causes for those offering the lucre. Another private channel telecast a program on 19-12-2005 alleging improper conduct of another MP of Rajya Sabha in relation to the implementation of the Member of Parliament Local Area Development Scheme ("MPLAD Scheme"). This incident was also referred to a committee.

On the report of the Inquiry Committee being laid on the table of the House, a motion was adopted by Lok Sabha resolving to expel the 10 Members from the membership of Lok Sabha, accepting the finding as contained in the report of the Committee that the conduct of the Members was unethical and unbecoming of Members of Parliament and their continuance as MPs was untenable. On the same day i.e. 23-12-2005, the Lok Sabha Secretariat issued the impugned notification notifying the expulsion of those MPs with effect from the same date. The expelled MPs challenged the constitutional validity of their respective expulsions. Almost a similar process was undertaken by Rajya Sabha in respect of its Member.

It was the contention of the petitioners, *inter alia*, that the impugned action on the part of each House of Parliament expelling them from the membership suffered from the vice of *mala fides* as the decision had already been taken to expel them even before examination of the evidence. In this context they referred, *inter alia*, to the declaration on the part of the Hon'ble Speaker, Lok Sabha on the floor of the House on 12-12-2005 that "nobody would be spared". The contention was that the inquiries were a sham and the matter was approached with a

30 Raja Rampal v. Hon'ble Speaker Lok Sabha and Ors (2007) 3 SCC 184.
31 Ibid.

predetermined disposition, against all the basic canons of fair play and natural justice.

The questions that arose before the Supreme Court were:

1. Does the Supreme Court, within the constitutional scheme, have the jurisdiction to decide the content and scope of powers, privileges and immunities of the legislatures and its Members?

2. If the first question is answered in the affirmative, can it be found that the powers and privileges of the legislatures in India, in particular with reference to Article 105, include the power of expulsion of its Members?

3. In the event of such power of expulsion being found, does the Supreme Court have the jurisdiction to interfere in the exercise of the said power or privilege conferred on Parliament and its Members or committees and, if so, is this jurisdiction circumscribed by certain limits? In other words if the power of expulsion exists, is it subject to Judicial Review and if so, the scope of such Judicial Review.

The *Sabharwal, C.J. (for himself Balakrishnan and Jain, JJ.)* answered all the questions in the affirmative and dismissed the writ petitions and transfer cases.

The law was thus settled by holding that the actions of Parliament are subject to Judicial Review and no absolute immunity can be claimed to usurp the jurisdiction of the Court.

Conclusion

Therefore to conclude, we may say that whenever a question arises whether a particular Parliamentary or Legislative Privilege exists or not, it is for the courts to give a definitive answer by finding out whether the House of Commons had enjoyed the same on January 26th, 1950. The privileges as the meaning of the word itself suggests are immunities available to the members of the Parliament and the Legislature. But these Parliamentary and Legislative privileges have been subjected to judicial review in various circumstances which has eventually shaped the law in India on the subject. Some of the principles which can be deducted from the case law are summed up as under;

(1) The privilege of freedom from arrest is available for civil causes only but does not apply to detention under Public Safety Act or ordinary criminal law.

(2) The House has the power to commit persons for its Contempt and the officials implementing such a warrant are protected under parliamentary privilege even if the warrant is wrongly executed

(3) *The Parliamentary privileges are subject to judicial review in matters involving infringement of the fundamental rights of the citizens.*

(4) The members of the House have immunity against the proceedings in court for anything said in the House.

(5) The Parliamentary and Legislative Privileges cease to exist in cases involving criminal abuse of constitutional privileges.

Therefore, broadly speaking although parliamentary privileges are immune from judicial review but the Courts have assumed the role to lay down the limits of Parliamentary Privileges in India. Thus, it can be safely concluded that the Parliamentary privileges have been subject to Judicial Review in India.

Criminal Justice in India: A Historical Outline

Abstract

Modern thinking and reasoning about crime in India has progressively evolved from the time of Dharmasastras to the stage of codification of laws during the colonial period. In every phase of progression certain practices became institutionalized. During the ancient period it was the practice of Dharma, Islamic law or Sharia during the medieval period and the colonial period was marked by codification and consolidation of numerous legislations. This paper is an enumeration of Criminal Justice in India from a historical perspective.

Keywords: *Dharma, Arajakata, Matsyanyaya, Shara, Kisa, Mufussil Nizamat Adalats, Indian Penal Code, Criminal Procedure Code.*

The Criminal Justice System is necessary for the protection of life and liberty of people and for maintaining the rule of law within the society. The Criminal Justice System in India which has evolved over a period of history was influenced by societal attitude towards crime, punishment and justice at different points of time. The System works for upholding civilization ethos by promoting social control, preventing, deterring and sanctioning criminal activities keeping in view the collective well being. Rehabilitation and re-integration of offenders is one of the primary objectives of modern Criminal Justice Administration.

The Criminal Justice System in India over the period of history-ancient to colonial times is briefly enumerated below:

Ancient Period (1000B.C.-A.D. 1000):

In early societies in India the victim of crime would himself retaliat for the harm caused to him through revengeful methods, as there was no State or other authority. Individual revenge came to be replaced by group revenge, as the man soon realized the importance of living in group/community for their basic survival. Group life further gave way to

the formulation of behavioural norms and set of common rules to be followed by all members in group. Such ground norms also defined inappropriate social behavior and prescribed sanctions/punishments for causation of the same. *Dharma* or Law (in its natural and un-codified form) was nothing but a refined version of ground norms which governed the affairs of people in society. The object of dharma was to create a better world where individuals and societies could attain divine self-realization.

While dharma or a god fearing attitude to do no wrong to fellow human beings continued to regulate social conduct during the early times of ancient India, however, actual law and order situation started detoriating soon thereafter. The strong began tyranny and domination over the weaker sections of society for selfish interests in the absence of any central authority to protect the interests of all sections of society. The Institution of 'Kingship' was the natural progression in the midst of such anarchy that was caused by deviation of people from the path of *dharma*, righteous conduct. There was something called in classical language as *Arajakata,* refers to the condition when *matsyanyaya* or the law of the fish prevail when the strong swallow the weak without either any guilt of conscience or societal punishment. [1]That was in fact the beginning of the process of the formation of 'State' where king's paramount duty was to protect and preserve the *'raj dharma'* i.e to enforce the law and punish those who violated it. This System later came to be known as the Criminal Justice System in India.

Medieval Period(A.D.1206-1757):

Islamic law or *Sharia* was followed by all the Sultans and Mughal Emperors during the medieval period and the Islamic criminal law as applied in India, was supposed to have been defined once for all in the *Quran.* Under the Islamic criminal law the offences were

1 Ananta K. Giri:*"Rethinking Systems as Frames of Coordination: Dialogical Inter subjectivity and the Creativity of Action."* Man & Development March, 2000

classified under three heads, namely, crimes against God, crimes against the State, and crimes against Private Individuals. Hence all crimes were not considered injurious to the State as was the case under the Hindu criminal law. Crimes against God and the State were treated as offences against public morals. Other crimes were treated as offences against the individuals; it was for the private persons to move the State machinery against such offences and the State would not *suo-moto* take cognizance of the same. The punishments for various offences were classified into four broad categories, viz (a) *kisas,* i.e. retaliation which meant in principle, life for life and limb for limb; (b) *diya* meant blood money being awarded to the victim or his heirs; (c) *had* inflicted on persons who committed offences against God; (d) *tazeer, i.e.* punishment for the cases not falling under *had* and *kisas*. The punishment which fell in this category consisted of imprisonment, corporal punishments and exile or any other humiliating treatment.

The classical law of India, transformed through the passage of time, continued for many centuries and when Muslims began their rule in India it found Islamic law in its neighborhood. But the Muslim rule did not alter the fundamental structures of classical law of India. The Islamic law was applied only to the believers, while Hindus were ruled by the *Dharmasastras.*

Colonial India (1757-1947):

The British after assuming power in India found the then prevailing criminal justice administration defective and therefore decided to bring about drastic changes in it. Lord Cornwallis made detailed studies of the existing conditions of the criminal justice administration. He introduced many reforms to revamp the whole system. In 1772 when Warren Hastings took over the charge of administration of Bengal, he established two Criminal Courts, viz. *Mofussil Nizamat Adalat* at the district headquarters and *Sadar Nizamat Adalat* at Calcutta to decide all type of criminal cases. Muslim Law Officers including *Kazis, Muftis and Moulvis* were appointed to

administer criminal justice to the inhabitants of Bengal, Bihar and Orissa. However the Regulating Act of 1773 placed all Britishers residing in Bengal, Bihar and Orissa under the criminal jurisdiction of the Supreme Court established at Calcutta in 1774.

Lord Cornwallis who succeeded in office in 1787 formulated a plan of reforms in criminal courts in 1790. Under this plan, magisterial powers were given to the judges of *Mufussil Nizamat Adalats* who as magistrates were authorized to inquire into the charges against Britishers and were empowered to arrest them but could not punish any British subject. These courts were also authorized to commit an accused for trial before the Supreme Court if the circumstances so warranted on the basis of evidence. He also made detailed studies of the existing conditions of the criminal justice administration. He introduced many reforms to revamp the whole system.

Lord Hastings took special interest in reorganizing the police force to deal with the criminals and maintain law and order in the country. Lord Bentinck created the post of District and Sessions Judge and abolished the practice of *sati*. In 1843, Sir Charles Napier introduced a police system on the lines of Royal Irish Constabulary. He created the post of Inspector-General of Police to supervise the police in the whole province. Subsequently, the Indian Police Act of 1861 was enacted on the recommendations of a Commission which studied the police needs of the Government. They codified the existing laws; established the High Courts and Prisons Laws.

While Warren Hastings, the first Governor General of Bengal, and scholars of the Early British India who had much more respect for the native Indian tradition known as Orientalists, wanted the new laws to be in tune with the rules of the *Dharmasastras.* Whereas, others such as Thomas Macaulay and James Mill, who were influenced by the contemporary regnant ideology of utilitarianism were much more in favor of a formal law in the line of English Law. Finally it was the ideologies of persons like Macaulay and James Mill which influenced in

the making of criminal laws in India like the Indian Penal Code in 1864.[2] In fact way back in 1833 itself the first Law Commission of India favoured the idea of giving equal treatment to British subjects and native Indians in all cases except capital offences. This uniformity in criminal law came in the shape of Indian Penal Code and Criminal Procedure Code in 1872.

The history of Criminal Procedure Code dates back to 1847 when President in Council instructed the Indian Law Commissioners to prepare a scheme of pleadings and procedures prepared by Messers Cameron and Elliott. The draft was examined by Sir John Romilly M.R., Sir John Jervis C.K., Sir Edward Ryan, Messrs Cameron etc. Earliest draft code of 1856 was presented to the Parliament in 1857 by Sir Barnes Peacock. There have been several versions of Cr. P.C in history since then-Cr.P.C, 1861- Immunity of Whites from Criminal jurisdiction of district courts and only High Court could try then European British subjects, Cr. P.C, 1872- A magistrate could try a European British subject if he was himself one, Cr.P.C, 1882- Empowered Indian Magistrates too exercised jurisdiction over whites but they could do so only in presidency towns, Cr.P.C, 1898 was uniformly made applicable to both Indian and British subjects which was eventually replaced by the 1973 Act.

2 See, Dr.Dalbir Bharti :*The Constitution and Criminal Justice Administration.* APH Publishing Corporation, Delhi,2002

Conclusion:

After independence several reforms in Criminal Justice System in India were initiated in tune with the Constitutional principles and philosophy. The basic thrust of criminal justice administration in post-independence times is on equal treatment before law and following of the procedures established by law.

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Women Empowerment Vis-a-Vis Gender Justice in India: An Analysis

Abstract

Women empowerment is an essence of gender justice. It can be achieved by statutory provisions as well as by removing the social myth that half of the human beings society is consist of the weaker section i.e. Women. In this paper an attempt is made to present the gender based discrimination as well as gender justice secured by legislative measures in India. The status of women is highlighted since Vedic period to 1950 and their position as changed after the commencement of the Constitution of India. A brief account of legislations especially for the protection of women and their implications is explained here to present the current situation in India. The participation of women in the decision making bodies of the country like union parliament, state legislative assemblies particularly in the state of Jammu and Kashmir along with provision for their reservation in the local bodies both rural and urban has been dealt with. The percentage of women elected to the Indian parliament from first general election to 16th which was held in the year 2014 and the role played by Supreme Court of India in the implementation of gender justice through various landmark judgments are explained in this manuscript.

Keywords: *Gender Justice, Discrimination, Vedic, Statutory Provisions, Supreme Court, Participation*

I. Introduction

India is a land of diversities. One can find such diversity herein the shape of regional imbalance, religious groups, social, cultural diversity, developed as well as under-developed areas. But despite this wide disparity all citizens of our country have feeling towards national unity. In addition to it, all major religions of the world find their place in India like Hindu in majority followed by Muslim, Christian, Sikh and Buddhist etc. So far as the state affairs are concerned, they are carried on

the principle of secularism. The constitution of India is very much clear in this context.[1]

Moreover, the oldest civilization of the world known as Indus Valley civilization flourished in the Indian sub-continent. Indian social system is basically based on the traditions and customary regimes. The family affairs of all the communities were used to be regulated by their religious texts or local customary laws like Vedas for Hindu, Quranic versions for Muslim etc. till the advent of the Britisers in India.

But the living conditions of women which were always considered as an important aspect in the contemporary regimes that is how to uplift them. As it is rightly said by the first law minister and chairman of the drafting committee Dr. B.R. Ambedkar that I measure the progress of a community by the degree of progress which women have achieved. The status of woman changed from powerless to power sharing traced since ancient to modern era. There were patriarchal societies but after the commencement of the constitution all stigmas and disabilities or discriminations against women came to an end and they were brought at par with their male partner in the eyes of law in every walks of the life. In this respect all the fundamental rights provided in part of the Indian constitution are available to them irrespective of their sex.[2]

As women form the fifty percent of the world population but still efforts are being made to provide them their due share in all the fields of the state affairs. In this direction the world community is trying their best to improve their conditions especially after 1945 under the regime of United Nation Organisation. In this context it was rightly observed by Kofi Annan

That our aim is to have a situation in which all individuals are enabling to maximize their potential and to contribute to the elevation of society as whole[3]

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1 42nd Constitutional Amendment Act, 1976 expression "Secularism" added to the preamble of the Indian constitution.

2 Part III[rd], The Constitution of India

3 Kofi Annan, Former Secretary-General, UNO

It is important for women to know that they have to be there (within the political progress) whether it is at the rural or urban council ,the forum for policy making , to ensure that their lot is to be addressed[4]. As, it is rightly said, that the best way to judge the position of a nation is to assess the status of women in a society. Consequently the status of women sometime is called the best criteria for judging the standard of the culture of any age in a society vis- a-vis representation of the social sprit of the contemporary age. According to one opinion a women is the best gift of God to man, because she brings the prosperity when she is properly treated and respected and has been called Lakshmi-the Goddess[5]. The holiest object in the world is the virtuous women; a tears of sorrow falling down from her eyes can melt the heart of even mighty tyrant. Thus the celebrated heroes are those who have led and won rebellion against injustice and suppression while fighting for their freedom and rights.

II. Status of Women in India: Historical Jurisprudence

Vedic the creator of mantra of Rig-Veda was Riskika, women sage known as Surya Savitri observed that unfortunately their humiliation and sufferings began soon after the Vedic period and it continues in its worst form in the age of so called modern time. Moreover with respective to the Position of women in India during Rig Veda there was no mention to that effect in Hymns, we find a prayer for the birth of son[6] in Athrarva Veda in the hymens VI.2-3. The status of women was fairly satisfactory.

During the Rigveda period they (women) were educated like boy and their marriage was considered as union of two souls for their development. The society was patriarchal and no property rights were there for them[7] . Besides, the marriage was not breakable as there were no provisions for widow remarriage. They were kept away from the political activities. It is evident from the facts that no women sovereign

4 Gita Welch, WNDFW
5 A.S.Aleker, the position of women in Hindu, p. 3
6 AthrarvaVeda , VI 2-3
7 Ibid.p.336-37

was there during Aryan period in the country; rather their activities were confined up to household or in agriculture sector outside the domestic wall. In this way we can say that their conditions were satisfactory to some extent only. No doubt they were deprived of legal and political status[8].Whereas during the Post Vedic their education was discouraged and were used to be married before the age of puberty[9].

A. Medieval Period:

This period is usually called as Muslim regime era of the Indian sub-continent. During this period a huge social, as well as, political changes took place with the passage of time in which the position of women deteriorated further with the emergence of various new social evils like child marriage and practice of Sati Pratha are the evidence to the above assertion

According to Rekha Mishra the woman conditions remained same in all the ages. The widowhood was considered as the sin of past deeds. The evil practice of the child marriage and sati were still there in British period. But the social evil of sati Pratha was prohibited in the year 1829 by the efforts made by Raja Ram Mohan Rai a high visionary social reformer. The Sati Pratha (Prohibition) Act, 1829, provides that the practice of sati is culpable homicide and its commission or to assist such act or omission amounts to be an offence. The other welcome steps to improve the social conditions prevailing in the Indian social system were in the form of Widowed Remarriage Act, 1856 and The Child Marriage Restrained Act. More over the education system introduced by Britishers in India along with certain other legal steps in the form of codification of which was proved as panacea for the women. To provide law in codified form the first law commission was constituted under the chairmanship of Lord Macaulay[10].

The social status of the women was also improved during British period as various legislations were there to protect their rights as cited

8 Dr. Kulwant Gill, Hindu Women's right to property in India,p.25(1986)
9 Ibid.p26
10 Children Marriage Restraint Act, Widowed Remarriage Act ,1856

above[11]. Since, during the 19th century law reforms have been at the centre of the agenda for strengthening gender justice in India.

Therefore the first of such comprehensive document making the contemporary feminist movement in India was based on the report[12]. It was viewed that legislation was one of the major instrument for ushering social order in the post-colonial state. There are no two opinions on the fact that law can act directly as norm setter or indirectly providing institution which accelerate social change by making it more acceptable.

B. Post-Independence

The constitution of India came into force on 26th of January 1950. The preamble, the part IIIrd and the part IVth provides for the removal of all forms of gender based discrimination. In this regard right to equality to all person (legal or natural) whether male or female.[13]Prohibition of discrimination based on sex. Not only the prohibition of discrimination but also empowered the state to make special provision for women in the form of protective discrimination, affirmative actions, or reservation etc.[14] Further the right to equality of opportunity in employment and appointment for all posts in public office has been provided in the Indian constitution under article 16.Right to life and personal liberty to all, Prohibition of traffic in human being especially to protect the children and women in India under article 23 of the Indian Constitution .On the basis of this Fundamental Right the Parliament of India enacted a very impressive legislation[15] which later on amended to make it more suitable to the needs of the society and to remove the drawbacks which is now called as Prevention of Immoral Traffic Act. The prevailing evils like Devdasi system,

11 P.Thomas, Indian women through the ages, p.295
12 Report of the committee on the status of women in India
13 Article14,The Constitution of India
14 Ibid,Article15 (1) and clause 3 Based on this constitutional provision Indian parliament has passed various legislations providing special provision for women e.g. 33% reservation for them in local bodies (Panchyat and municipality by 73rd and 74 constitutional amendment)
15 Suppression of Immoral Traffic Act,1956

untouchability or even bonded labour[16] were abolished and their practice as such in any form amounts to an offence punishable by law in India.

Further there are various directives principles of state policy enshrined in part- IVth of the Indian Constitution providing for the improvement of social and economic conditions of the female in India. Article 39 provides for equal pay for equal work both to men and women.

In this context the Supreme Court of India in the case of *Randhir Singh v Union of India*[17] held that although the principle of "*equal pay for equal work*" is not expressly declared by our constitution to be a fundamental right, but it is certainly a constitutional goal under articles 14,16 and 39(c). This right can be enforced in cases of unequal scales of pay based on irrational classification. So much so the Equal Remuneration Act, 1976 was passed with a view to provides equal pay for equal work. But the main drawback of this legislation was with respect to its scope as it was not applicable to the agriculture workers i.e. Area where most of the Indian women are employed. Provisions are there for maternity benefits for female.

