ISSN 2321-1059

Journal of Legal Studies

An International Journal of Legal Studies

Volume 2 **Issue I** **January** **2014**

Published By:
Manavta Samajik Sanstha
Mughalsarai, Chandauli, U.P. India

ISSN 2321-1059

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MANAVTA SAMAJIK SANSTHA
MUGHALSARAI CHANDAULI U.P.

Published By:
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Cite this Volume as JLS Vol. 2, Issue I, January 2014

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Contempt of Courts *Vis- A-Vis* Apology: A Critical Analysis

Dr. Banshi Dhar Singh*

Abstract

The rule of law is the foundation of the democratic society. The judiciary is the guardian of the rule of law. Hence judiciary is not only the third pillar, but the central pillar of the democratic State. The Judiciary is the final interpreter and guardian of the Constitution, and also the Fundamental Rights of the people. If the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the courts have to be respected and protected at all costs. An act or commission scandalises or lowers the authority of any court, prejudices, or interferes with; the due course of any judicial proceedings, calculated to interfere with the due administration of justice is called contempt of court. Both the Supreme Court as well as High Courts is court of record having powers to punish for contempt including the power to punish for contempt of itself. It is an inherent power of the court and sue generis. An apology as a legal remedy against contempt of court but it is not a weapon of the defence forged to purge the guilt of the offences nor is it intended to operate as panacea. This paper discusses what is contempt of court? What's object of contempt of courts? What's power of Court to Punish for Contempt of Court? Is apology as a legal remedy against contempt of court? What does an apology involve? What makes an apology meaningful? Is the law concerned whether an apology is given sincerely? What are the grounds on which ordered apologies have been justified?

Introduction

The rule of law is the foundation of the democratic society. The judiciary is the guardian of the rule of law. Hence judiciary is not only the third pillar, but the central pillar of the democratic State. In a democracy like ours, where there is a written Constitution which is above all individuals and institutions and where the power of judicial review is vested in the superior courts, the judiciary has a special and additional duty to perform, viz., to oversee that all individuals and institutions including the executive and the legislature act within the framework of not only the law but also the fundamental law of the land. This duty is apart from the function of adjudicating the disputes between the parties which is essential to peaceful and orderly development of the society. If the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise, the very cornerstone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. It is for this purpose that the courts are entrusted with the extraordinary power of punishing those who indulge in acts whether inside or outside the courts, which tend to undermine their authority and bring them in disrepute and disrespect by scandalising them and obstructing them from discharging their duties without fear or favour. [1]

The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets eroded.[2]

**** Associate Professor, Faculty of Law, University of Lucknow, Lucknow- 226031.***

Contempt of Courts

Contempt is any conduct that tends to bring the authority and administration of Law into disrespect or disregard or to interfere with or prejudice parties or their witnesses during litigation. Contempt of court is an act or commission calculated to interfere with the due administration of justice. It includes civil and criminal contempt.[3]

Halsbury defines contempt thus:[4] "Any Act done or writing published which is calculated to bring a court or a Judge into contempt or to lower his authority or to interfere with the due course of justice or the lawful process of the court is contempt of court. Any episode in the administration of justice may, however, be publicly or privately criticized, provided that the criticism is fair and temperate and made in good faith. The absence of any intention to refer to a court is a material point in favour of a person alleged to be in contempt."

Under the common law definition, "contempt of court" is defined as an act or omission calculated to interfere with the due administration of justice. This covers criminal contempt (that is, acts which so threaten the administration of justice that they require punishment) and civil contempt (disobedience of an order made in a civil cause.) Section 2 (a) (b) and (c) of the Contempt of Court Act, 1971 defines the contempt of court as follows:

Definition

In this Act, unless the context otherwise requires, -

a) "contempt of court" means civil contempt or criminal contempt;
b) "civil contempt" means wilful disobedience to any judgment decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;
c) "criminal contempt" the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which -

1) scandalises or tends to or lowers or tends to lower the authority of any court; or
2) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings, or
3) interferes or tends to with, or obstructs or tends to obstruct, the administration of justice in any other manner"

The definition of criminal contempt is wide enough to include any act by a person which would tend to interfere with the administration of justice or which would lower the authority of court. It has been enacted to protect apart from sanctity, the regularity and purity of a judicial proceeding. The public have a vital stake in effective and orderly administration of justice. The Court has the duty of protecting the interest of the community in the due administration of justice and, so, it is entrusted with the power to commit for contempt of court, not to protect the dignity of the Court against insult or injury, but, to protect and vindicate the right of the public so that the administration of justice is not perverted, prejudiced, obstructed or interfered With. [5]

Contempt of court has various kinds, e.g. insult to Judges; attacks upon them; comment on pending proceedings with a tendency to prejudice fair trial; obstruction to officers of Courts, witnesses or the parties; scandalising the Judges or the courts; conduct of a person which tends to bring the authority and administration of the law into disrespect or disregard. Such acts bring the court into disrepute or disrespect or which offend its dignity, affront its majesty or challenge its authority.[6]

Object of Contempt of Courts- The object of punishing contempt for interference with the administration of justice is not to safeguard or protect the dignity of the Judge or the Magistrate, but the purpose is to preserve the authority of the courts to ensure an ordered life in society.[7]

The power to punish contempt is vested in the Judges not for their personal protecting only, but for the protection of public justice, whose interest, requires that decency and decorum is preserved in Courts of Justice. Those who have to discharge duty in a Court of Justice are protected by the law, and shielded in the discharge of their duties. Any deliberate interference with the discharge of such duties either in court or outside the court by attacking the presiding officers of the court, would amount to criminal contempt and the courts must take serious cognizance of such conduct.[8]

The Supreme Court in **M. B. Sanghi v. High Court of Panjab & Haryana & Ors.**,[9] case observed as under the foundation of our system which is based on the independence and impartiality of those who man it will be shaken if disparaging and derogatory remarks are made against the presiding judicial officer with impunity....It is high time that we realise that much cherished judicial independence has to be protected not only from the executive or the legislature but also from those who are an integral part of the system. An independent judiciary is of vital importance to any free society.

Power of Court to Punish for Contempt of Court- The Constitution of India declare both the Supreme Court as well as High Courts are court of record having powers to punish for contempt including the power to punish for contempt of itself.[10] The Constitution does not define "Court of Record." A "Court of Record" is a court where acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the 'record' of the court and are conclusive evidence of that which is recorded therein.[11] Once a court is made a Court of Record, its power to punish for contempt necessarily follows from that position.[12] The jurisdiction of the Supreme Court under Act 129 is sui generis. Neither the Contempt of Court Act, 1971 nor the Advocates Act, 1961, can be preserved into service to restrict the said jurisdiction.[13]

In India prior to the enactment of the Contempt of Courts Act, 1926, High Court's jurisdiction in respect of contempt of subordinate and inferior courts was regulated by the principles of Common Law of England. The High Courts in the absence of statutory provision exercised power of contempt to protect the subordinate courts on the premise of inherent power of a Court of Record.[14] The Kings Bench in England and High Courts in India being superior Court of Record and having judicial power to correct orders of subordinate courts enjoyed the inherent power of Contempt to protect the subordinate courts. The Supreme Court being a Court of Record under Article 129 and having wide power of judicial supervision over all the courts in the country, must possess and exercise similar jurisdiction and power as the High Courts had prior to Contempt Legislation in 1926. Inherent