In addition to it as per the views of Aristotle a thinker regarding the gender justice observed that there should be formal equality which means that like should be treated alike. Whereas, in United Kingdom the concept of advance equality with implication of direct discrimination is witnessed. In United States of America there is equal protection and substantive equality.

Fundamental duties[18] are there for all citizens of the country to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of the women[19]. In political affairs in India women have now equal right

16 The Bonded Labour Prohibition Act,1976
17 AIR 1982 SC 879
18 Article 51-A, PART-IV-A, The Constitution of India
19 Ibid. Article (e)

both to be elected and to elect to highest post irrespective of their gender[20].

III. Judicial view on Gender Justice

The apex court of India played a vital role to implement the principle of gender justice in India. The various landmark judgments are testimony to this assertion. In the case of *Yusuf Abdul Aziz v State of Bombay*[21] section 497 of Indian Penal Code which only punishes man for adultery and exempts the women even though she may be equally guilty as an abettor was held valid since the classification was not based on the ground of sex alone. Article 15(3) provides that special provisions can be there for the benefits of women and children. While enforcing the fundamental rights of the women in India in the cases where this vulnerable section of the society was victim of discrimination mainly on the ground of sex[22]

After 1950 various legislations were passed to deal with the issue of gender justice in the country. Hindu code bill[23], Criminal Law (Amendment) Act, 1983 etc. in addition to it the guidelines to prevent sexual harassment of the working women: In a land mark judgment in a case[24] in the year of 1997 exhaustive guidelines to prevent sexual harassment of the working women in places of their work until a legislation is enacted for this purpose. A public interest litigation (PI L)was filed by a social worker for the enforcement of rights of working women under articles 14, 19 and 21 of the Indian Constitution and in order to find suitable method for realization of the true concept of "Gender Equality "which is universally recogonised as basic human right. International Convention and norms are of great importance in the

20 Article 325
21 AIR 1954 SC
22 Union of India v Nargesh Meerza AIR1981 SC 1829; C.B. Muthamma v Union of India AIR 1979 SC 1868; Mathura; Shah Bano etc.
23 Hindu Marriage Act, 1955 ; Hindu Succession Act,1956; Minority and Guardianship Act,1956; Hindu Adoption and Maintenance Act,1956; Dowery Prohibition Act,1961 ; Criminal Law(Amendment) Act,1983
24 Vishaka v state of Rajasthan AIR SC 1997 3014

formulation of the guidelines to achieve this purpose. The following guidelines were laid down:

All employers or person in charge of the work in the public and private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of his obligation he should take steps to express prohibition of sexual harassment which includes e.g. any unwelcome physical or verbal or non-verbal conduct should be notified, published and circulated in appropriate ways. The rule and regulations of government and public sector bodies relating to conduct and discipline should include rules prohibiting sexual harassment and provide for appropriate penalties against the offender. With respect to private employees such prohibitions should be included in the Standing Order[25]. It was also provided that there should be appropriate working conditions for women with respect to leisure health and hygiene having no scope of hostile environment towards women at work place. Where such conduct amounts to specific offences, under Indian Penal Code[26] or under any law, the employer shall initiate appropriate action in accordance with law making a complaint with the appropriate authority. The victim of sexual harassment should have option to seek transfer of the perpetrator or their own transfer. Even after the enactment of ample number of legislations for the protection of interest of the female in India the incidents of discrimination and the violation of their rights are noticed everywhere across the country which is quite evident. As per the reports of the national crime bureau which reflects that the incidents of offences against women happened after every minute.

The position of household women and violence against them are so grave which compels the woman to commit suicide. So in order to protect the women from domestic violence parliament of India passed Act to provide both criminal, as well as, civil remedy to the victim[27]. As it is observed that the aggrieved parties in most of the domestic violence

25 Indian Employment (Standing Order) Act,1946
26 Indian Penal Code,1860
27 The Protection of Women from Domestic Violence Act,2005

cases are women, due to the vulnerability of their position in a patriarchal system of the society. Men, children and old people can also become regular victims of domestic violence in some cases[28]

However as a result of feminist advocacy within arena of international human right and development, social responsibility for domestic violence is strongly being acknowledged in many parts of the world[29]. It is common all over the world in all culture, classes and ages. It can take place between man and women, parent and children, elder and adult and vice-versa. Further it can be of many dimensions like physical, sexual, social, psychological or economical.

In this direction a positive step was taken in India in the year 1992 when a bill was drafted by the lawyers and presented to the women group's organization. Whereas in 1994 National Commission for Women recommended for such measure. The criminal law in force in India in the form of criminal code[30] was not adequate to deal with the menace of domestic violence.[31] In 2001 Protection from domestic Violence Act was presented. There was no specific law to control threat of abuse especially women in home. Domestic Violence Act was passed in 2005 with effective from the 26th October 2006. This legislation provides for both criminal as well as civil remedy of monetary relief, personal use of property by the victims.

At present domestic violence can be physical, verbal, emotional, economic abuse that can harm, cause injury to, endanger to health, safety, life/limb, being either mental or physical of aggrieved person is a wide definition and covers every eventuality. The aggrieved person means any person residing in the house hold. It is not necessary that aggrieved should lodge complaint before concern authority. Any person can lodge complaint that he has reason to believe that such offence has been committed. The aim of the Act is to provide for more effective

28 A.S. Anand justice for women(concern and expression)p.6(2008)
29 P.C.Triphathi, Criminal Victimization of Weaker Sex a Failure of Protection measures – An Analysis
30 Indian Penal Code,1860
31 Sections 498-A cruelty by in-laws with a married woman,304-A Dowery death ,IPC

protection of the rights of women guaranteed under the constitution of India who are victims of violation of any of kind occurring within family and for matters connected therewith or incidental thereto. The Constitutional right like right to equality means that women should be equal partner in the household management and sharing at par with male member both in rights and liability. Other right to life means that no harassment, torture of subjection of females in the family by the male member. They should be allowed to live a dignified life. The relationship can be marriage, blood-relation, by adoption or a relationship in the nature of marriage. Thus we can say that to live in relationship also comes under the Act. It is like giving a prisoner certain rights to resist torture and abuse but doing nothing for releasing him from his shackles[32]. It is only a societal system that will free both the man and woman and make them truly equal partners economical, socially and political so that they can enter into a genuine partnership thus evolving a new type of family where neither will be victim of villain because it is rightly said that home is where law is.

IV. Women empowerment in Present Scenario

Indian statistics shows that after the passage of various legislations for the gender justice, the sex ratio is declining day by day. Number of offences against females like rape, Dowery death, murder, cruelty etc. is a matter of concern for all the right thinking citizens. The soul shaking incident which took place on 16th of December 2012 led to the passage of criminal amendment law on the basis of report of former chief justice J.S.Verma in order to protect women and provide more stringent measures in the forms of both corporal and monetary sanction for the offences. The highest sex ratio at present is in the state of Kerala whereas other state with lowest one is Haryana as per the census 2011 held in the country.

32 Women's initial Community level responses to Domestic Violence, summary report of three states

In addition to it the female infanticides incidents are still there in spite of legal prohibition in the form of statute[33]. But with regard to the Trans Gender there are no such clear provisions in India. The state of Tamil Nadu allowed them to include their gender as "T" and election commission of India has made provision for them to show their sex as "O". In this context Justice P.Sathashivam observed "That *exploitation of women is "reality in India and gender justice is fragile myth" attributing the evil of the social prejudice? The discrimination against women stem not from legislation insufficiency, but from the attitude to a deep-rooted social values and ethics involved in the establishment of Indian society? The fact is that women's exploitation is reality and gender justice a fragile myth"*[34]

In this backdrop with regard to the issue of infanticides in India former *Chief Justice S.P.Bhraucha* opined that law alone would not be able to tackle menace of the female infanticide in the country and accordingly suggested that there should be better education in the country that could solve the problem of gender justice in India[35]. No doubt India is one of the few countries of the world where woman elected to the highest post of the country like president and prime minister[36]. But in spite of the honor endowed to the women in India there is no constitutional or other statutory provisions for their representation in the legislative bodies like Parliament and State's Legislative Assemblies in India except the constitutional amendments[37] which provide 33% reservation to women in the local bodies i.e. Panchyat raj institution in rural area and urban local bodies like Municipal Corporations in the country.

It is dismay to know that much awaited, the Women Reservation Bill is still pending in the Indian parliament. The objective of this proposed bill is to provide a fixed number of seats in legislative bodies

33 Medical Termination of Pregnancy Act,1971 and Prenatal Diagnostic Techniques(Regulation and Prevention of Misuse)Act,1994
34 Times of India dated 10.11.2012
35 Times of India dated 17.12.2001
36 Smt. Partiba Devi Singh Patil and Late Smt. Indira Gandhi
37 73rd and 74th Constitutional Amendment,1992

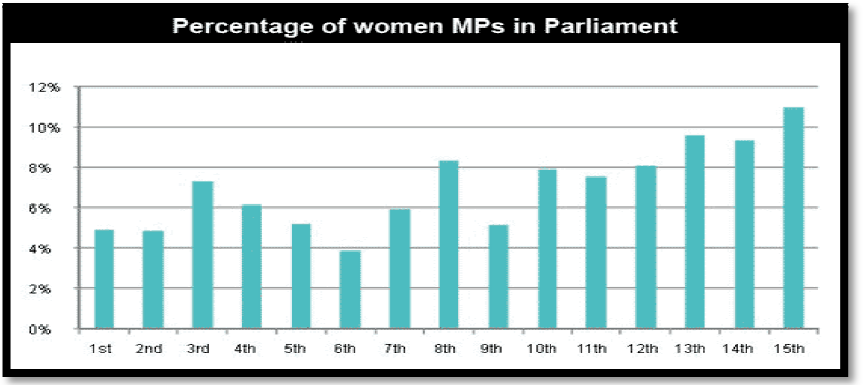
for women in India[38].The political vested interest till date prevented the constitutional guarantee to females in the law making process of the country that is even after more than six decades. It is pertinent to mention here that some states of Indian federation have made statutory provision for 50% reservation for women in the local bodies These states are: Maharashtra, Kerala, Andhra Pradesh, H.P, Jharkhand, MP, Chhatishgarh, Oddisha, Rajsthan, Tripura, Uttrakhand and Bihar. In this regards the Constitutional amendment bill[39] is pending in the parliament of India which sought to provide constitutional guarantee of 50% reservation to women in the local bodies and it is hope that it may get the approval of Parliament in near future and may add another feather in the cap of world's largest democracy.

The state of Jammu and Kashmir is the only federal unit of Indian federation where the representation of women in the state's legislative assembly is constitutionally guaranteed in the state's Constitution[40]. The provisions are there which enable the Governor of the State to nominate not more than two women to the lower house of the legislative assembly in case they are not adequately represented in the Assembly[41]. In previous state's legislative assembly (2008-14) there were three women who were elected from different constituencies[42] but in recently held assembly election for 12th legislative assembly (2014) two woman have been elected to lower house[43]. The number of women in the current state legislative assembly is four, including two nominated members one, each from Jammu and Srinagar[44]In addition to them there are two women in the upper house of the state assembly i.e. Rani Gargi

38 108th Constitutional Amendment Bill
39 110th Constitutional Amendment Bill,2009
40 The Constitution of Jammu and Kashmir,1957
41 Ibid, section 47
42 Shamim Firdous from Habbakadal, Mehbooba Mufti from Wachi and Sakina Ito from Noorbad is social welfare minister of the state.
43 Mrs.Asiea of the PDP and Shamim Firdous of the national conference(NC)
44 Mrs. Priya Sethi from Jammu (BJP) and Mrs. Anjum Fazili from Srinagar(PDP)

Bloeria and Dr. Shenaz Ganai. The state's Panchyat Raj[45] Act provides for the one-third reservation for women in the rural local bodies[46] as well as urban local bodies.[47]

The women's participation in the union parliament after reviewing the past record shows that at present in the lower house of the union legislature, there are 11.23% (61 women) and 88.77% men and whereas in the first general election for parliament 5% women formed the part of the lower house of the parliament. It is pertinent to mention here that their winning percentage always remained higher than the men in the various general elections as held in India[48].



From the above table we can say that their participation in the law making process of the nation based on their percentage has increased from 1950 onwards. More than 6% women were formed the part of parliament in the 3rd, 8th, and 10th to the current house. Whereas in the 6th house of the Parliament had lowest number of the women in Indian democratic process. But it was observed in the survey held 2011, India stood at 98th position of the world's women participation in the parliament[49].Further as per the report of the inter-parliamentarian union the position of India in a serious matter, as it ranked 111th position out of 189 countries in the matter of women's participation in the national

45 The Jammu and Kashmir Panchyat Raj Act,1989
46 Ibid, section 4
47 The Jammu and Kashmir Municipal Act,2000,Section 11-A
48 Journal of Constitutional and ParliamentStudies, Vol.XXXIII, p.137 (1999)
49 The Hindu 8.3.2011

parliament much lower than the neighboring countries.[50]The higher percentage participation of the women in India during 2014 general election is a positive signal in the women's empowerment. There are 61 women MP in the house of people which constitute 11.23% of the 543 parliamentary seats. Out of six parliamentary seats in the state of J&K one seat won by Mehbooba Mufti daughter of the former Chief Minister of the state who represents Anantnag parliamentary constituency of the Kashmir Division. Smt. Sumitra Mahajan is now holding the office of speaker in Lok Sabha

V. Conclusion

It is concluded that the position of Indian women has improved to a notable extent in the present arena in comparison to the past records. Now they have equal rights both in family and outside the household e.g. in the political affairs of the state too. Although gender based legislations are working for the benefits of the women but there is a need to frame more laws for them. Therefore, it is pertinent to mention here that in spite of the legal framework of the country for gender justice, the discrimination still persists among gender whether in family or the state affairs e.g. Obligations of state are to bring uniform civil code to end disparity based on religion in the matters concerning the marriage, succession or adoption etc. There is not equal participation of women in the law making process of the nation. Moreover still most of the societal norms are based on patriarchal system. As a result the number of offences against females is increasing day by day in the country. Therefore if we empower the women section of the society it will result into gender justice .In nut shell it will be beneficial to the human society at large.

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50 Delhi Policy Group ,April 2014

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Fundamental Rights and Provisions Facilitating Legal Aid: An Appraisal

Abstract

The legal system is not equally accessible to all. High cost of justice prevents the poor man from making use of the machinery of justice, for vindication of his rights or redressal of his grievances. Consequently, the poor and weaker section of the society continue to suffer speechlessly and have no alternative but to bear with injustice because they cannot pay the price of justice within the frame work of the judicial administration. The result is that the poor people are not able to secure the protection of laws. This results in losing faith in democracy and the rule of law and they get convinced that the legal system is intended to benefit the rich at the cost of the poor and disadvantaged if the poor cannot get equality before the law and equal protection of laws as enshrined in Constitution of India. This trend will certainly pose danger to the rule of law and grave threat to Constitutional Democracy. Therefore, the right to legal aid as an essential part of administration of justice is designed to protect the individual rights and also simultaneously meet the demand for social justice by protecting the new social rights of citizens, to ensure them economic and social equality.

Keywords: *Justice, Democracy, Legal Aid, Rule of Law, Equality.*

I. Introduction

The Constitution of India has defined and declared the common goal for its citizens as to secure to all the citizens of India, justice – Social, Economic and Political. The eternal value of the constitutionalism is the rule of law which has three facets i.e. rule by law, role under law and rule according to law. Under our Constitution, it is the primary responsibility of the State to maintain law and order so that the citizens can enjoy peace and security. The preamble speaks of justice, social economic and political and of equality of status and opportunity. It points out that protecting the interest of the poorer section of the society is the constitutional goal. So this very idea of protecting poor people cannot be promoted without the effective, efficient functions of the legal aid programmes and legal literacy programme.

Part III of the Constitution deals with Fundamentals Rights which are judicially enforceable. Indian Constitution not only proclaims in the Preamble but also guarantee equal justice to all under Art 14. Articles 14, 21 & 22, incorporate the idea of legal aid and equal justice. Justice Chandrashekhar highlighted as to how economic inequality hampers equality in the administration of justice, in his following words:

> *Theoretically all are equal in the eyes of law and justice. But in reality economic inequality has made justice beyond the reach of the weaker section of the people. As the law has become so complicated and the procedure in courts is so technical that very really a litigant will not be able to put forth his case before the Court, without the aid of an advocate. How many people in our country can afford to pay fee for engaging the services of advocates? A litigant has also to incur expenses for the travel, between his place of residence and the place where the Courts situated and for bringing his witness to the Court.*

Therefore, our concept of legal aid is expected to take note to such economic needs of litigation.

If equality disappears from the precincts of court, justice is orphaned. Therefore 'access to justice' in our Constitution is placed on the high pedestal of fundamental right. Access to justice is an inbuilt content of Article 14. If in accessing justice, the common man has to encounter barriers and impediments, the equality clause becomes a mere promise on paper. If access is gagged in a judiciary and the judges do nothing to remove the obstacles, such a system ceases to be an independent judicial system. The Principle of legal aid is based on the social, economic and political considerations. The Framers of the constitution of India desired that the citizens and the government are to strive for the establishment of an egalitarian society in which full and equal justice is guaranteed to all irrespective of position at which one is stationed in life.[1]

1 Manoj Kumar, "Legal Aid in India" 30 *DLR* 94(2011).

II. Right to Equality and Legal Aid

Liberty and equality are the words of passion and power. They were the watchwords of the French Revolution; they inspired the unforgettable words of Abraham Lincoln's Gettysburg Address; and the U.S. Congress gave them a practical effect in the 13th Amendment, which abolished slavery, and in the 14th Amendment, which provided that "the state shall not deny to any person within its jurisdiction…the equal protection of the laws." Conscious of this history, our founding fathers not only put Liberty and Equality in the preamble to our constitution but gave them practical effect in Art. 17 which abolished "Untouchability, and in Art.14 which provides that "state shall not deny to any person equality before the law and equal protections of the laws in the territory of India.[2]

The Doctrine of equality enshrined in Article 14 is a dynamic and evolving concept, which has many facets. It is embodied not only in Article 14 but also in Arts.15-18 of part III as well as in Articles 38, 39-A, 41 & 46 part IV of the constitution. The objective of all these provisions is to attain-Justice social, economic, and political which is indicated in the Preamble and which is the sum total of the aspirations incorporated in part-IV. The spiritual essence of legal aid moment is to provide equality.

The legal aid is an instrument to achieve equality before law. It is a concept of administration of justice. Equality is the bedrock of any democracy. Democracy provides equality before law and equal protection of law.[3] Equality before the law is the fundamental principle of the English Constitution. Regarding the principle of equality before the law learned English Scholar A.V. Dicey writes: With us no man is above the law but that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. In England, the idea of legal equality or of the universal subjection of all classes to one law

2 H. M. Seervai, *Constitutional Law of India*, 435 (Universal Book Traders, Delhi, 2002).

3 S.S. Sharma, *Legal Service, Public Interest Litigations and Para-Legal Services*, 193 (Central Law Agency, Allahabad, 2006).

administered by the ordinary courts has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.[4] Equality in administration of justice thus forms the basis of all modern systems of Jurisprudence.

It has been realized that there cannot be any real equality in the right to sue and be sued, unless legal advice is available to the poorer people, in the same manner as to others, whether in civil or criminal proceedings. For, without free advice, there is virtual denial of equal justice to poor man.[5]

Equality before law necessarily involves the concept that all the parties to a proceeding in which justice is sought must have an equal opportunity of access to the court and of presenting their cases to the Court. But the access to the courts depends upon the payment of court fees, and the fee of skilled lawyer. In so far as a person is unable to obtain access to a court of law due to poverty for having his wrongs redressed or for defending himself against a criminal charge, justice become unequal and laws which are meant for his protection have no meaning and to that extent fail in their purpose. Unless some provision is made for assisting the poor man for the payment of lawyer's fees and other incidental costs of litigation, he is denied equality in the opportunity to seek justice. The rendering of legal aid to the poor litigant is, therefore, not a minor problem of procedural law but a question of a fundamental character. Article 14 sets out an attitude of mind, a way of life, rather than a precise rule of law.

The law is a bewildering jungle of rules, and a procedure which confounds both judges and lawyers alike. How can we expect from poor person to conduct his case successfully in such complicated legal system without any help. The interpretation of our Constitution must be progressive. Now a line has been drawn between the rich and the poor,

4 A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 193 (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2003).

5 D. D. Basu, *Commentary on the Constitution of India*, 1008 (Wadhwa and Company, Nagpur 2007).

hence the justification that "like should be treated alike" seems to be irrelevant. The Court should interpret Article 14 in such a way as to invoke its aid to the poor and direct the State not to deny equality to those who have not ample means of representing themselves in the courts of law. Equal justice demands access to law and justice to both the poor and the rich and unless concession is provided to poor persons the Article 14 regarding equality will be futile and a mockery. The legal aid is really a fact of the right to equality before the law The assurance of equal justice under law is an essential requisite of true democracy, and the such principle requires that competent and conscientious legal assistance be available to all persons in need thereof even though they are unable to secure it through their own financial resources.[6]

There is no justice unless there is a sure uniformity about it. In a country like ours, where the poor are neither aware of their rights nor have money to engage lawyers, justice ends up becoming a rich man indulgence. The object behind free legal service for poor is to ensure equal and uniform justice. The ideals of equal justice, legal services and legal aid are a mechanism to realize equality before the law and equal protection of laws as these are basic aspects of administration of justice.

III. Protection of Personal Life and Liberty and Legal Aid

The object of Art 21[7] is to protect the life or personal liberty of every person. It guarantees against deprivation of personal liberty. The State cannot deprive a person of his life or liberty except in accordance with procedure established by law. Procedure established by law are words of deep meaning for all lovers of liberty and judicial sentinels. Procedure means fair and reasonable procedure. One component of fair procedure is natural justice. Prior to the decision in 1978 in ***Maneka's case***[8] Article 21 was construed narrowly only as a guarantee against executive action unsupported by law but in ***Maneka's case***[9] a limitation was imposed upon legislations while depriving a person of his life or

6 *Supra* note 4 at 65

7 Art. 21 of the Constitution of India "No Person shall be deprived of his life or liberty except according to the procedure established by law".

8 *Gopalan v. State of Madras*, 1950 SCR 88.

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

liberty it must prescribe procedure which is reasonable, fair and just. Justice Bhagwati, (as he then was) pronounced that the procedure by which a person is deprived of his life or personal liberty must be reasonable, fair and just. This view of justice Bhagwati became harbinger of the most revolutionary development in the field of Human Rights. The Maneka ratio was fruitfully utilized by Justice Bhagwati to extend legal services to the accused.

The Supreme Court of India has laid down that right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it is implicit in the guarantee of Article 21. The Learned Judge had a wider vision of the right to get legal aid in his opinion it was nothing but equal justice in action and the delivery system of social justice. The State Government cannot avoid its Constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative liabilities. The State is under a Constitutional mandate to provide free legal aid to an accused that is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the State.[10] The Supreme Court set aside the conviction and the sentence passed by the trial court because free legal aid was not provided to the accused during the trial as it is violative Article 21.[11] Under the canopy of Article 21 so many rights have found shelter, growth and nourishment.[12]

The concept of legal aid is a necessary corollary of right to life and personal liberty. The consideration of right to free legal aid as Fundamental Right is nothing but the outcome of judicial interpretation of the most cherished right under Article 21 of the Constitution of India. However, the special mention of those cases is unavoidable while discussing the role of judiciary in the field of legal aid. Undoubtedly, the concept of legal aid has gained strength and momentum due to the activist approach of judiciary. The provisions of Legal Aid were not

10 *Francis Coralie v. Union Territory*, AIR 1981 SC 746.
11 *Sukdas and others v. Territory of Arunachal Pradesh*, AIR 1986 SC 991.
12 Abhay Ostwal, Judicial Interpretation of Article 21 *Available at:* http://legalarticles.deysot.com/constitutional-law/judicial-interpretation-of-article-21-of-the-indian-constitution.html (visited on May 2013)

interpreted liberally so as to confer maximum possible benefit to the poor accused or litigants. It is only after the Forty Second Amendment to the Constitution of India and later period that the present right has gained an all encompassing position in the Indian Legal System. The same is evident from the approach of judiciary in interpreting various such provisions.

India having written constitution, the Preamble of which envisages basic objectives of the Constitution makers to build a new socio-economic order, where there will be equality of status and opportunity for all citizens. The Constitution of India also guarantees number of Fundamental Rights including *inter alia* equal rights of life and personal liberty. Besides this various other legal rights have been conferred on individuals through different Statutes and schemes deriving their validity from the Constitution of India itself.

However, if we critically examined the provisions of legal aid, it appears that even after sixty years of commencement of the Constitution of India, the Constitutional mandate of social justice is not transmitted into reality. This is because, generally Legal Services are available only to a fortunate few as there is wide disparity in level of income of people. So majority of people with inadequate resources are not having access to Courts, because of high litigation costs. Keeping these facts in mind, the Indian judiciary has taken lead and is playing a significant role in providing justice to the under privileged, indigent and helpless individuals through many novel concepts namely Public Interest Litigation, compensatory justice *etc.* The concept of legal aid is one of them. The concept of legal aid owes its very existence to the activist role of the members of Higher Judiciary in India.

IV. Right to Legal Aid as a Fundamental Right

Legal Aid was recognized by the Courts as a Fundamental Right under Article 21 of the Indian Constitution, the scope and ambit of this right was not made clear. The step was taken in this direction in the form of the verdict of ***Sunil Batra v. Delhi Administration***[13] where the two situations in which a prisoner would be entitled for legal aid were given:

13 AIR 1978 SC 1675.

First, to seek justice from the prison authorities and

Second, to challenge the decision of such authorities in the Court.

Thus, the requirement of extension of benefit of legal aid to the needy person was considered essential not only in judicial proceedings but also in proceedings before the prison authorities which were administrative in nature.

The Court has reiterated this principle again in ***Hussainara Khatoon v. State of Bihar***[14] and by saying that,

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.

In the instant case, the Court invoked Article 39-A of the Constitution of India which makes a provision for free legal aid in the form of Directive Principle of State Policy in order to interpret Article 21, which guarantees a Fundamental Right to Life and Personal Liberty. Thus by interpreting Article 21 of the Constitution of India in the light of Article 39-A the Court has tried to harmonize both provisions and thereby to confer justice to needy person. In further cases the Court has attempted to widen the scope of this right in many ways.

V. Legal Aid before Forty Second Amendment of the Indian Constitution

Though 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. However, in India as there is an adversarial judicial system based on the Anglo-Saxon Jurisprudence. As far as the Indian scenario is considered, the weakness of such a system lies in the fact that, the victim faces difficulties in satisfying the Court of Law about his innocence and many times it may place a poor victim in a defeating position. No doubt, there are some provisions in the existing Statutes and the Constitution of India itself

14 AIR 1979 SC 1369.

dealing with legal aid benefit but they were not given expansive interpretation by Courts at initial stages. As an effect, though law provided for representation through a lawyer[15] it was considered as a duty of accused or his relatives to make arrangements for the same. State had no obligation in this respect. Thus, in spite of there being the provisions conferring the benefit of Legal Aid to poor litigants, effectiveness and implementation of the same was not satisfactorily. In this context, it is important to note that the insertion of Article 39-A[16] in the Constitution of India has changed the scene totally.

VI. Legal Aid after Forty Second Amendment of the Indian Constitution

Forty Second Amendment Act, 1976 in the Constitution of India is the most extensive and exhaustive of the Amendments made so far. It *inter alia* inserted Article 39-A in the Constitution of India as one of the Directive Principles of State Policy. It aimed at delivering of equal justice with the instrument of legal aid. In spite of being a mere directive to the State, it has become capable of causing far reaching effects on the entire legal system in India only due to its dynamic and humanistic interpretation at the hands of Indian Judiciary. Thus, it can be said that insertion of Article 39-A in the Constitution of India has brought about a revolutionary change in the field of Legal Aid in India.

While marking out the status of Article 39-A of the Constitution of India, the Supreme Court recognized the changed position of Directive Principles under the Constitution of India through many of its decisions. In ***Keshvanand Bharti v. State of Kerela,***[17] the Supreme Court has taken a view that, the Fundamental Rights and Directive principles aim at the same goal of bringing about a social revolution and establishment of a Welfare State. So they can be interpreted and applied together. The Court now considers that the Fundamental Rights and Directive Principles are complimentary and supplementary to each other. This is because, the Directive Principles prescribes the goal to be attained and the Fundamental Rights lay down the means by which that goal is

15 Section 304 of the Code of Criminal Procedure, 1973.
16 By way of 42nd Amendment Act, 1976.
17 AIR 1978 SC 1461

achieved. This shows the equality of significance of both, Fundamental Rights and Directive Principles of State Policy in fulfilling the Constitutional mandate of equal and social justice.

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.

VII. Right to Legal Aid and its Enforcement

In spite of these laudable interpretations by judiciary of the right to free legal aid in India, there appears a wide gap between the decisions of the Court and their implementation. The Supreme Court many times has expressed a deep concern about such situation. In one such significant judgment of ***Sukhdas v. Union Territory of Arunachal Pradesh***,[18] Justice P.N. Bhagwati, had made the observations highlighting the importance of legal literacy as a part of 'Legal Aid Movement' to cope with the problems aroused due to the societal set-up in India. The Court has pointed out that, now it is to the common knowledge that in India, about 70% of the people living in rural area are illiterate and even more than that percentage of the people are not aware of the rights conferred upon them by law. Even literate people do not know what are their rights and entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits from which the poor suffer in this land. Their legal needs always stand to become crisis oriented because their ignorance prevents them from anticipating legal troubles and approaching a lawyer

18 AIR 1986 SC 991.

for consultation and advice in time. Moreover, of their ignorance and illiteracy, they cannot become self-reliant; they cannot even help themselves. Due to this the law ceases to be their protector because they do not know that they are entitled to the protection of the law and they can avail of the legal service programs for putting an end to their exploitation and winning their rights. The result is that poverty brings with them a condition of total helplessness. This miserable condition in which the poor find themselves can be alleviated to some extent by creating legal awareness amongst the poor. That is why it has always been recognized as one of the principal items of the program of the Legal Aid movement in the country, to promote legal literacy.

According to Justice Palok Basu, the unfortunate scene in India is that, the programme of free legal services is not successful to the extent to what it should have been due to non co-operative attitude of the Bar which aggravates this problem.

VIII. Article 22 and Legal Aid

The right to appear through counsel has existed in England for over three centuries. In ancient Rome there were great lawyers e.g., Cicero, Scaevola, Crassus, etc. who defended the accused. In fact the higher the human race has progressed in civilization, the clearer and stronger has that right appeared, and the more firmly has it been held and asserted. Even in the Nuremberg trials the Nazi war criminals, responsible for killing millions of persons, were yet provided counsel. Therefore when we say that the accused should be provided counsel we are not bringing into existence a new principle but simply recognizing what already existed and which civilized people have long enjoyed. The Founding Fathers of our constitution were themselves freedom fighters who had seen civil liberties of our people trampled under foreign rule, and who had themselves been incarnated for long period under the formula "*Na vakeel, na daleel, na appeal*" (no lawyer, no hearing, no appeal). Many of them were lawyers by profession, and knew the importance of counsel particularly in criminal cases. It was for this reason that they provided for assistance by counsel under Article 22 (1) and that provision must be

given the widest construction to effectuate the intention of the Founding Fathers.[19]

Article 22 (1) of our Constitution provides that no person shall be denied the right to consult, and to be defended by a legal practitioner of his choice. The right of the accused to have a counsel of his choice is fundamental and essential to fair trial. The right is recognized because of the obvious fact that ordinarily an accused person does not have the knowledge of law and the professional skill to defend himself before a court of law wherein the prosecution is conducted by a competent and experienced prosecutor. This has been eloquently expressed by the Supreme Court of American in ***Powell v. Alabama***.[20] The Court observed that right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and the knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step of the proceeding against him. Without it he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

When a person is arrested ever since the moment of his arrest he has a right to consult a legal advice of his own choice and also to have effective interview with the lawyer out of the hearing of the police, though it may be within their presence. The right extends to any person who is arrested, whether under the General Law or under the special Statute. The right to consult and to be defended by a lawyer of his choice belongs to the person arrested not only at pre-trial stage but also at the

19 *Md. Sukur Ali v. State of Assam*, AIR 2011 SC 1222.
20 287 US 45 (1932).

trial of any offence whether the offence is punishable with death, imprisonment or otherwise.[21]

IX. Legal Aid and Statutory Provisions

I. Legal Aid in Criminal Procedure Code

Aristotle Observed "Injustices arises when equal are treated unequally and unequals are treated equally. Justice arises when equals are treated alike".[22] Justice V.R. Krishna Iyer rightly mentioned that to sensitize the criminal process to the wavelength of the poor is the strategy. The legal process without legal aid to the poor may be a guarantee of anarchy and not of order. To hands and feet, we need an efficient means and method to carry out Justice in every case in the shortest possible time and the lowest possible cost.[23] In India there was no specific provision in Criminal Procedure Code, 1878 for appointment of a pleader for the poor accused.[24] The Law Commission[25] of India strongly recommended that the right of the accused to representation at the Government expense should be placed on statutory footing in relation to trails for serious offences, and as a first step in this direction, the Commission proposed that such a right should be available in all

21 D. D. Basu, *Shorter Constitution of India*, 135 (Wadhwa and Company, Nagpur, 1999).

22 Harbans Lal, "Legal Aid—A Fundamental Right__Eligibility for Providing Legal Aid" *ND* 59 (2009).

23 Legal Aid-Constitution and Other Laws. *Available at:*http://legalaidinindia.weebly.com/chapter-ii.html.(Visited on June 2013).

24 *Supra* note 4, Roma Mukherjee, *Women Law and Free Legal Aid in India*, 42(Deep & Deep Publications Pvt. Ltd. New Delhi, 2000).

25 The Law Commission made three recommendations as regards legal aid in criminal cases. Initially, representation by a lawyer should be made available at Government expenses to accused persons without means in all cases tried by a Court of Session. Secondly, representation by a lawyer should be made available at Government expense to appellant without means under the Code. Thirdly, representation by a lawyer should be made available at Government expenses to an accused person without means at the time of the final hearing of an appeal that has been admitted .The Law Commission of India strongly recommended that the right of the accused to representation at the Government expense should be placed on statutory footing in relation to trials for serious offences and as a first step in this direction, the commission proposed that such a right should be available in all trials before the court of session.

trials before the Court of Session. Section 304[26] of the Criminal Procedure Code (Cr.P.C.) 1973 gives effect to the recommendation of the Law Commission by conferring on the accused the right of legal aid at the expenses of Government.[27] The echo of the provisions contained in section 304 of Cr.P.C. now finds place in Art 39-A of the Constitution which forms a part of Directive Principles of State policy. Court should administer the provisions of Sec 304 of Cr.P.C. with zeal and interpret the same liberally in favour of the citizen seeking legal aid. Sec 304 of Cr.P.C. is a right step in the right directions of providing free and competent legal aid to the accused who are unrepresented. The ambit of providing legal aid to an accused at the state expense has been enlarged by the provisions of Sec 304.

Section 303 of the Code of Criminal Procedure, 1973 is in conformity with fundamental rights enshrined in Article 22(1) of the constitution. Scope of 303 and 304 of the Cr.P.C are different. Neither Article 22(1) of the constitution nor section 303 of the Cr.P.C enjoins any duty on the state to provide legal practitioner of the choice of the accused for his defence in criminal trial. The lawyers to be provided by the state under Section 304 of the code need not to be of the choice of the accused. The Law Commission of India in its 48th Report suggested for making of provisions for free legal assistance by the state for all

26 Sec. 304 of Criminal procedure code: Legal aid to accused at State expense in certain cases.
(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appear accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.(2) The High Court may, with the previous approval of the State Government, make rules providing for(a)the mode of selecting pleaders for defence under subsec (1);(b)the facilities to be allowed to such pleaders by the Courts;(c)the fees payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-sec.((3)The State Government may, by notification, direct that, as from such date as may be specified in the notification. The provisions of sub-secs. (1) and (2), shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Session.

27 Prior to the amendment of Cr.P.C. section 340 of the Cr.P.C. provided that a pleader may represent the accused. It did not give him any right to legal aid at the expense of the state. Assistance of counsel at the expenses of the state was provided under section 304 Cr.P.C.

accused who are undefended by a lawyer for want of means. [28] Section 303 of Cr.P.C provides that any person accused of any offence before a criminal court, or against whom proceedings are instituted under this code, may of right be defended by a pleader of his own choice. Section 41 D[29] provides that where any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation.

II. Legal Aid and the Code of Civil Procedure

Order XXXIII of the Civil Procedure Code (CPC) provides for suits by indigent persons. It enables persons who are too poor to pay court-fees and allow them to institute suits without payment of requisite court-fees. The provisions of Order 33 are intended to enable indigent persons[30] to institute and prosecute suits without payment of any court fees. Generally, a plaintiff suing in a court of law is bound to pay court fees prescribed under the Court Fee Act at the time of presentation of plaint. But a person may be poor to pay the requisite court fee. This order exempts such person from paying the court fee at the first instance and allows him to prosecute his suit in *forma pauperis*, provided he satisfies certain conditions laid down in this code.[31]

Conclusion

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

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28 K.D. Gaur, *Criminal Law and Criminology*, 880-881 (Deep & Deep Publications Pvt. Ltd. New Delhi, 2002).

29 Inserted by The Code of Criminal Procedure (Amendment) Act, 2008.

30 The Law Commission in its 14th report recommended to replace the word "pauper" by the word "poor person" or "assisted persons." Since the expression "pauper" is used in English Statutes also and the expression had come to acquire special meaning in legal parlance and had become familiar, the Law Commission in its 27th Report did not suggest for the change and considered it as unnecessary to disturb existing term. But the Law Commission in its 54th Report recommended that the present expression "indigent person" should be used throughout the Code in place of the expression "pauper" which is not in harmony with modern attitudes. The original marginal note "Suits may be instituted in forma Pauperis" is however not changed.

31 C. K. Takwani, *Civil Procedure Code,* 300-301*(*Eastern Book Company, Lucknow, 2003).

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 non-governmental organizations (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. 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.

For the preservation of the Rule of Law and Democracy and for making the Fundamental Rights meaningful, the legal aid to the poor and weak persons is necessary. Thus free legal aid is the instrument of speedy justice for the poor and the needy. The Constitutional obligation of access to justice can be achieved only through this mechanism, which delivers the justice to the door steps of the poor.

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Justice For Women: Empowerment Through Law

Abstract

The great gift of classical and contemporary, human thought to culture and civilization is the notion of human rights. The struggle to preserve, protect and promote basic human rights continue in every generation in each society. Today we widen the sphere of human rights thought and actions to new arenas and constituencies. Our world of terror and horror, of hunger and handicaps, of hopes of human order where people everywhere will be sovereign and as groups and as individuals will be free, where society will guarantee full person hood in holistic richness of every member of world community, present many problems of social dynamics and jural pragmatism. The task is to strive for a social order concretizing by positive law, the aspiration of mankind for the full and free development of every individual[1].Among the wonders of the omnipotent creator, women stands apart for her charm and attraction. But, unfortunately, this apparent boon, has become a curse for her in various ways. History bears testimony to the fact that many bloody battles were fought for women resulting in the rise and fall of many civilizations. Numerous socio-political and legal reforms have failed to change woman's position and her exploitation in one form or other is still rampant. Particularly the Indian woman is greatly exposed to exploitation. The continuing phenomena of woman's suffering in all walks of her life is a clarion call for humanity to wage an ultimate war against these atrocious acts[2].

Gender inequities throughout the world are among the most all pervasive, though deceptively subtle form of inequality. Gender equality concerns each and every member of the society and forms the very basis of a just society. Human rights issues, which affect women in particular, play a vital role in maintaining the peace and prosperity of a just society. It is an established fact that women represent very kernel of the human society around which social change must take place.

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1 Justice V.R Krishna Iyer, Human Rights and the Law,(1986)at p.3

2 Prabhat Chandra Tripathi, Crime Against Working Women,(1998) at p.241-42

Keywords: *Human rights, Gender equality, jural pragmatism, positive law, just society.*

Introduction

"Violence against women is perhaps the most shameful human rights violation. And it is perhaps the most pervasive. It knows no boundaries of geography, culture or wealth. As long as it continues, we cannot claim to be making real progress towards equality, development and peace".[3]

Every human being has the inherent right to life. The right to life is a fundamental human right, central to the enjoyment of all other human rights. Right to life is a phrase that describes the belief that a human being has the right to live, particularly that a human being has a right to live with dignity. Movement from the First U.N World Conference on women held in Mexico in 1975 to the Fourth World Conference on women held at Beijing in 1995, has been a journey in search of equality, development and grant of rightful place of women throughout the world.

At the International level, prohibition against sex discrimination was first articulated in the United Nations Charter of 1945 and later reiterated in the Universal Declaration of Human Rights of 1948.

Equality of rights for women is a basic principle of the **United Nations Charter**. The preamble of the United Nations Charter (1945) begins by referring a" faith in fundamental human rights, in the dignity and worth of the human persons, in the equal rights of men and women and of nations large and small ". The United Nations Charter states that the United Nations aspire to "achieve international cooperation.....in fundamental freedom for all without distinction as to race, sex, language, or religion [Art. 1(3)]. Article 13 of UN charter empowers the General Assembly to initiate studies and make recommendations to foster the realization of human rights and fundamental freedom.

3 Kofi Annan Secretary General of the United Nations, March 8th, 1999

Universal Declaration of Human Rights[4]

Human rights may be defined as the rights and freedom that every person on the earth are entitled to enjoy viz. right to social security, right to equality, right to life, liberty and security of persons etc., without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.

The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all the regions of the world, the Declaration was proclaimed by the United Nations General Assembly[5] in Paris on December 10th1948[General Assembly Resolutions 217 A (III)(French)(Spanish)]as a common standard of achievements for all people and all nations. It sets out, for the first time, fundamental human rights to be universally protected.[6]

The Universal Declaration of Human Rights, 1948 opens with an assertion of the equal unassailable rights of all members of the human family to inherent dignity and appreciation of the aspiration of the common people for a world that is free from experience of barbarous acts which have lived with conscience of human kind.

The preamble states, "Whereas recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of 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 human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people".

Articles 1, 2, 3, 7, are specifically relevant to the present purpose, addressing questions of entitlement to dignity and freedom without distinction of race, colour, sex etc.

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4 Adopted by United Nations On December 10, 1948

5 http://www.un.org/en/documents/udhr/index.shtml visited on 9.07.15

6 http://untreaty.un.org/cod/avl/ha/udhr/udhr.html visited on 9.07.15

Article 1 of the Universal Declaration of Human Rights states that "all human beings are born free and equal in dignity and rights".

Article 2 prohibits gender discrimination or discrimination on the ground of sex. It states, "Everyone is entitled to all rights and freedoms set forth in this Declaration, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or any other limitation of sovereignty".

Article 3 says that "everyone has the right to life, liberty and security" of person.

Article 7, all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

States also have an obligation under international human rights law to respect, protect and fulfill the human rights of women, as elaborated, for example, in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), International Covenant on Civil and Political Rights (ICCPR); The International Covenant on Economic, Social and Cultural Rights(ICESCR)[7]-Article 2(2).

International Covenant on Civil and Political Rights (ICCPR)

The ICCPR was opened for signature by the UN General Assembly on 19th December, 1966 and entered into force on 23rd March, 1976. The ICCPR deals in particular with what are typically referred to as "civil and political" rights, such as the right to equality, the right to life and so forth. Article 3 requires a special mention as it provides for equal

7 The State parties to the present Covenant undertake to guarantee that the rights enunciated in the present covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

rights of men and women. The right to life in Article 6 of the ICCPR states:

"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

The Human Rights Committee explains that the right to life "is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation".

In ***Nilabati Behera v State of Orissa***[8]a provision in the International Covenant on Civil and Political Rights (ICCPR)was referred to support the view taken that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right, as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for constructing the fundamental rights expressly guaranteed in the constitution of India which embody the basic concept of gender equality in all spheres of human activity.

TheInternational Covenant on Economic, Social and Cultural Rights (ICESCR)also approved in 1966 promises women equality of status.

The Fourth World Conference on women, held at Beijing just a few years back, has brought us further forward by reaffirming gender equality as a fundamental prerequisite for social justice. The Platform for Action at the Beijing conference addressed eleven substantive areas of concern, poverty, education, health, violence, armed conflicts, economic structures and policies, decision making, mechanisms for the achievement of women, women's human rights, mass media and the environment. The Conference also attempted to strike a balance between local customs, traditions and cultures and indeed, Beijing went even so far as to demand that religious and cultural values should contribute to the realization of women enjoying full equality.

8 Nilabati Behera v State of Orissa [(1993)2SCC746]

The Convention on the Elimination of All Forms of Discrimination Against women (CEDAW):

The most important step in the advancement of women's right is the Convention on the Elimination of All Forms of Discrimination against Women. Perhaps the most important conceptual advance in the international law of women's rights is the CEDAW, which provides that women be given rights equal to those of men on equal terms. The Preamble maintains that "the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields[9]".

CONSTITUTIONAL FRAMEWORK

The role of women, which constitute half of the population, has greatly changed after industrialization and independence of the country. In addition to their family chores, they are now working in offices, industries, educational and professional institutions and commercial and agricultural occupations. Nobody can now afford to ignore their contribution in different walks of life. In the industrialized sector they are working both in the organized and unorganized sectors of employment.

The Constitution of India has given special attention to the needs of women to enable them to exercise their rights on an equal footing with men and participate in national development .It provides security and protection to women by guaranteeing equality before law, equality of opportunity in the matter of employment, equal pay for equal work, maternity relief, decent standards of life and living wages. It prohibits the state from making any discrimination on the basis of sex. While all provisions of the constitution are applicable in equal measures to men and women, Part III and IV need special mention; as these are backbone on which protective legislation for women has been based and can, therefore be invoked by women for the assertion of their rights.

9 Convention on Elimination Of All Forms Of Discrimination Against Women, Adopted by General Assembly of UN on December 18,1979.

The jurisdiction of the Central government and State Governments are within the mandate given by the Constitution which adopt a policy which is non-discriminatory towards women. As such all the policies, programmes and legal instruments either put in place by the State Governments or the Central Government addresses all the issues in a non-discriminatory manner. While bringing enactments in respect of the matter included in the concurrent list the Central Government always consults the State Governments.

Even though the State of Jammu and Kashmir enjoys a special status[10], fundamental rights and other rights available under the Constitutional framework, are equally enjoyed by the people living in the State of Jammu and Kashmir. The Government of the State of Jammu & Kashmir has put in and continue to put programmes, policies and legal instruments for the welfare of the people of the State within the Constitutional mandate.

This ensures consistent implementation of necessary programmes including welfare measures for women in the state to eliminate all forms of violence against women. The State of Jammu and Kashmir has an institutional mechanism in the form of State Commission for Women which ensures protection of rights of women and gives recommendations to the State Governments on lacunae in existing legal framework concerning women.

Apart from the Constitutional guarantees provided under the Article 14 (Equality before the law and equal protection of the laws) and Article 15 (Prohibition of discrimination on grounds of sex), Article 15(3) allows the State to make special provisions for women and children.

FUNDAMENTAL RIGHTS

Part III of the constitution recognizes and confer fundamental rights to citizens. And some of these are enjoyed by non citizens also. Thus Part III of the constitution "gives a constitutional mandate for certain Human Rights- called Fundamental Rights in the constitution. It also provides constitutional mode of enforcing them." These rights have a special status in the constitution, as according to Article 13:

10 Article 370 of Indian Constitution.

(a) All law in force before the commencement of the constitution, so far as they are inconsistent with the provisions of Part III, have been declared, to the extent of inconsistency, void; and

(b) The state has been prohibited from making any law which takes away or abridges the right conferred in Part III and any law made in contravention of this part, is to the extent of inconsistency, void.

Part III of constitution comprises Articles 12 to 35-A. The relevant provisions of part III are mentioned below:

Article 14-Equality before Law

The state shall not deny to any person equality before the law or the equal protection before the laws within the territory of India."Equality before law" finds a place in almost all the written Constitutions that guarantee fundamental rights.[11] Both the expressions have also been used by the Declaration of Human Rights.[12] This term has been adopted from English constitution and implied absence of any special privilege in favour of any person. The term "equal protection of law" is of American origin and is a most positive concept. It implies "equality of treatment in equal circumstances[13]" i.e. application of same law alike and without discrimination to all persons similarly situated.

Article 15 - Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex, or Place of Birth[14]

(1) The state shall not discriminate against any citizen on the ground only of religion, race, caste, sex, place of birth or any of them.

(2) Nothing in this article shall prevent the state from making any special provision for women and children.

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11 USA constitution, Sec 1 of 14thamendment "No state shall.....deny to any person within its jurisdiction the equal protection of laws." Eire constitution, Section 40(1), All Citizens shall as human persons be held equal before law". Burma constitution -Section 13 "All citizens irrespective of birth, religion, sex or race are equal before law, that is to say, there shall not be any arbitrary discrimination between one citizen or other class of citizen .

12 UN Declaration of Human Rights, 1945-Article 7" All are equal before the law and are entitled without any discrimination to equal protection of law".

13 Dicey, Law of Constitution,49 [Palgrave Micmillan,UK,10th edition]

14 Article 15(3) says that nothing in this Article shall prevent the state from making any special provision for women and children.

Article 16- Equality of Opportunity in Matters of Public Employment

(1) There shall be equality of opportunity for all citizens in matters relating employment or appointment to any office under the state.

(2) No citizen shall, on grounds only of religion, race, 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.

Article 19- Protection of Certain Rights Regarding Freedom of Speech Etc.

1) All citizens have the right –

a) To freedom of speech and expression.

b) To assemble peacefully and without arms.

c) To form associations or unions.

d) To move freely throughout the territory of India.

e) To reside and settle in any part of the territory of India.

f) To practice any profession, or to carry on any occupation, trade or business.

The article, affords "all citizens" equal opportunity to participate in workforce. Despite the great numbers of women entering the workforce, the working world is still viewed by many as man's domain. Motivated by traditional male dominated attitudes, some men try to intimidate women out of the work place through sexual harassment. Such hostility is often dismissed as an inevitable part of being a working women and, therefore, not something worthy of complaint. However, such behaviour clearly and directly violates Article 19(1)(g) .

Article 21- Protection of Life and Personal Liberty

No person shall be deprived of his life and personal liberty except according to the procedure established by law.

According to Article 21, all persons are entitled to "life and personal liberty" at all times and in all circumstances (other than certain legal exceptions). When considered in conjunction with Article 19(1)(g), which entitles all persons to equal opportunity at the workplace, it stands that no persons "shall be deprived" of life and liberty at the

workplace. Furthermore, the Supreme Court has interpreted "right to life" to mean, "right to live with human dignity".

DIRECTIVE PRINCIPLES

Till the end of the nineteenth century the old concept of the state was that the state is mainly concerned with the maintenance of law and order and protection of life and property of its subjects. But we living in an era of "welfare state ", where a state seeks to promote the socio-economic wellbeing of the people. The policy of state should be for social good.

Pursuing this object, the constitution of India has provided in Part IV the Directive Principles of State Policy. These principles lay down certain economic and social goals to be achieved by the various Government's in India i.e. Central Government and the State Governments. These directives impose certain obligations on the state to take positive action in certain directions in order to promote the welfare of the people. Though these principles are "non justifiable", they are constitutional directions which "the State" is supposed to abide by. Mathew J, has aptly observed:

"The moral rights embodied in Part IV of the constitution are equally an essential feature of it, the only difference being, that the moral rights embodied in Part IV are not specially enforceable as against the state by the citizen in a court of law in case state fails to implement its duty but, nevertheless, they are fundamental in the governance of the country and all the organs of the state, including the judiciary, are bound to enforce those directives".[15]

Those Directive principles, which are concerning women and have special bearing on their status are given as follows:

Article 39- Certain Principles Be Followed By the State

The state shall, in particular, direct its policy towards securing-

(a) That the citizens, men and women equally, have the right to an adequate means to livelihood;

(d) That there is equal pay for equal work;

15 Keshvananda Bharati v State of Kerala [AIR 1973 SC 1461]

Actions such as intimidation of women through sexual harassment with the (explicit or implicit) intention of driving them from the workplace can be interpreted to violate Provision (a) of Article 39. Also, it can be argued that the state is required under the provision (d) to protect individuals from situations in which they must choose between submitting to sexual demands and accepting lower pay(or dismissal) as punishment for rejecting those demands.

Article 42-Provisions for Just and Humane Conditions of Work and Maternity Relief

The state shall make provisions for securing just and human conditions of work and for maternity relief.

Article 42 further protects women's right to **maternity leave**. This makes it clear that attempts to intimidate a woman out of claiming maternity leave are illegal. Moreover it makes it clear that there is no legal basis for the traditional misogynist claim that pregnancy interferes with work thus making women unsuitable for the workplace.

FUNDAMENTAL DUTIES- ARTICLE 51A

It shall be the duty of every citizen of India to promote harmony and the spirit of common brotherhood amongst all people of India transcending religious, linguistic and regional or sectional diversities, to renounce practices derogatory to the dignity of women.

Thus, it can be concluded that the Constitution of India has given special attention to the needs of women to enable them to exercise their rights on an equal footing with men and participate in national development. The Indian Constitution declares that gender equality is a fundamental right[16]. When it is infringed, the natural basic human rights, inherent in human beings are violated[17].

The constitution aims at the creation of an entirely new social order where all citizens are given equal opportunities for growth and development and that no discrimination takes place on the basis of race, religion, and sex etc. The constitutional commitment imposes an

16 Sidhu Menon, Images of Women Workers in 2003, Labour File No 2, Jan - Feb 2004, p. 5.

17 Meena Rao: Rampifications of Harassment of Women, 43 JILI (2001), p.305.

obligation on the welfare state to protect the interests of the women and children. As they belong to the weaker section of the labour force, their exploitation by the employer has become in practice a rule rather than an exception.

PROTECTIVE LEGISLATION'S AND PROGRAMMATIC INTERVENTIONS

In order to achieve substantive equality special measures have been taken in the form of affirmative action that includes protective legislation and programmatic interventions as under:

- **Factories Act 1948:** Under this Act, a woman cannot be forced to work beyond 8 hours and prohibits employment of women except between 6 A.M. and 7 P.M.
- **Maternity Benefit Act 1961:** A Woman is entitled 12 weeks maternity leave with full wages.
- **The Dowry Prohibition Act, 1961:** Recognizing the need to address the social evil of dowry, the Dowry Prohibition Act was enacted in 1961. The Act defines “dowry” and penalizes the giving, taking or abetting the giving and taking of dowry with imprisonment for a term which shall not be less than five years, and with the fine which shall not be less than fifteen thousand rupees. It also lays down a built-in implementation mechanism in the form of Dowry Prohibition Officers to ensure effective and efficacious enforcement of the law.
- **The Equal Remuneration Act of 1976:** This Act provides equal wages for equal work: It provides for the payment of equal wages to both men and women workers for the same work or work of similar nature. It also prohibits discrimination against women in the matter of recruitment.
- **The Child Marriage Restrain Act of 1976:** This Act raises the age for marriage of a girl to18 years from 15 years and that of a boy to 21 years.
- **Indian Penal Code:** The provisions providing punishment for various offences against women are Section 354 IPC (Assault or criminal force to woman with the intent to outrage her modesty), Section 375, 376 - Rape and custodial rape, Section 304B - Dowry death, Section 498A - Husband or relative of husband of a woman subjecting

her to cruelty, Section 509 - Word, gesture or act intended to insult the modesty of a woman, Section 366A IPC - Procuring a minor girl and Section 372 & 373 IPC - Selling/Buying or hiring/obtaining a minor for prostitution.

- **The Medical Termination of Pregnancy Act of 1971**

The Act safeguards women from unnecessary and compulsory abortions.

- **Amendments to Criminal Law 1983:** which provides for a punishment of 7 years in ordinary cases and 10 years for custodial rape cases.
- **Reservation for Women in Local Self –Government** The 73rd Constitutional Amendment Acts passed in 1992 by Parliament ensure one-third of the total seats for women in all elected offices in local bodies whether in rural areas or urban areas.
- **National Commission for Women** In January 1992, the Government set-up this statutory body with a specific mandate to study and monitor all matters relating to the constitutional and legal safeguards provided for women; review the existing legislation to suggest amendments wherever necessary, etc.
- **The Protection of Human Rights Act, 1993**

According to the Protection of Human Right Act, 1993 "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India. Women rights are also Human rights and have to be protected to allow them to live with dignity without fear of their safety and security workplace"

- **The National Plan of Action for the Girl Child (1991-2000)** the plan of Action is to ensure survival, protection and development of the girl child with the ultimate objective of building up a better future for the girl child.
- **National Policy for the Empowerment of Women, 2001**

The Department of Women & Child Development in the Ministry Of Human Resource Development has prepared a "National Policy for the Empowerment of Women" in the year 2001. The goal of this policy

is to bring about the advancement, development and empowerment of women.

- **The Hindu Succession (Amendment) Act, 2005** was enacted to guarantee property rights to a daughter and to bring her at par with a son or any male member of a joint Hindu family. This Amendment Act makes the daughter a coparcener in her own right with the same rights and liabilities in the coparcenary property as the son.

- **The Protection of Women from Domestic Violence Act, 2005** is a gender specific legislation which seeks to provide immediate relief to any woman facing domestic violence.

- **The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act**, 2013 and Rules were enacted in December 2013 to provide a safe and secure working environment to all women. The Act seeks to cover workplaces in the organized and unorganized sectors and creates an effective complaints and redressal mechanism in the form of an Internal/Local Complaints Committee.

- **The Criminal law (Amendment) Act, 2013** –The Act lays down stringent punishment for crimes against women. It provides for minimum imprisonment for a term of twenty years for rape and extends to "natural life" under prescribed circumstances. There is also a provision for death sentence if the victim dies or is left in a "persistent vegetative state"."Stalking[18]" and "Voyeurism[19]" has been defined as criminal offence in the Act.

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18 The Hindu, February 02, 2013. Bringing stalking under the ambit of IPC Verma Committee said" Whoever follows a person and contacts or attempts to contact such person to foster personal interaction repeatedly, despite a clear indication of disinterest by such person or whoever monitors the use by a person of the internet, email or any other form of electronic communication, or watches or spies on a person in a manner that results in a fear of violence or serious alarm or distress in the mind of such person, or interferes with the mental peace of such person, commits the offence of stalking". A person convicted of stalking will get a jail term of not less than one year, which may extend to three years, and will be liable to fine.

19 The Hindu, February 02, 2013.The panel said that "whoever watches a women engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the

Legal Framework to Protect Women from Being Portrayed in a Negative Role

An adequate legal framework as under is in place to protect women from being portrayed in a negative or a subordinate role: These include:-

- The **Indian Penal Code** that provides penalty for sale of obscene books, sale of obscene objects to young person and obscene acts and songs.
- The **Information Technology Act, 2000** that provides punishment for publishing or transmitting obscene material in electronic form.
- The **Indecent Representation of Women (Prohibition) Act, 1986**.

It was enacted with the specific objective of prohibiting the indecent representation of women through advertisement, publication, writing, and painting or in any other manner. It prohibits such representation in any form in any advertisement, publication etc. and also prohibits selling, distribution, circulation of any books, pamphlets, and such other material containing indecent representation of women.

- The **Cinematograph Act, 1952** that provides penalties to anyone who exhibits or permits to exhibit any film other than the one certified by the Board as suitable for public/unrestricted view. Also covers situations where film is tampered with after certification.
- The **Press Council Act, 1978** that refers to action being taken by the Council against a news agency or a newspaper in case it has offended the standards of journalistic ethics or public taste or that an editor or working journalist has committed any professional misconduct.
- The Cable Television Network Rules, 1994 states that no cable service should carry out a programme which is denigrates women

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perpetrator, or by any other person at the behest of the perpetrator "would be charged with voyeurism. This will include "a sexual act that is not of a kind ordinarily done in public, besides dissemination of images or other material even if it was taken with the victims consent. In case of first conviction, imprisonment not less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

through the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to women.

In addition to the women specific legislations and programmes, the **Penal Code** and the **Criminal Procedure Code** have provisions to facilitate access to justice and address discriminatory practices. These include

- Penalty for a public servant who fails to record any information given to him in relation to offences under Section 326, 354, 375 and 376 (acid attack, outraging the modesty of a woman and rape) of the Indian Penal Code.
- Duty on all hospitals public, private run by the Central Government or State Government to provide first aid or medical treatment, free of cost to victims of acid attack or rape.
- Prohibit arrest of a woman after sunset and before sunrise.
- Statement of a rape victim to be recorded at her residence or at a place of her choice and as far as practicable by a woman police officer.
- All rape cases to be tried in the court of a woman judge as far as practicable.
- In camera trial of sexual offence cases to be conducted as far as practicable by a woman judge.
- Trials in rape cases to be completed within a period of two months from the date of commencement of the examination of witness.
- Under the Legal Services Authority Act, 1987 every woman has a right to free legal services. To access such services one can contact District/Taluk Level Legal Services Authority offices.
- Further, under various women related legislations the Government had identified and put in place special mechanism to facilitate women's access to relief under the law.
- Under the **Protection of Women from Domestic Violence Act, 2005** which seeks to provide immediate relief to women in cases of domestic violence, the State Government has appointed Protection Officers and registered Service Provider under this law to facilitate women's access to reliefs under this Act.

- **The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013** and Rules made there under has been brought into effect from December 2013. Under this Act every employer has to constitute a Complaints Committee in order to look into complaints of sexual harassment. The Act also mandates constitution of a Committee in every district by the District administration which gives access to a mechanism to those women who work in the unorganized sector or in workplaces having less than 10 employees.

Conclusion

The problems of women which are primarily on account of social prejudice and conventional and traditional approach inherent in the system, can be solved by creating the right public opinion against such conservative and discriminatory approach. Moreover much also depends upon the women themselves. Majority of them being illiterate and ignorant are unaware about their rights and privileges. They must rise to the occasion and realize their rights and status given to them under the law. They must leave the fear and agitate for their rights.

For long the country has neglected the gender aspect in development process. The time has come to recognize the contribution of women to the generation of national wealth. Formulation of the policies which are gender sensitive is the need of the hour. For the emancipation for women in every field, economic independence is of paramount importance. Along with economic independence, equal emphasis must also be laid on the total development of women-creating awareness among them about their rights and responsibilities –the recognition of their vital role and the work they do at home. If necessary a social system must evolve .The society must respond and change its attitude.

Awakening of the collective consciousness is the need of the day. Change of heart and attitude is what is needed. If man were to regain his harmony with others and replace hatred, greed, selfishness and anger by mutual love, trust and understanding and if woman were to receive education and become economically independent, the possibility of this pernicious social evil dying a natural death may not remain a dream

only. The Legislature, realizing the gravity of the situation has amended the laws and provided for stringent punishments in such cases and even permitted the raising of presumptions against an accused in cases of unnatural death of brides within first seven years of their marriage. The Dowry Prohibition Act was enacted in 1961 and has been amended from time to time, but this piece of legislation, keeping in view the growing menace of the social evil, also does not appear to have served much purpose as dowry seekers are hardly brought to book and conviction recorded are rather few. Laws are not enough to combat the evil. A wider social movement of educating women of their rights, to conquer the menace, is what is needed more particularly in rural areas where women are still largely uneducated and less aware of their rights and fall an easy prey to their exploitation.

Whenever crime is committed against women and that too a violent crime, it sends shock waves to the society but those shock waves burst like bubbles in a very short time. The society must change its attitude.

Fight for justice by females or cry for gender equality is a fight against traditions that have chained people -a fight against attitude that is ingrained in the society.

Primarily, it is for the men folk to bring about the change .Every effort must be made to ensure that a girl child is treated as an equal important member of the family.

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Comparative Study Of Consumer Protection Laws In India And Usa

Abstract

There is a growing awareness in India about consumer rights. The common masses are taking interest in the market and its ever changing trends. As regards the efforts being made by the Government of India, the Department of Consumer Affairs, being the nodal Department in the field of consumer protection, has been given the mandate to strengthen the consumer movement in the country by generating awareness amongst the consumers on the one hand and simultaneously providing for a grievance redressal machinery, by means of the Consumer Protection Act, 1986. The need for empowerment of consumers as a class cannot be over emphasized and is already well recognized all over the world. The efforts made in other countries to protect the rights of consumers may be borrowed in Indian context keeping in view the peculiar circumstances of country like India. This paper attempts to critically analyze the legal frame work related to consumer protection in India and USA.

Keywords: *(consumer, United Nations, Consumer Bill of Rights, caveat emptor, injunction)*

Introduction

Consumer protection is a concept of worldwide popularity now days. This concept gained the momentum when on April 9, 1985 the General Assembly of the United Nations adopted a set of general guidelines for consumer protection and the Secretary General of the United Nations was authorised to persuade member countries to adopt these guidelines through policy changes or law. The member countries including India were obliged to draft new pieces of legislation relating to the consumer protection. The laws relating to the consumer protection in these countries were not adequate to protect even the basic rights of consumers. But the situation has changed altogether after these countries passed the special Acts relating to the consumer protection.

Legislative Measures in USA

The history of consumer protection in the United States is the story of specific formal legal responses to crises and emergencies that generate great public outrage and require a public response. This pattern began against the background of the 19th century common law, which emphasized freedom of contract and caveat emptor (let the buyer beware). Over time, specific crises and political events led to both the creation of government bureaucracies with jurisdiction over specific products and practices affecting consumers and a broad array of private rights of actions where consumers can sue for damages, injunctions, attorney fees, and litigation costs if they are able to show harm from the illegal practice. One of the earliest examples was the deplorable conditions in the American meat packing industry which were exposed by Upton Sinclair in his best selling 1905 novel *The Jungle*. However, the modern consumer protection movement began in the 1960s with reference to a Consumer Bill of Rights by President Kennedy.

The US had a free economy from the start .The public law of consumer protection in the United States has been a mess, as a result, the effectiveness of litigation and other methods to enforce those laws has remained in jeopardy. This has occurred because those who decide the country's public policy on consumer protection are torn between two opposing perspectives. Policymakers strive to preserve freedom of contract and a marketplace unburdened by the costs that result from government agencies and individuals enforcing strong consumer laws. Under this free market model, favored by the business community, consumers remain responsible for their actions, and "free" to enter into bad deals, including contracts that take away their right to resolve disputes in court.[1] There is great variation among consumer protection laws. The law varies depending on whether a transaction involves credit

1 Budnitz: " *The Federalization and Privatization of Public Consumer Protection law in the United States: Their Effect On Litigation And Enforcement." Georgia State University Law Review, Vol. 24 [2007], Iss. 3, Art. 1.*

cards or debit cards, home mortgage loans or loans not secured by a personal residence, heavily regulated financial institutions, such as, banks or loosely regulated institutions such as companies that cash cheques. There is no uniformity and no consistency among the various consumer protection laws and how they are enforced because there is no national consensus on what laws are necessary to protect consumers and who should enforce those laws. The development of public consumer law in the United States differs significantly from the approach of the European Union where there is a modicum of consensus and uniformity.[2]

Federal Laws and Regulations: The Lack of Uniformity and Spotty Coverage

Federal consumer protection law is not uniform and its coverage is not comprehensive. These characteristics have a substantial effect on litigation and the enforcement of these laws. Over the course of several years, Congress seemed to be headed in the direction of establishing a national uniform law to protect consumers. The Consumer Credit Protection Act regulates the disclosure of credit terms and discrimination in the granting of credit. Despite the title of the Act, it also covers many areas besides credit transactions, for it governs consumer leases, consumer reporting agencies gathering information for non-credit transactions, such as, employment and insurance, debt collection, and electronic fund transfers.[3] It would be wrong, however, to conclude that the United States has a comprehensive and adequate uniform national statutory framework for consumer protection and its enforcement. Some of the most important elements of consumer transactions are completely unregulated. For example, the Depository Institutions Deregulation and

2 Jane K. Winn & Mark Webber, " *The Impact of EU Unfair Contract Terms Law on U.S. Business-To-Consumer Internet Merchants,"* 62 *BUS. LAW.* 209, 214 (2007); Jane K. Winn & Brian H. Bix,"*Diverging Perspectives on Electronic Contracting in the U.S. and EU*", 54 *CLEV. ST. L. REV*. 175, 183.(2006).

3 *Supra* note 1 at 4

Monetary Control Act of 1980 deregulated interest rates for an entire segment of the consumer credit market. Other types of fees and charges are also unregulated. Privacy protection has become increasingly important with the development of electronic databases and the epidemic of identity theft. Rather than enacting laws instituting broad privacy protection, however, federal law has inserted narrowly focused protections into a few consumer laws. A significant aspect of every consumer transaction involves the consumer paying for goods or services. Payments law is chaotic, with great variations. Whether or not federal law governs the payment aspect of a consumer transaction depends on what type of payment device the consumer uses and what system processes the payment. For example, one kind of stored value card is subject to federal regulation, but all others are not, and few states regulate them. Some aspects of cheque transactions are subject to federal law. But many other features are subject to the Uniform Commercial Code (UCC), a state law that specifically eschews protecting consumers.[4] As discussed above, consumer law increasingly has become federal law. Having national public laws governing consumer transactions is sound because many consumer problems are national in scope and transactions increasingly cross state lines. States, however, have always played a critical role in protecting consumers. State laws can fill gaps left in the federal law, serve as laboratories that experiment with new approaches to deal with consumer problems, and respond to problems that have a particularly harsh impact on consumers in their state. The second major challenge to consumer protection is the privatization of consumer law, primarily through the pervasive use of mandatory pre-dispute arbitration clauses. Arbitration privatizes the public law in four respects. One, it relegates dispute resolution to private companies that are not subject to government oversight. Two, arbitration agreements generally prohibit class actions. As a result, no matter how clearly illegal and injurious the company's behavior, enforcement of the

4 *Supra* note 1 at 6-7.

law to protect the public is because consumers can gain redress only in one case at a time. Three, arbitrators are not required to follow the law. Therefore, arbitrators can ignore these laws and entirely undermine the goal of the public nature of these laws. Four, arbitration operates in secret, hiding illegal practices from the scrutiny of Government agencies. Consequently, those committing such practices are able to escape enforcement by the agencies. This privatization of the law and dispute resolution has substantially diluted the "public" law nature of consumer protection law.[5]

India

Unlike USA, India is a union of states and there is more powerful center than the states. The central Acts are applied to the whole of the Indian territory except a few states like J&K,[6] but the states legislate their own acts on the same model and the object of the central Act with a slight difference in the provisions keeping in view the circumstances of the concerned state. Prior to the enactment of the Consumer Protection Act 1986 there were many Acts under which a consumer could seek the protection against unfair trade practices, but the scope of the provisions in these Acts was limited. There is a comprehensive protection of the consumers under the C.P. Act. There is a three-tier court system under the C.P.Act and no court fee is required to be paid to these forums and there is no need to engage a lawyer to present the case.[7] The rights under the Consumer Protection Act, 1986 flow from the rights enshrined in Articles 14 to 19 of the Constitution of India. The Right to Information Act (RTI), which has opened up governance processes of our country to the common public, also has far-reaching implications for consumer protection. The success of consumer movement mainly depends upon

5 *Supra* note 1 at 28-29.

6 Section 1(2). Consumer protection Act. 1986.

7 The Indian Express. New Delhi, Wed Aug 31 2011. The Supreme Court has said non-advocates can represent litigants in the country's consumer courts as their authorised agents.

the level of consumer awareness generated in the country by educating the consumers about their rights and responsibilities coupled with effective functioning of the consumer forums throughout the country where the consumers can ultimately assert their rights in seeking redressal. Where the literacy rate is high and social awareness is greater, the consumers cannot be easily exploited. Within India, the level of consumer awareness varies from State to State depending upon the level of literacy and the social awareness of the people. There is a growing awareness in India and the common masses are taking interest in the market and its ever changing trends to become aware of the quality of the products and regulation of the markets and application of laws to protect their rights and hard earned money as well. As regards the efforts being made by the Government of India, the Department of Consumer Affairs, being the nodal Department in the field of consumer protection, has been given the mandate to strengthen the consumer movement in the country by generating awareness amongst the consumers on the one hand and simultaneously providing for a grievance redressal machinery, by means of the Consumer Protection Act, 1986. The need for empowerment of consumers as a class cannot be over emphasized and is already well recognized all over the world. The Department of Consumer Affairs has been continuing a countrywide multi-media awareness campaign since 2005, whereby various issues related to consumer rights and responsibilities are highlighted. "Jago Grahak Jago" has today become a household name. As a natural corollary, joint publicity campaigns are being carried on with all Government Departments/ Organizations having mass consumer base by means of TV, radio, newspapers, railways, outdoor advertising etc.[8]

The Indian legal system experienced a revolution with the enactment of the Consumer Protection Act of 1986 ["CPA"], which was specifically designed to protect consumer interests. The CPA was passed

8 Annual report 2011-12. Department of Consumer Affairs New Delhi; available *at:* www.fcamin.nic.in

with avowed objectives. It is intended to provide justice which is "less formal, and involves less paper work, less delay and less expense". The CPA has received wide recognition in India as poor man's legislation, ensuring easy access to justice. However, the CPA simply gives a new dimension to rights that have been recognized and protected since the ancient period. It is rightly said that "the present-day concern for consumer rights . . . is not new and that consumer's rights like the right to have safe, un-adulterated and defect-free commodities at appropriate prices has been recognized since ancient times."[9]

The experience with the operation of the CPA shows its popular acceptance and the legal preference of injured consumers to enforce their rights under it. The CPA commands the consumer's support because of its cost-effectiveness and user-friendliness. In fact, the CPA creates a sense of legal awareness among the public and at the same time, brings disinterest to approach traditional courts, especially on consumer matters. It has changed the legal mindset of the public and made them think first of their remedies under the CPA, regardless of the nature of their case. In short, the CPA has instilled confidence among the "teeming millions" of impoverished litigants. The way in which the consumer fora are flooded with cases and the mode in which these cases are being disposed off creates an impression of "judicial populism" in India in the arena of consumer justice. The greatness of the CPA lies in its flexible legal framework, wider jurisdiction and inexpensive justice. One can find in the CPA a mixture of principles of torts and contracts.[10]Basically, the CPA liberalizes the strict traditional rule of standing and empowers consumers to proceed under the CPA.[11] Consumer groups, the central or any state government are all empowered

9 Gurjeet Singh *"The problem of Consumer Protection in India: A Historical Perspective"* Consumer Protection Reporter 704 at 705, n.6 (1994 III)

10 Bill Thomas, *The Legal Framework of Consumer Protection*, *in Marketing and the Consumer Movement* 49 (Jeremy Mitchell ed., 1978).

11 The Consumer Protection Act, No. 68 of 1986; India Code (1986) ch. 2 S 1(b) (iv).

to lodge complaints under the CPA.[12] This liberalization shows the care that has been taken to represent and fight for the cause of weak, indifferent and illiterate consumers. The novelty of the CPA is the inclusion of both goods and services within its ambit. The consumer can bring suit for defective products, as well as, for deficiency of services.''[13] In the event of any deficiency, all services, whether provided by the government or private companies, can be questioned under the CPA. The CPA also liberalized rigid procedural requirements and introduced simple and easy methods of access to justice. To proceed under the CPA, the consumer need only pay a nominal fee and need not send any notices to the opposite party. A simple letter addressed to the consumer forum draws enough attention to initiate legal action. Another major procedural flexibility is the option of the consumer to engage a lawyer. If the consumer prefers, he can represent himself. The simple measures of action drive consumers to avail themselves of the benefits of the CPA.

The CPA initiated a legal revolution by ushering in the era of consumers and developing a new legal culture among the masses to take recourse under the CPA regardless of their grievance. The Consumer Disputes Redressal agencies, the National Commission, the State Commission, and the District Fora are working together in a way that is revolutionizing the present Indian legal system and challenging the traditional system of delivering justice. With easy access to the courts guaranteed by the CPA, consumers now wage legal battles against unscrupulous traders or service providers without any hesitation. The Indian government is also taking an active interest in protecting consumer rights and promoting effective consumer movements. In 2003, the Planning Commission of India identified "Consumer Awareness, Redressal, and Enforcement of the Consumer Protection Act of 1986" as a priority, and as a result, a national action plan was prepared. The

12 Section 2 1(b) (iii) The Consumer Protection Act, No. 68 of 1986

13 Section 2(1) (c) (i) subs. by Act 50 of 1993, S.2 (w.e.f.18.6.1993)

consumer fora created by the CPA have proven to be effective, disposing of thousands of cases with few legal formalities, and leading the way towards well-founded consumer jurisprudence in India. The traditional Indian legal system, in addition to a huge backlog of cases, is experiencing a litigation explosion in the area of consumer protection. According to one report, the total number of consumer cases pending in different fora was 359,469 cases as of June, 2004.'' [14]Around 45,798 cases have been filed before the national commission since its inception. At present, 8,884 cases are pending disposal.''[15] The huge backlog of consumer cases before consumer fora is forcing the Indian legal systems to think of "alternatives" for speedy disposal of consumer cases. India, home to the majority of the world's consumers, is committed to working for the welfare of consumers through new legal innovations. During the course of time new challenges and circumstances rise as a challenge before every law. But the law has to stand the tests of the time and therefore, amendment of law is undertaken. Similarly the CPA 1986 also underwent the amendments in order to provide the better solutions to the legal problems. Although, by amending laws a solution to the problem is provided but there is always a scope of improvement e.g. CPA 1986 as amended by the amendment Act 2002 has brought some laurels yet there are some loopholes as well.

Latest Developments in Consumer Protection in India

The Indian parliament is allset to bring amendments in Consumer Protection Act which is likely to be passed in the upcoming Parliament session that seeks to create a Consumer Protection Authority to fast-track grievance redressal of consumers on the lines of US and European

14 Dep't of Consumer Affairs, Ministry of Consumer Affairs, Food and Pub. Distrib., Gov't of India, Annual Report 2004-5, ch. 5, http://www.fcamin.nic.in/

15 Mahendra Kumar Singh, Vacancies, Pending Cases Plague Apex Consumer Body, Times of India, Mar. 9, 2007, available at http://timesofindia.indiatimes.com/articleshow/1738563.cms, Times of India, 9th Aug. 2007.

countries. Food and Consumer Affairs Minister Ram Vilas Paswan said that the bill provides for punishment up to life imprisonment in certain cases of food poisoning and also has a provision for product liability. Paswan told Media. Noting that the government is seriously planning to make consumer protection rules in India at par with international standards, he said many changes have been made in current law to protect consumer rights and simplify the judicial process to ensure speedy and inexpensive justice. Paswan said if any consumer complaint affects more than one individual, that issue will go to the Authority, which will have the power to recall the product and cancel the licenses. He further said that the provision will be applicable to a cross section of products ranging from cars to flats. Besides giving back the invested money of consumers, the service providers will also have to take in account the inconvenience faced by passengers (air travellers) and the resultant he added.[16]

Paswan, who also holds the Consumer Affairs portfolio, said the proposed amendments to the Consumer Protection Act would empower district consumer forums to arbitrate in disputes involving a sum of up to Rs one crore as against the existing ceiling of Rs 20 lakh. Similarly, state forums, which can at present adjudicate in matters involving not more than Rs one crore, would be authorised to arbitrate in disputes involving a sum of up to Rs 10 crore. Moreover, in order to reduce inconvenience to aggrieved consumers, they will be "allowed to fight their cases without hiring a lawyer, if they choose to do so", the minister said.

Further, he said, "It will no longer be necessary to file a claim in the very city where a defective item has been purchased. A person from Allahabad will be allowed to file his claim in the city here even if he happens to make a purchase in Delhi. "We are also going to introduce facilities like filing of claims through mobile phones and internet so that

16. http://www.moneycontrol.com/news/economy/consumer-protection-bill-likelythis-parl-session_1330328.html?utm_source=ref_article

there is no need to be physically present at every stage," Paswan said. The minister said the government is going to crack down on "misleading advertisements, splashed across newspapers day in and day out, wherein unbelievable cures for baldness, obesity and similar afflictions are claimed". He also hoped the Indian Standards Bill will be passed soon by Parliament to pave the way for "a uniform country-wide standardisation, devoid of any loopholes" [17]

17 Press Trust of India | Allahabad January 25, 2016 Last Updated at 19:22 IST www.business-standard.com › PTI Stories › National › News

Conclusion

On perusing the legislative measures in both countries, 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 which hinders the progress of achieving the object of the consumer protection legislation. The procedure of dealing with the consumer complaints should be made simple and time saving. Many NGO's are working in the field of consumer awareness, but these NGO's need to reach the grass root level, so that the enactment of the Consumer Protection Act becomes meaningful. The success of consumer movement mainly depends upon the level of consumer awareness generated in the country by educating the consumers about their rights and responsibilities coupled with effective functioning of the consumer forums throughout the country where the consumers can ultimately assert their rights in seeking redressal. Where the literacy rate is high and social awareness is greater, the consumers cannot be easily exploited. Within India, the level of consumer awareness varies from State to State depending upon the level of literacy and the social awareness of the people.

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Nature & Scope Of Ijtihad In Contemporary World: An Appraisal

Abstract

Nothing in Islam is against reason or contrary to wisdom. Holy Quran is the greatest source of knowledge and Prophetic Tradition is the treasure of intellect. Islam binds its followers to get educated and commands them to go to far-off places for enhancing their knowledge and to quenching the thirst of intellect. Islam is the only religion, which as a principle, promotes intellect in men and women and encourages the approach of reasoning and logical attitude. Islamic law is the purely divine in form and the source for it has been the revelation. Time and again in the Quranic injunctions, man has been invited to ponder, to think and to exert. This paper attempts to through a light on the scope of Ijtihad and reasoning in Islam with special emphasis in south Asian context.

Keywords:- *Ijtihad, State, Mujtahid, Taqlid, Terrorism, Cloning, Economic Issues.*

Introduction

Islam as a religion confronts various challenges at global level within and outside. The political, social and economic aspect of it has been almost universally secularized. At basic level Islam is not properly educated to the common masses. From traditional (rigid) ulemas of particular school of thought; their less understanding and critique of modern thought, aggressive stance against other Muslims following different school of thought, failure to get any consensus over some important theological and logistic issues; failure of communication between Muslim intellectuals and orthodox ulemas, Inability to convince or appeal to modern educated Muslims etc, has been the major challenges for Islam in recent past. Unfortunately Quran has been the most oppressed book; Islam the most distorted and oppressed religion primarily because its defenders and interpreters which are almost uneducated in the real sense of terms and with this sort of situation

enemy has lost no opportunity in exploiting the situation.[1]Islam has been unfortunate in the sense that it has very few able defenders at highest intellectual level. Real challenges come from humanism, neo-paganism and all the different forms of modern worship of lesser divines and Quran call it 'tagut'.[2]

With this scenario in mind, let us deliberate on the contemporary significance of Ijtihad. Ijtihad means to strive for knowledge to get a solution. **It means to think using reason and logic but it never means to think independent of Quran and Sunnah.** The guidelines while doing ijtihad have to be inferred from the original source of Shariah. No doubt ijtihad needs intellect of high caliber and the mujtahid must be occupied with the sound knowledge of Quran and Sunnah .The apprehension that ijtihad leads to deviation from the path already laid down by the injunctions of Quran and Hadith has largely been by the irrational use of the instrument of Ijtihad by the so called secular and liberal Muslim scholars who justified ijtihadic pattern to get free from the bondages of Islam in the name of modernism and change in the society. The truth is that Ijtihad never means to escape from the boundaries laid down by the Quran and Sunnah of Prophet. It only means that in each generation the Law should be applied to the new circumstances that are faced. The practice of ijtihad in the spirit of Islam does not mean to change the Law to suit the convenience of men but to face and solve every new situation and problem in conformity with the teachings of the Shariah by applying those teachings to newly arisen problems.[3]But before we proceed, let us find the reasons why Ijtihad was restricted, restrained and blocked for so many centuries.

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1 Hameed Naseem Rafiabadi: *Challenges to Islam* Vol: I, p:236 (Sarup Sons, New Delhi, 2007 edition)

2 Al-Nahl 36; *And We have sent Messenger to every Nation who invites people to worship only Allah and refrain from obiendece of T'agut,*

3 Nasr Syyed Hossian: *Ideas and Realities of Islam* London George Leynn 1975. P:105

Taqlid….Reasons….

There are various reasons responsible for an intellectual attitude that reduced the law of Islam to the state of immobility.[4] This trend can be attributed mainly to the rise of Rationalism or the Rationalist Movement which aimed at deciding each and every thing on the touch stone of reason and logic. Islam has the source in revelation, as each and every thing could not be understood by the human mind, never the less it encourages application of reason and logic. It may be asserted here that human reason has an inherent limitation which envisages the need for super human intervention and that is probably the revelation, discernible in the difference between religion and philosophy. By denying the eternity of Quran or by challenging or raising doubts on some verses of Quran the orthodox conservative thinkers thought that Rationalists are undermining the very foundation of Islam leading to over protection of social integrity of Islam and thereby making the structure of Legal system as rigorous as possible. When a person is not rationally satisfied with any query, the obvious result is the growth of skeptic feelings within. As skeptical thought grooms, it results in denial of things which otherwise exist on the guide lines of religion or divine knowledge. Apprehending the further alienation from the Islam and disintegration within the social fabric of Islam, the institution of Taqlid was strongly upheld.The rise and growth of ascetic Sufism (rahbaniyat: no concern with the worldly affairs) which gradually developed under influences of a non- Islamic Character, a purely speculative side, is to a large extent responsible for this attitude.. It also kept Islam in the state of immobility as it undermined the social polity of Islam and puts more weight on speculative thinking, thus absorbed the best minds in Islam. The Muslim state was thus left generally in the hands of intellectual mediocrities, and the unthinking masses of Islam, having no personalities of a higher caliber to guide them, found their security only in blindly following the

4 Allama Iqbal's Lecture VI: *The Principle of Movement in the Structure of Islam of The Reconstruction of Religious thought n Islam.*

schools. On top of all this came the destruction of Baghdad, the centre of Muslim intellectual life-----in the middle of the 13th century. This was indeed a great blow, by the invasion of Tatars resulting havoc and creating future threats for Islam. Apprehending, further disintegration, which is natural in such a periods of political decay, the conservative thinkers of Islam focused all their efforts on the one point of preserving a uniform social life for the people by exclusion of all the innovations in the law of Sharia. Their leading idea was social order of Islam, and to preserve the identity of Islam. Therefore it was said that gate of ijtihad has been closed in the Sunni world since the formation of the four schools of Law whereas in Shi'ism the gate must of necessity be always open.[5] Now let us deliberate upon the concept of ijtihad in Islam and reasons for revival.

Ijitihad---Meaning

The term ijtihad is derived from the root "jahd" and "juhd" as its verbal form meaning exerting oneself to the utmost. It is an effort, hardship and to take trouble, but juhd means might, capacity, capability. The term Ijtihad combines both meanings in its essence.[6]Imam Ghazali defines Ijtihad as follows:

> *"Ijtihad means to expend one's capacity in a certain matter and to use it to the utmost. This term is used particularly on such occasions where hardship and effort are involved.../.Scholars, however, have defined to mean the expending of the fullest capacity by a Mujtahid in seeking the knowledge of Sharia laws. The perfect ijtihad would mean that one has spent so much effort in the pursuit of the knowledge of Shariah that further pursuit is humanly impossible."*[7]

5 Supra 3 p:105

6 Dr. Khalid Masud: *Iqbal's Reconstruction of Ijtihad.*2nd edition p:13(Islamic Academy Pakistan)

7 Ibid p:14

Imam Fakhr al-Din Razi defines Ijtihad in typical theological mode:"To exert one's effort in Nazar (juristic reasoning by way of analogy) to the extent than no blame may be forthcoming in this respect."[8]

Abu Zuhrah defines Ijtihad as: "Jurist's utmost effort to infer practical legal injunctions from the sources of the Shariah."[9]

Abdur Rahim says, "Ijtihad is the capacity for making deductions in matters of law in cases to which no express text or a rule already determined by Ijma is applicable. The legal effect of the Ijtihad is the probability of the conclusions so arrived at being correct, but the possibility of such conclusions being erroneous is not excluded. [10]

Ijtihad literally means 'exerting oneself to the utmost degree to attain an object' and, technically, 'exerting oneself to form an opinion in a case or as to rule of law'. It is a power of independent interpretation of law.[11]

It is to reapply an unchanging principal of Islam to the changing situation of the time. Or we can say that ijtihad is to find Islamic answers to the questions which are not covered directly by Quran and Sunnah.[12]

W.B. Hallaq has taken the help of Imam Ghazali's illustration who has compared science of legal theory in terms of tree cultivated by man. The fruits of the tree represent the legal norms or rules; the stem and the branches are the textual materials and the human agency i.e. a cultivator who has a definite role to play in making up the cultivation methods, thus, cultivator is the human agent whose creative legal reasoning is directed toward producing the fruit, the legal norm. The jurist (faqih) or the jurisconsult (mufti), who is capable of practicing such legal reasoning is known as the mujtahid, he who exercises his utmost effort

8 Ibid p:16
9 Ibid p.17
10 Abdur Rahim: *Muhammadan Jurisprudence*, 111, (Allahbad Law Agency)
11 A.A.Fyzee: *Outlines of Muhammadan Law* 5th edition 2010 revised by TahirMahmood. P:23
12 Dr. MustaqAhamdGanai : *NazriyahIjtihadAurIqbal* 1st edition 2003

in extracting a rule from the subject matter of revelation while following the principles and procedures established in legal theory. The process of this reasoning is known as ijtihad, the effort itself.[13]Ijtihad is a Doctrine which implies the exercise of one's utmost reason to deduce a principle compatible with the Shariahi.e the injunctions of Quran and Sunnah. Where the Scriptural texts are silent and do not cover a new situation, an independent effort is called for as a result of compelling necessity to lay down the line of action. As a measure of foresight, the principle of ijtihad was devised to provide for accommodation of future needs, so that new rulings might be formulated in new cases where no specific Law exists in the Quran and Hadith. Ijtihad is basically the service to meet the growing legal requirements of the expanding Commonwealth of Muslims.[14] In the early period ra'y (considered personal opinion) was the basic instrument of Ijtihad. The term Ijtihad in the early period was used in a narrower and more specialized sense than it came to be used in al-Shafi and later one. It conveyed the meaning of fair discretionary judgment or expert's opinion.[15]

Sources

In the terminology of Islamic Jurisprudence it means to exert with a view to form an independent judgment on a legal question. The mujtahideen or the jurists exert to find out laws from the Quran and the Sunnah and apply to the prevalent conditions of the society. This exertion has been ordained in the Quran:

> *We have sent down to you the Book in truth, so that you might judge between men as guided by Allah.*[16]

13 W.B. Hallaq: A *History of Islamic Legal Theories* .first published 1997 P: 117

14 AlhajMoiundin: *The Urgency of Ijtihad.*

15 *Ahmed Hasan*: *The Early Development of Islamic Jurisprudence*. 1st edition 1994 p:115

16 Quran *5:105*

This verse clearly implies to understand the guidance provided by God and apply that to decide the living problems of the people. This is, in substance, the scope of ijtihad.Shah Wallliulah has described the scope of ijtihad in a beautiful way. He says that the object of ijtihad is to exert, to know that if this problem had occurred before the Prophet (peace be upon him) what would have been his judgment?[17] The Holy Quran declares:

"**As for those who strive in Us, We surely guide them to our path**"[18]

> *And when there comes to them tidings of safety or fear, they spread it all round, whereas if they had referred it to the Prophet and to such other persons as are in authority-those among them who can search out the Knowledge of it, would have known it.*[19]

"And if you dispute, then refer it to Allah and the Messenger if you really do believe in Allah and in the Last Day."[20] Imam Abu Bakr Al-Jassas says: "if you dispute..." prove that those of Amr are indeed jurists because He has ordered everyone else to follow them and then proceeded to say that "if you dispute....." Hence Allah has ordered those of Amr to refer the disputed issue to the Book of Allah and the traditions of the Prophet. The Lay person is not a person of knowledge; he is not of this caliber. The lay person would be unaware of how to refer the disputed issue to the Book of Allah and to Sunnah and how their proofs would apply to situations and events. Thus, it is established that the second command, is for the scholars." [21]

It is not valid to conclude that those who are incapable of Ijtihad should refer directly to Qur'an and Sunnah in disputed issues. In reality,

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17 Shah Walliullah: *Fuyud-al- Haramain*, p.48 as quoted by Riyaz-ul-Hassan Gillani in *The Reconstruction of Legal Thought in Islam.*

18 Al-Ankabut: 69

19 Al-Nisa: 83

20 (Surah Al-Nisaa: 59)

21 AhkaamulQura'n vol. 2, page 257

the command in the first part of the verse (to follow those of Amr) is for those people who cannot extract any rules from the Quran and Sunnah directly. They are required to follow the Quran and Sunnah by asking those of Amr (meaning jurists) and following their guidance. The second statement is exclusively for the Mujtahids that is to say disputed issues should be referred to the Quran and Sunnah.

The Mujtahids should exercise their skills of legal judgment and extract rules. So there are in fact two commands, the first statement is to those who adopt Taqleed and the second is directed to the Mujtahids to practice Ijtihad.The Quranic term used in this verse is 'Yastambitun' derived from Istimbat which literally means deduction or drawing conclusion. The jurists however used it to mean search out hidden meaning. Another term used in this verse is ulu'l-amr meaning men who are in authority or who are in a position to search out the knowledge.*The teaching of the Quran that life is a process of progressive creation necessitates that each generation guided but unhampered by the work of its predecessors, should be permitted to solve its own problems*.[22]

The Prophet (SAW)appointed Mu'adh RA as a Governor, judge, mentor and Mujtahid for the people of Yemen and ordered him to be followed. He allowed him, not only to give Fatwas based on the Qur'an and Sunnah, but also to use and exercise his own judgment*. It is clear that the Prophet sallalahu alaihi wa sallam decreed the people of Yemen to practice Taqleed of an individual. To argue that this Hadith deals with judicial practices and not with Ijtihad and Taqleed is misguiding.* The Prophet asked him what he would do to solve the problems if he could not find the explicit texts from the Quran and the Sunnah, Muadh answered that he would do Ijtihad without personal bias. The prophet appreciated his answer. The starting point of such an endeavor according to the tradition of Muadh is the absence of any clearly applicable text, and it may operate only so far as thinking does not contravene the message and spirit of Quran and the Sunnah. Aswas-Ibn-Zaid said that

22 AllamaIqbal----*Reconstruction of Religious Thought In Islam.*

Mu'adh-Ibn-Jabal came to us in Yemen as a teacher and as a governor. We asked him regarding how the inheritance should be distributed of a man who had died leaving behind a daughter and a sister. He ruled that both the daughter and the sister should receive half each.[23] Here Mu'adh RA ruled as a Mufti and did not offer any proof for his ruling. His view was implemented by merely accepting and following it as in Taqleed. However, even though Mu'adh RA did not offer any explanation for his ruling, his opinion was based on the Qur'an and Sunnah.

The general misconception about doing ijtihad is that it may lead to deviation from the path already laid by the injunctions of Shariah. But it is not the case. In fact Ijtihad is not the freedom of judgment as some modernists believe. Certain modernists over the past century have tried to change the Shariah, to reopen the gate of ijtihad, with the aim of incorporating modern practices into the Law and limiting the functioning of Shariah to personal life. All of these activities emanate from a particular attitude of spiritual weakness vis-à-vis the world and surrender to the world. Those who are conquered by such a mentality want to make the Shariah 'conform to the times'which means to the whims and fancies of men and the ever changing human nature. They do not realize that it is the Shari'ah according to which society should be modeled not vice versa. They do not realize that those who practiced ijtihad before were devout Muslims who put the interest of Islam before the world and never surrendered its principles to expediency.[24]In fact the aim of those who practice ijtihad was not to modernize Islam, but in order to return to the practice of the original modern community.[25] Another misconception which has been attributed with ijtihad is that it signals the limitation of Shariah, i.e. laws of Quran and Sunnah are limited, whereas the possible cases are unlimited. According to Ibn-Qayyim, the acts and transactions if classified according to their categories are limited in number; and God

23 Bukhari vol. 2, page 99

24 Supra 5; P:117

25 H.A.R. Gibb, *Modern Trends in Islam,* as quoted by RiazGillani (the Reconstruction)

and the Prophet while expressing the Divine Will, cover series of acts and transactions at one and the same time. Furthermore the injunctions of the Shariah are in the form of axiomatic expressions. For instance, the saying of the Prophet SAW that all intoxicants are forbidden implies what is not intoxicant is permissible.[26] According to Shahwaliullah it is not possible for a legal system to address and pronounce the legal nature of every act of each and every individual. Even if it is done, it will not be possible to know innumerable and scattered bits of legal injunctions.

Need For Ijtihad On Contemporary Issues

The province of legal reasoning and interpretation, properly called ijtihad, does not extend over the entire range of the law. Excluded from this province is a group of texts which unambiguously state the legal rules of number of cases. The certainly (*qat*) generated by these texts abinitio precludes any need for reinterpretation. Some cases in point are the prohibitions imposed, by textual decree, on adultery, homosexuality, and consumptions of grapevine. Also excluded are those cases subject to consensus, the sanctioning instrument that generates certainty. In all other spheres of the law, ijtihad is not only admissible but is also considered a religious duty incumbent upon those in the community who are learned enough to be capable of performing it; this duty is known as *fardkifaya*.[27]The message of Islam is eternal and must, therefore always remain open to the searching intellect of man. The more our knowledge of the world progresses, the better we can understand the wisdom of the Law of Islam. Thus our right to independent ijtihad on the basis of the Quran and Sunnah is not only permissible but mandatory, and particularly so in matters on which the Shariah is either entirely silent or has given us no more than general principles. [28]In the contemporary world, Muslims are spread almost all over the globe and are definitely a force to recognize with. But at the same time there are issues of diverse

26 Riyaz –ul-Hassan Gillani :*Reconstruction of Legal though in Islam*p.112
27 W.B. Hallaq: *A History of Islamic Legal theories*. P: 117
28 H.S.Bhattia: *Studies in Islamic Law, Religion and Society*. p.97

nature emerging at the global level which have direct or indirect impact on Muslims also. The new world order which is almost dominated by the western countries has controlled almost all the affairs of political, social and economic aspects. But at the same time for the Muslims Islam has always been the precedence. The role of Islamic jurists, luminaries and scholars become very important in the changing circumstances of the contemporary period to guide the Muslim societies on such matters where Islamic texts (sources) are silent. Understandably lot of issues and problems are on which need for ijtihad arises so that these aspects of life could be brought in conformity with Islamic principles. It must be noted that contemporary changes have to be adjusted as per the principles of Islam and not vice-versa. That is and should be the golden rule of Ijtihad i.e. in accordance with the real nature of things it is the human that must conform to the Divine and not the Divine to the human.

Some of The Contemporary Issues Are:

a. Structure of an Islamic State

The Muslim voices all over the world have been very different in their methodology and approach for upbringing the change in their respective societies. Some believe in participating elections to bring the change, for some mass-uprising is a solution, for few it is active armed resistance, while some believe in passive resistance and finally are those who believe only in the propagation of the message of Islam. For some, Islamic state is not really needed as there is no such concept in Islam. Generally some ritualistic aspects of Islam like prayer, fasting, *zakat* etc. are imposed in addition to the Islamic punishments to lay claim to the status as an Islamic state. Is this enough? The liberal scholars argue that the Prophet wanted to build a religious community instead. If Muslims evolved into a political community it was accidental rather than essential. Hence the *Qur'an* lays more emphasis on values, ethics and morality than on any political doctrines. It was more a society rather than

a state.[29] But there are majority of the Islamic scholars who are the staunch supporters of revival of *Khilafat.* Now in today's Muslim world, if an Islamic state is formed, then what would be its structure, parliamentary or presidential, monarchial or democratic? Would it be *khilafat* in real sense? During the republican phase of the Rightly Guided Caliphs, "*bay'ah*" had meant a contract between every individual citizen and a candidate for office of the Caliphate, the candidate when appointed Caliph shall govern in accordance with the laws of the *Shari'ah*. Now in the contemporary era the problem lies with what would be the structure of the Islamic state if formed any where, surely it needs ijtihad. What would be the composition of the Shura (Parliament). These are the questions which are to be addressed. Since the Muslims have grown with the growth of Islam and have now inhabited almost sixty countries of the world. The conventional bayah system (allegiance to Caliph) is not possible for each and every person due to increase in populations and the expansions of Muslim territories. Therefore, would elections be a viable option to bring Islamic revolution. Since all our laws with the exception of personal laws have been secularized, how far they would be upheld in the contemporary Islamic political structure. However whether Islamic state in its true character will be formed or not, but the heads of Muslim states have the option of incorporating Shariah in their states in their constitutional, criminal, civil, and social matters. Some scholars like Muhammad Asad believe that an elective form of government is more compatible and majority principle is more viable,[30] while some scholars like Dr. Israr believe that elections cannot bring true Islamic revolution and cannot change system. Similarly what will be the powers of the head of the state? Is democracy of modern sense adjustable in Islam? Dr. Khalifa Abdul Hakim, the Pakistani scholar argues that Islamic democracy is somewhat different from today's democracy. He says that decision by raising of hands and counting the votes of the ignorant and

29 Ashgar Ali Engineer: *The Concept of Islamic State*

30 Mazheruddin Siddique: *Modern Reformist Thought in Muslim World*. 1st edition P:137

the wrong-doers alike, each one to count for one and nobody as more than one has no place in Islam . In Islam all must be equal before the law, but all could not be equal in framing the law. Framing of a just law is the concern, is the right and duty of men of knowledge and integrity, it should not become the petty game of party politics where legislation is proposed or opposed in order to maintain the strength of a party or to dislodge from power a ruling party. Therefore Ijma (collective ijtihad) is the essence of the Islamic democracy.[31] As Iqbal believes that to do ijma must be delegated to the elected body that is parliament in the modern sense?Some scholars believe that it is enough to incorporate Islamic principles in the constitution, irrespective of one man rule or collective government. Similarly is there any scope for theocratic state or secular state?It is, therefore, not possible to talk of an 'Islamic State' with a sense of finality. It is extremely difficult task to evolve any *ijma*(consensus of Muslims) on the issue. Today also there are several Muslim countries with as varied forms of state as monarchical to dictatorial or semi-dictatorial to democratic. All these states, however, call themselves as 'Islamic State'. There are similar sort of question regarding running of political affairs in a Muslim populated country and its relations with foreign states in which need to be answered in the light of *Quran* and *Sunnah* using the instrument of ijtihad.

b. Economic Issues

The Muslim scholars in modern age are keenly aware of the economic disequilibrium in Muslim society but they are not agreed as the methods by means of which this disequilibrium may be removed. The interest based economy has raised lot of questions in the Muslim minds. Even though there is a categorical and express rejection of usury ***/riba***in Islamic texts but still there are voices which take refuge of contemporary changes in allowing riba and they argue that the forms of interest have changed since then. What is the scope of **insurance** in Islam? Similarly banking has become an essential part of our

31 Ibid: p:135

life.Muslims are taking housing loans for the constructions of their houses, purchasing cars. How far it is justified in Islam? In this scenario the scope of ijtihad regarding the structure of Islamic banking and its modules can be taken care of. How a Muslim should conduct his economic affairs in a secular state or in a non Muslim state or for that matter in the interest based economy?

c. Policy On Terrorism And Suicide Bombing

Muslims all over the world are being made soft targets on the issue of terrorism especially after September 11 attacks in America. After 2001, the worst victims of terrorism and extremism have been Muslims all over the world. Muslims are being alleged as the sponsors of terrorisms and terrorist activities in the name of Jihad. There is divergent opinion on this issue also in the different Islamic scholars all over the world. Some scholars believe that the insurgent groups fighting in Palestine, Afghanistan or in any other part of world in liberating its land from the occupied forces are doing Jihad and could not be called as terrorists. However, there are many insurgent groups operating in many Muslim countries that are allegedly killing innocent people, in the name of religion, sect or ethnicity which needs to be addressed not by mere condemnation but by devising a legal mechanism by invoking the doctrine of ijtihad,. Another challenge is regarding the suicide bombing, which is being used as the latest but lethal weapon of resistance in many parts of the world. As such suicide is categorically prohibitive in Islam, but there are Ulemas who believe that as a last resort against enemy forces who have inflicted barbarity on the people can be used, while as many scholars do not approve of violence in what so ever form it may. Similarly what should be the ways and means of fighting or participating in Jihad or what is the current legal status of armed outfits who are claiming to be the defenders of Islam. These issues need to be addressed through collective ijtihad(ijma).

d. Job For Females

There is no comparison of any other religion or system with Islam when it comes to granting status and dignity to the woman. Equality

accorded by Islam to woman is unparallel in any other religion or country. With the change in our modern societies, and new slogans of woman empowerment and equality of sexes, we see today almost in all sectors females have been competing with males in earning, participating in economic activities and even in the field of politics and other areas. Although it is viewed as a compromise with her integrity and chastity and invasion on her inherent rights and duties bestowed upon her by the creator. The question is whether Muslim female can do job? Since Islam advocates for the segregation of sexes. There have been divergent opinions regarding the purdah and even in its interpretation. Allama Iqbal criticizes the west for permitting women to enter the field of economic competition and says that experience has shown that this has not led to increased economic production. It has only resulted in the breakup of family life. He believes that in view of the peculiar conditions emerging, the teachings of Islam and the recent discoveries in physiological and biological sciences, Muslim women should live within the limits laid down by Islam and their education should also be conducted in such a way as to conform to these limits. He argues that nature has assigned separate duties to men and women and human welfare is bound up with this natural arrangement. Muhammad Abduh, the Egyptian reformer justifies the relative superiority of man over woman, he says by nature woman is unable to earn her living and keep off Makruhat (unwanted things) from her especially is this so, when a woman is pregnant or when she gives birth to a child and during the period she milks the baby.[32] There are other opinions who believe females can do job or earn or participate in economic activity only in women and children oriented institutions e.g. hospitals, schools, universities which are only meant for females. As such Islam has made obligatory on husband to earn for its family, however in exceptional situations where husband is unable to earn, there is permission for

32 Supra 35, p: 190

women to job is the view of many scholars. These issues are to be addressed and in this field there is scope for ijtihad.

e. Issue Of Moon Sighting /Divison Of Ummah On Celebrating Eid

In recent years controversy over the sighting of moon on the eve of Ramzan and subsequently on Eid has also been the cause of concern in Muslim Ummah, as being seen the indicator of split in the Muslim fraternity. Recently in Pakistan, eid was celebrated on three different days. Similarly we see in gulf countries and in some parts of Europe, Eid is celebrated a day or two earlier than South Asia. There is a dire need of ijma (collective ijtihad) on this issue that central Committee pertaining to Sighting of the Moon must be considered as the supreme authority on this issue. In the broader consensus, all over the globe there should be efforts in reaching the conclusion on celebrating eid on the same day but there are definitely some geographical issues involved and astronomical experts are to be sought on this issue. Although there is a narration in this regard that every Muslim should try to see the moon for confirmation, and if it is not possible then those who see it should back it with witnesses. But the question of reliability and unanimity is basically the issue in this case which need to be addressed.

f. Cloning, Reproductive Technology, Surogation

Islam does not place any restrictions on the freedom of scientific research, or place any obstacles in its way, because it is a mean of understanding the laws of Allah in His creation, but Islam also stipulates that this cannot be left without any guidelines or regulations of the Shairah. Among the new scientific discoveries that man has made in modern times and has been a controversial issue in Islamic circles, that which is known as cloning. Cloning means producing one or more living beings by transferring the nucleus of a body cell (to an egg whose nucleus has been removed, or splitting a fertilized egg at the stage before the tissues and organs become distinct. In other words, the cloning of a complete creature is done by taking the complete number of chromosomes, in the form of a complete nucleus from one of the cells of

the body, and inserting it into an egg cell from which the nucleus has been removed, thus forming a fertilized cell containing a complete number of chromosomes and at the same time able to multiply; if it is planted in the uterus of the mother it will develop and grow and be born as a complete creature, by the will of Allaah. This kind of cloning is known as nuclear transfer or nuclear insertion in the egg cell. This is what is understood by the word "cloning".The ethics of cloning is an extremely controversial issue. The term is generally used to refer to artificial human cloning. Human clones in the form of identical twins are common, with their cloning occurring during the natural process of reproduction. However human cloning is completely prohibited in Islam prohibits such cloning because of the following reasons:

It contradicts with diversity of creation. Allah has created the universe on the base of diversity while human cloning is based on duplicating the same characteristics of the original bodies. This bears great corruption to human life, even though we did not realize all its forms. For example, if a student of a cloned class did something wrong, how could a teacher identify him/her while the whole class had the same features? If human cloning is permitted, how will we determine the relation of the cloned in regard to the original – will he be his brother, his father, or even himself? This is a confusing point.

Cloning contradicts with the pattern of creating things in pairs, as Allah said in His Glorious Qur'an and of everything we have created pairs, that ye may receive instruction. (Az-Zariyat: 49). Cloning goes against this principle since it depends on only one gender. And this matter will cause harm to people.

All scenarios in which a third party may be added to the marital relationship are forbidden, whether that involves a womb (surrogacy), eggs, sperm or cells for cloning. "Or do they assign to Allaah partners who created the like of His creation, so that the creation (which they

made and His creation) seemed alike to them?" Say: 'Allaah is the Creator of all things; and He is the One, the Irresistible'"[33]

It becomes clear from the above discussion that cloning a whole human body is completely prohibited even if it is for the purpose of treatment. However, some scholars believe if it goes into cloning only specific parts of the human body, such as, heart and kidneys, for the purpose of treatment, this is permitted and actually recommended and rewarded by Allah.

g. Surogacy or Surogate Motherhood

The question of the permissibility of surrogacy in Islam is being posed frequently in this day and age. Most Muslim scholars and thinkers seem to view the question as one of*fiqh* and base their findings on legal analogies and considerations. **Surrogacy** is an arrangement in which a woman carries and delivers a child for another couple or person. **One group of Scholars says that surrogate motherhood is not allowed because it is akin to *zina* (adultery)** since the surrogate is carrying the fertilized egg of someone who is not her legal husband. The child produced therefore has no lineage through legal marriage and will have to be considered as illegitimate. They state that artificial insemination of other than the husband's sperm and adultery are both similar in effect; that is, in both cases it is inseminated by a stranger. It is also a more severe crime than legal adoption, which is also completely prohibited in Shariah. Therefore, if the product is *haram*, the means of acquiring the product (the surrogate's renting of her womb) is also *haram*. Furthermore, this group argues, since the biological mother has a genuine stake in the product, there is an overwhelmingly high probability for emotional and legal confrontation between the two "mothers". Law, by definition, aims to remove potential disputes among human beings. Law is not legislated to increase the possibility of dispute.Perhaps, the most compelling evidence supporting this group of

33 [al-Ra'd 13:16]

scholars is the *ayah* (verse) in *Surah al-Mujadalah* (58: 2) where the Quran says:**"…their mothers are only those who conceived them and gave birth to them (*waladna hum*)."**

The Arabic verb "*walada*" is used for the whole process of begetting (*wiladah*) – from conception to delivery. It does not only refer to the act of carrying (*haml* in Arabic) and giving birth (*wald*'). Thus, this ayah categorically denies any rights of motherhood to the surrogate 'mother'. Furthermore, this group can argue that the harms of confusion and dispute far outweigh the benefit of offering someone a child. The child will be a source of perpetual stress for all parties involved which will invariably cause harm to the child also. "Harm is to be avoided before benefit is derived" is a well established maxim in Islamic law. This group further argues that in **the case of surrogate motherhood, the problem becomes even more perplexing as to who will be considered the child's real mother? Is it the woman who provided eggs from which the child is born, or is it the one whose womb serves as a carrier for the child and then gives birth? Many contemporary scholars have stated that based on the Quranic verse which states: Their mothers are only those who gave them birth(Surah al-Mujadalah, V. 2), the woman who carries the child to its full term and then gives birth to it will be considered the real mother.** Hence, the woman whose eggs were used will not even be regarded as the real mother of the child. When the surrogate mother is considered to be the real mother, her husband will be the father of the child unless he rejects the child, in which case the child will only be attributed to the surrogate mother in the light of the Hadith recorded by Imam Muslim in which Prophet SAW said: The child will be attributed to the husband and the adulterer will receive the stone. The meaning of this Hadith is that the right of paternity will always be for the person who is married to the child's mother. Now if an unmarried woman (surrogate) was artificially inseminated, the child will only be attributed to herself. The man (donor) will have nothing to do with the child.

Another group of scholars favor the permissibility of this kind of surrogacy. They base their claim on secondary considerations and not on any primary principle.

This group claims Islamic law recognizes the preservation of the human species as one of its primary objectives (*maqasid*). It follows that allowing married couples to pursue conceiving children is also part of this primary objective. Therefore, if a married couple is not able to conceive children themselves, they should be allowed to use means that override their inability to do so. If surrogacy is one method, it should also be allowed on the principle of ***maslaha*** **(public interest**). The fact that the surrogate mother is not carrying her own child can be overridden by saying that she is merely renting her womb as an incubator and she is not actually engaged in any act of *zina*. Besides, there is no fear of confusing the lineage of the child as the biological parents are already confirmed. This could be made analogous – some say – to hiring a woman to breast feed someone else's child which is an acceptable practice. However many scholars rebutthis line of argumentation as they believe it fails to address the *ayah* in *Surah al-Mujadalah* which defines who is a mother and who is not. The *ayah* is a primary source of Islamic law and provides conclusive evidence regarding the definition of motherhood as one who both conceives and gives birth. Since neither the biological mother nor the surrogate has comprehensively fulfilled the definition of motherhood, as defined in the *ayah*, Islamic law will not be able to determine who the mother is. This – as I have explained above – will definitely lead to dispute and harm – neither of which fall in the ambit of the *maqasid* (objectives) of Islamic law. The *ayah* cannot be simply discarded by secondary legal considerations such as *maslaha*. That would be analogous to saying that since wine has some benefits (*maslaha*) for human beings, the Quranic *ayahs* that prohibit the drinking of wine should be discarded because of that *maslaha*.

As far as artificial insemination between legally married husband and wife is concerned, majority of the contemporary scholars are of the view that this is permissible, whether it is artificially inseminated and

injected into the uterus of the wife or artificially fertilized in a test tube and then inserted into the womb of the wife. But there are others who oppose it on being unethical and unwarranted as it exposesboth the spouses to nakedness and masturbation being unlawful in Islam. There is third view who believes that it must take place only between the husband and wife. There should be no third party involvement in any shape or form, and the treatment shall be done by the gender of their own i.e. the female should be treated by a female doctor and male should be treated by the male doctor. **Therefore the Islamic scholars of the contemporary era must addressthese issues through the mode of ijtihad to avoid any further confusion among the Muslims.**

CONCLUSION

Muslims of every age have the right to understand Islam in the light of the knowledge they have at their disposal and human knowledge advances with every age. Our medieval scholars understood Islam in the light of the knowledge which they had at their disposal. They did not claim finality for their understanding of Islam. Similarly, we modern Muslims can not claim finality for our understanding of Islam, because the coming generation of Muslims will have a far larger stock of knowledge at their disposal and their understanding of Islam will be shaped by their greater knowledge. However, each generation has to be in close relation and under close guidance of primary sources of Islam. There is also a misunderstanding that while making Taqleed of a certain Mujtahid, continuing research into the Quran and Sunnah is somehow forbidden or dormant. The concept of Taqleed does not hinder seeking knowledge of the Quran and Sunnah. This seeking of knowledge continues even while practicing Taqleed. For this reason hundreds of scholars - who practiced the Taqleed of an individual - continued to write commentaries of the Quran and Sunnah and expand their scholastic horizons. So, if you do not know, ask those of remembrance." (Surah Al Nahl: 43) There is an academic principle in this verse, which is that those who are not experts in a field should resort to seeking advice from

those who are and act accordingly. If during research an opinion of a certain Mujtahid was conclusively proven to be against the Quran and Sunnah, the "unsound" opinion would be relinquished and the stronger evidence would be adopted. If a Muqallid (someone who follows a Mujtahid) finds that the opinion of his Imam is contrary to a Hadith, this is not necessarily antithetical to Taqleed. Ijtihad is a living institution but only when it is not out of pleasure or according to the whims of personal interests. Thus an honest and sincere application of mind with strong efforts is needed in Ijtihad. The main purpose of it is to bring uniformity in plurality. Similarly there is a definite need of solution through Ijtihad on such diverse scientific and technological issues of the contemporary era which are in the main focus and are having impact on the Muslim societies globally directly or indirectly. Therefore Ijtihad is an intellectual striving which starts when there is no express text given. It is a research aspect of Islam. The aim of Ijtihad is to gather all the diverse problems and questions owing to the changing situations and then to strive for settlement in conformity with the essence of Islamic teachings in order to follow Islam.

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An Appraisal of *NPMHR* Case with Special Reference to AFSPA: A Critique

Abstract

The Government's overt endorsements of the AFSPA have found tacit support from the judiciary. In the case of the Naga People's Movement of Human Rights the Supreme Court upheld the Constitutionality of the AFSPA but placed various checks on the armed forces exercise of power there under. Specifically, the Court rejected the petitioners argument that the AFSPA was unconstitutional because it transferred to the armed forces full power to maintain public order in a disturbed area whereas the Constitution only permits Parliament to enact laws relating to the 'use of the armed forces in aid of civil power'. The verdict demonstrates an extreme technical formalism which is at the same time of the crudest positivist kind, totally devoid of the notions of public justice that are now supposed to be part of our civilization. No civilized jurisprudence would justify this permission given to the security forces to kill citizens. In this paper an attempt has been made to analyze the verdict delivered by the apex court in the light of the various provisions of AFSPA in the historic case of ***NPMHR.***

Keywords*: Endorsements- Judiciary- Disturbed Area- Parliament- Formalism- Civilization- NPMHR*

I. Introduction

Everyone has inherent dignity, inalienable rights and wants to live in peace. If anyone will disturb and violate these essential natural qualities of the human beings, it will affect the social order, tranquility and prosperity of the society, the result of which will be a breach of law and order. Disturbance is one of the reasons of creating law and order problem in the society[1]. It can be said that if any human being creates any problem for maintaining law and order in the society, he should be punished according to the due process of law but law does not permit anyone to take it in its own hand. However, the law has the power to

1 Justice Krishna Iyer, "Human Rights and Inhuman Wrongs" (2001).

take its own course because no one is above the law and the law is supreme. Reasonability and fairness of the law are the proper tests for the protection of human rights. For the purpose, it requires application of law with complete intelligence of a human being, as a tool for regulating, controlling and maintaining peace and order in the society

The state has the Constitutional duty to protect the Sovereignty, Integrity and Solidarity of the country[2]. In order to fulfill the Constitutional obligation the Central Government has enacted various laws in this regard and AFSPA is one of these laws which are in vogue in some of the states of India, like North East, J&K. AFSPA[3] is primarily aimed at protecting the Integrity and Solidarity of the country against the disruptive and divisive forces that are in constant war with the Centre and the State Governments. After the application of AFSPA debate arose in the society for the protection of human rights of general people, because such law provides uncontrolled power to the law enforcement authorities and there are chances of abuse and misuse of this power by the authorities. For the past about fifty years or so, large parts of the North East have been virtually under army rule, having a drastic effect on the daily life of the average citizen residing in the seven states of the North East and the state of J&K. A state of the de facto abrogation of fundamental rights including, the all important right to life

2 Art. 19(2) of the Constitution of India.

3 The Armed Forces Special Powers Act is an act empowering armed forces to deal effectively in disturbed areas. Any area which is declared ''disturbed'' under Disturbed Areas Act enables armed forces to resort to the provisions of AFSPA. The choice of declaring any area as 'disturbed' vests both with State and Central Government. After an area comes under the ambit of AFSPA, any commissioned officer, warrant officer, non-commissioned officer or another person of equivalent rank can use force for a variety of reasons while still being immune to the prosecution. [The Act was passed on 11 Sep. 1958 by the Parliament of India to provide special legal security to the armed forces carrying out operations in the troubled areas of Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland, Tripura (seven sisters) and was later extended to the state of J&K.]

and large scale encroachment by the security personnel on the life and liberty of the citizens, led several human rights organizations to file writ petitions in the Supreme Court between 1980 and 1982 challenging the Constitutional validity of the Armed Forces Special powers Act, 1958. The Act was challenged on the grounds of being violative of the fundamental rights to life, liberty, equality, freedom of speech and expression, assemble peacefully, move freely, practice any profession, protection against arbitrary arrest and freedom of religion enshrined in Articles, 14,19, 21, 22 and 25 in the Constitution. These petitions were pending with the Supreme Court for long fifteen years, during which period the violations of rights continued[4].

There were several cases pending before the Supreme Court challenging the Constitutionality of the AFSPA. It is extremely surprising that the Delhi High Court found the AFSPA Constitutional in the case of *Indrajit Baruah*[5] allowing the only judicial way to challenge the Act by the Supreme Court and to declare the constitutionality of the AFSPA unconstitutional. In 1980, a Manipuri group named the Human Rights Forum filed public interest litigation in the Supreme Court, challenging the Constitutional validity of the AFSPA. The Naga People's Movement for Human Rights and the People's Union for Democratic Rights also moved separate writ petitions on the same issue in 1982. However, the Supreme Court did not proceed in the matter for 15 years. The various petitions were combined in the case of the *Naga People's Movement of Human Rights, etc.* v. *Union of India*[6]. 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. This paper makes

4 An illusion of justice, "Supreme court judgment on AFSPA" *PUDR Report* Delhi 1(May 1998). *Available at:* http://www.pudr.org/sites/default/files/pdfs/masooda-1.pdf (Last visited on Feb. 23, 2013).

5 *Indrajit Barua* v. *State of Assam*, AIR 1983 Del 513 p. 525.

6 1998(2) SCC 109.

an in depth analysis of the judgment delivered by the Apex Court in Naga Peoples case about the constitutionality of AFSPA.

II. An Analysis of NPMHR Case

The Naga Peoples' Movement of Human Rights challenged the validity of the legislation in 1982. The Supreme Court chose to keep the case pending for 15 long years during which atrocities mounted and people living in the North East were effectively deprived of their fundamental rights. The petitioner alleged that the Act had violated Constitutional provisions that govern the procedure for issuing proclamations of emergency, upset the balance between the military and civilian and the union and state authorities. The Court rejected those contentions it found that:

> *The Parliament had been competent to enact the Act and ruled that its various sections were compatible with the pertinent provisions of the Indian Constitution. In particular, the Court held that the application of the Act should not be equated with the proclamation of a state of emergency, which led to its finding that the Constitutional provisions governing such proclamations had not been breached. The Court further emphasized that the military forces had been deployed in the disturbed areas to assist the civilian authorities. As these authorities continued to function even after the military's deployment, the Court held that the Constitutional balance between the competencies of the military and the civilian authorities had not been upset. Equally, the Court found no violation of the Constitutional balance of competencies of the union and state authorities*"[7]

7 The Armed Forces Special Powers Act, 1958 in Manipur and other States of the Northeast of India, *Sanctioning repression in violation of India's human rights obligations*, (18Aug.2011). *Available at*: http://www.refworld.org/docid/4e5630622.html (Last visited on Apr. 23, 2013).

The Supreme Court upheld the Armed Forces Special Powers Act in its final verdict on Nov. 27, 1997. The Supreme Court also said that any complaint alleging the misuse or abuse of powers conferred by the Act shall be thoroughly inquired into and, if on enquiry it is found that the allegations are correct, the victim should be suitably compensated and the necessary sanction for institution of prosecution and/or suit or other proceeding should be granted.

III. Implication of the Judgments

The hearing of the case starkly brought forth the basic difference of approach between those pleading for striking down of this legislation and that adopted by the Court. It was the alarming rate of heinous crimes against the populace perpetrated by the Paramilitary personnel and the need to end it, the virtually nonexistent space for redressal of victims grievances and the inaccessibility of people to the military courts where such crimes were to be tried, that prompted various democratic rights organizations and individuals to file cases before the Court. Such concerns were, however, not shared by the highest Court. The Court refused to go into the actual working of the Act and deemed it irrelevant for purposes of deciding its Constitutionality[8]. The position of the Supreme Court carries immense persuasive weight when interpreting the Constitutional vires of the Act. What the Court did not address was the compatibility of the Act with India's obligations under the ICCPR or other international obligations. One could argue that the main points of discussion concerning the Constitutionality of the Act in Naga peoples Movement for human rights revolved around the procedures followed during the enactment and the implication of the Act in the Centre State relations[9]. However the Supreme Court has been liberal in deciding that international human rights jurisprudence could be applied at the domestic level. For instance, in 1996 the Supreme Court extensively

8 *Supra note* 4

9 *Supra note* 7

drew inspiration from the general comment adopted by the human rights committee to decide upon the question of reservations[10].

The Court has held on various occasions that although ratified international treaties do not automatically become part of domestic law they are nevertheless relevant to Constitutional interpretation, with reference to Article 51(c) of the Constitution which directs the state to endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another. This provision does not confer a justiciable right. It, however, encourages the Government to strive to achieve in good faith the objectives of the ratified international treaty through executive or legislative actions. It is this provision that the Courts in India have liberally interpreted to read within the domestic framework the country's obligation under international human rights law. A fitting case to the point would be the *Keshvananda Bharti case*[11]. The then Chief Justice of India, *Justice Sikri,* while deciding the case said it seems to me that, in view of Art.51 of the directive principles, this Court must interpret the language of the Constitution, if not intractable, which is after all an intractable law, in the light of the United Nations Charter and the solemn declaration subscribed to by India. The principle was developed further and applied without hesitation in the *Vishaka case*[12] where the Court said: In the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19 (1) (g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein.

10 *T.M.A. Pai Foundation* v. *State Of Karnataka*, (2002)8 SCC 481.

11 *Keshvananda Bharti* v. *State of Kerala*, 1973 SCR 1.

12 *Vishaka* v. *State of Rajasthan,* (1997) 6 SCC 241.

Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee. It follows that under Indian domestic law, wherever possible, a statutory provision must be interpreted consistently with India's international obligations, whether under customary international law or an international treaty. If the terms of the legislation are not clear and are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that the Parliament does not intend to act in breach of international law, including therein, a specific treaty obligation; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Considering the question of domestic applicability of the principles of customary international law the Court did not have any hesitation in holding that once these principles are accepted as part of the customary international law there would be no difficulty in accepting them as part of the domestic law. It is almost accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to have been incorporated into the domestic law and shall be followed by the Courts of law[13]. Despite all these affirmative and progressive steps in its pertinent jurisprudence, when it came to interpreting the Act, the Court fell short of its own established practice and failed to interpret the Act in compliance with India's international human rights obligations and the treaty obligation under the ICCPR in particular. Yet, there is hope, since the Court did not merely say that the AFSPA Act is Constitutional and leave it at that. By way of caution, probably reading on the arbitrary nature of the powers conferred by the Act to the persons working under

13 *Vellore Citizens Welfare Forum* v. *Union of India*, AIR 1996 2715.

the Act, the Court set out some precautions for the implementation of the Act as follows[14]:

While exercising the powers conferred under *clauses (a) to (d)* of *Section 4* the officers of the armed forces shall strictly follow the instructions contained in the list of Do's and Don'ts issued by the army authorities which are binding and any disregard to the said instructions would entail suitable action under the Army Act, 1950[15]. The instructions contained in the list of Do's and Don'ts shall be suitably amended so as to bring them in conformity with the guidelines contained in the decisions of this Court and to incorporate the safeguards that are contained in clauses (a) to (d) of Section 4 and Section 5 of the Central Act . A complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act shall be thoroughly inquired into and, if on enquiry it is found that the allegations are correct, the victim should be suitably compensated and the necessary sanction for institution of prosecution and/or a suit or other proceeding should be granted under Section 6 of the Central act. In this case, certain do's and Don'ts which were part of instructions issued by the army were made binding on the armed forces. These were in the nature of moral norms like do not use excessive force, do not ill-treat anyone, in particular women and children, and do not torture. In addition, the judgment directed that the armed forces use minimal force required, hand over arrested people at the nearest police station without delay, and conduct search and seize operations according to the provisions of the Criminal Procedure Code.

There has been no effective review of these directions so far. For instance, the Central Bureau of Investigation of India only lists 118 applications that sought prior sanction for prosecution, of which only five are from Manipur. This is contrary to the statistics available as to

14 *Supra note* 7

15 The 1950 Act was a revision of the 1911 Indian Army Act. One of the goals of this revision was to bridge the gap between the army and Civil laws, as far as, possible in the matter of punishment of offences.

the number of civil cases in which Courts in India have awarded monetary compensation to victims. It is perhaps time for an effective review of the AFSPA Act. It is also important to note that a remedy under the writ jurisdiction is not punitive in nature. A prosecution by means of the "procedure established by law" has never happened[16]. Leaving it to the armed forces to respect "Do's and Don'ts" issued by the army authorities has proven to be inadequate and ineffective. The Supreme Court also said that any complaint alleging the misuse or abuse of powers conferred by the Act shall be thoroughly inquired into and, if on enquiry it is found that the allegations are correct, the victim should be suitably compensated and the necessary sanction for institution of prosecution and/or suit or other proceeding should be granted[17]. In practice, local police usually discourage victims from registering a case against the armed forces, or simply refuse to register such complaints. Efforts to investigate such complaints by the police, in any case, are usually futile since the armed forces use the immunity provisions of the AFSPA to refuse to produce the relevant officials for questioning. The judgment of the Supreme Court seems to have made little difference to the ground realities. This is instructive and a pointer to certain dimensions that may help in forming a perspective on AFSPA. The Constitution does not contain any provision for martial law. Giving independent powers to the armed forces, results in the army supplanting,

16 A case that could be considered to have come close is *Sebastain M. Hongray* v. *Union of India* AIR 1984 571, where a writ of habeas corpus was filed before the Supreme Court of India concerning the disappearance of two persons.

17 The Court in *NPMHR* said that the army should not be deployed for long periods since the primary task of the armed forces is to defend the country in the event of war or when it is faced with external aggression, and that an internal conflict puts the armed forces in a situation that brings them in confrontation with their countrymen. The judges concluded that prolonged or too frequent deployment of armed forces for handling such situation is likely to generate a feeling of alienation among the people against the armed forces.

rather than supplementing civil power. AFSPA is the only law in the country that confers independent powers directly on the army to shoot to kill, to mortar-shell places, arrest and search civilian citizens in areas declared "disturbed" under the Act.

IV. An Overview of Various Provisions of AFSPA as discussed in *NPMHR* Case

Section 3 having caused large scale violation of fundamental rights in the North East is a direct consequence of areas being declared as disturbed areas under Sec 3 and the simultaneous acquiring of wide powers by army personnel under Sec 4 of the Act. Vague and circular definition of disturbed area as being an area which is disturbed or dangerous requiring the aid of the armed forces ensures that any area can be declared disturbed. The definition or the rest of the provisions offers no guidelines and lays down no objective criteria to adjudge an area as disturbed. Thus, with almost no application of mind, large geographical areas can be arbitrarily declared as disturbed areas. There being no independent yardstick, the issuance of notification in even a peaceful area cannot be contested or challenged section 3 also does not contain any requirement of periodic review to asses, even on the basis of subjective criteria, whether an area continues to be in a disturbed or dangerous state and the notifications having drastic effects on the citizens can routinely continue.

In the present case, in fact, entire states were notified as disturbed under Sec 3 of the Act by the Central Government. These notifications have continued for years on end, sometimes extending to 10 or 15 years. As Sec 3 does not specify any time limit, the notifications were not time bound and continued till withdrawn. The Supreme Court judgment has held the definition of disturbed area to be precise and held that Sec 3, does not confer an arbitrary power to declare an area as a disturbed area. The court has held the power of the Central Government or the Governor to independently declare an area to be disturbed as Constitutional. Along with the court has observed that it is desirable that the State Government be consulted before a declaration by the Central

Government. However, on the lack of any time duration of notifications under Sec 3 the Court has held that a declaration of an area as a disturbed area has to be for a limited duration and periodic review of the declaration before the expiry of six months has to be undertaken by the executive. The basis for this change, the judgment argues, flows from the Constitutional provisions of Articles 352 and 356 but it fails to even mention that these provisions stipulate a review by both houses of the legislature. Clearly the conferring of independent powers on the army on notification under Section 3, leads to the supercession of the civil authority of the state and army rule, which is totally impermissible under the Constitution. The Act permitting such rule is clearly unconstitutional. The judgment, totally ignoring the reality, mechanically concludes that the word aid postulates the continued existence of the authority to be aided and therefore civil power continues to function even after the deployment of armed forces and hence the validity of the Act[18].

The exercise by the army of the unchecked powers to arrest, search, seize and even shoot to kill conferred under *Section 4* of the Act has resulted in large scale violation of the fundamental rights of citizens under Articles 14, 19 21, 22 and 25 of the Constitution. The systematic and routine nature of violation of rights shows the intrinsic link with the working of the Act. The scale and extent of violation take them totally out of the category of isolated instances of abuse of the Act and show them to be integral to the working of the law. The present judgment has upheld *Sections 4(a) to 4(d)* which form the basis of the army actions in the North East. The power under *Section 4 (a)* to a noncommissioned officer and above of the army to use force to the extent of causing death is unconstitutional and bad in law. The judgment while upholding the power directs that while exercising power under Section 4 (a) the army officers should use minimum force required for effective action. However, this supposed restriction bringing the wide power to kill within the ambit of Constitutionality does not amount to anything. The

18 *Supra note* 4 at 5

army of a nation is trained to kill the enemy. The giving of warning, the use of minimum force which is essential when dealing with citizens of the country has no place in an army. Therefore, army personnel trained for war, deployed in a domestic situation dealing with citizens of the country, characteristically over-react leading to use of excessive force and violation of human rights. The innumerable incidents of atrocities demonstrate the consequence of giving independent powers to the army. That is the reason why the Constitution only permits the army to aid civil power. That is also the reason for the Criminal Procedure Code permitting the use of the army in aid of civil power under the directions of a civil Magistrate[19]. The power to shoot to kill for violation of an order under Sec 144 of the CrPC is totally disproportionate and violative of the right to life. Violation of an order under Sec 144 CrPC is a minor offence punishable with a month's imprisonment under the ordinary law of the land. The power to shoot to kill if a person is carrying firearms, weapons or things capable of being used as weapons is also bad in law as being too vague and broad. The Act does not require the army personnel who shoot a person causing his death to give a report on the circumstances under which he formed his opinion to shoot to kill. There is thus no check or impartial application of mind as to whether there was any justification for the killing. The Act does not provide for an inquest or investigation into the death of a person killed by the army. There is thus, no check or accountability. For example in cases of death in police custody, there is a mandatory requirement of a magisterial inquiry under Section 176 of the CrPC. The judgment does not even attempt to answer such criticisms of the Act.

The power under *Section 4 (b)* to destroy any arms dump, any shelter from which armed attacks are made or likely to be made or any structure used as a training camp for armed volunteers or as a hideout by armed gangs or absconders is unconstitutional. The judgment bypasses the provision for destruction of structures from which attacks are likely

19 *Id* at 7

to be made. For this can include any house or construction that may so arouse the suspicion of the armed forces, similarly, on the provision for the destruction of the hideout of an absconder, the judgment not only assumes that the absconder is guilty but that the crime for which the person is absconding is heinous. The Act, on the other hand provides the power for any and every kind of absconder.

The power to arrest without warrant given under the *Section 4 (c)* is bad. Arrest without warrant is a serious encroachment on the right to life and liberty of a person, therefore under the ordinary Criminal law the power is checked by provisions laying down the conditions of exercise of such power by the police and the detailed procedure to be followed on arrest. These checks are absent in the Act. A person arrested under Section 4 (c) is deprived of his fundamental right under Art.22 of the Constitution to be informed of the grounds of arrest, to consult a lawyer of his or her own choice. As observed by the Guwahati High Court in *Peoples Union for Human Rights* v. *Union of India,* the army follows the practice of routinely arresting innocent persons at a large scale and then giving them clean chits instead of first ascertaining whether there is credible information or ground for reasonable suspicion that a person has committed a cognizable offence and then arresting him. The judgment does not give any serious thought to this provision. It considers such powers as normal since it is vested in the police as well. That the police can arrest without a warrant only for a certain class of serious offences is overlooked. Then, again restrictions are imposed on the police on the amount of force that can be used to effect an arrest. The Act empowers the members of the armed forces to use such force as may be necessary to effect the arrest. Through overlooking the problem, the provisions of this section are upheld.

The power of search and seizure under *Section 4 (d)* has been extensively used by the army in cordon and search operations leading to widespread violation of fundamental rights of citizens residing in areas declared as disturbed. The judgment while upholding Sec 4 (d) has directed that the provisions of the CrPC have to be followed in the

course of search and seizure. The judgment has directed that guidelines issued by the army which have to be followed while exercising powers under Sec 4 (a) to 4 (d) of the Act have to be brought in conformity with the other decisions of the Supreme Court with regard to arrest, interrogation and custody. How is it to be ensured that such guidelines are followed and what happens if they are flouted is nowhere discussed.

Section 5 of the Act provides that a person arrested by the army is to be handed over to the nearest police station with the least possible delay. The army in reality has been arresting persons and keeping them in custody for days and in some cases for months and using third degree methods of torture.

Section 6 of the Act provides that armed forces personnel cannot be prosecuted for acts done under the Act, except with the previous sanction of the Central Government. This has been upheld by the Supreme Court[20]. The Apex Court has held the Act as Constitutional by taking a narrow reading of the phrase 'procedure established by law' it continues to be questioned by eminent legal luminaries for its arbitrary and unjust provisions. The narrow reading of the phrase 'Procedure established by law' in the judgment was taken even when Justice ***P.N. Bhagwati*** in the landmark *Maneka Gandhi case* which practically over ruled *Gopalan case*[21] held:

> *Procedure established by law must be right, just and fair and not arbitrary, fanciful or oppressive, otherwise it would not be procedure at all and the requirements of Art. 21 would not be satisfied.*

The Act allows the armed forces operate independently of local administration and to the extent the actions of the armed forces are to remain outside the jurisdiction of local judicial machinery, the AFSPA continues to supplant local Government and suspend people's rights and shield those guilty of crimes against the people. Therefore the struggle

20 *Ibid*

21 AIR 1950 SC 27.

for the preservation of people's rights and for the repeal of this draconian Act must continue. The 1997 judgment failed to refute criticism that the powers exercised under the AFSPA violate the Constitution and international laws to which India is bound. It failed to clarify as to how the provisions of the law that allow for security forces to fire upon persons and cause death on the order of even a non-commissioned officer with the slightest suspicion of an offence do not amount to the legalization of extrajudicial execution.

Conclusion

In the 60-page judgment, the Constitutional bench, headed by the Chief Justice, *J. S Verma* observed that the Parliament could enact the impugned statute through the power conferred under Art. 248 read with list 1, entry 2, entry 97 and entry 2A, inserted after the 42nd Constitutional amendment. The Supreme Court has thus far failed in its duty to the people of the North East. In this it also failed to consider the recommendation of the National Human Rights Commission of the year earlier that the law be repealed; likewise, the Government has itself failed to comply with this recommendation. In this, the commission has been joined by numerous other domestic and international human rights groups, which have denounced and called for the withdrawal of the law.

Most importantly, by giving virtual impunity in the armed forces under Section 6 of the AFSPA which makes it mandatory to seek prior permission of the Central Government to initiate any legal proceedings, the executive has expressed its lack of faith in the judiciary. Otherwise, it would have been left to the judiciary to decide whether the charges are vexatious, abusive or frivolous. The prevailing concept of sovereign immunity exempts the public functionaries from prosecution for any offence committed in course of discharging of their official duties. The judiciary has to be ever alert to repel all attacks, gross and subtle against human rights and how to guard against the danger of allowing themselves to be persuaded to attenuate or construct human rights out of the misconceived concern for state interest or concealed political preferences. Judicial indifference or timidity can be a source of greater

threat to human rights enforcement than the aggression of the violators, for the great bulwark against state authoritarianism or arbitrariness would then be gone. The strength of any country claiming itself as democratic lies in upholding the supremacy of the judiciary and primacy of the rule of law. It requires putting in place effective Criminal-law provisions to deter the commission of offences against the innocents and punishment for breaches of such provisions while exercising executive powers; and not in providing the arbitrary powers to the law enforcement personnel to be a law unto themselves.

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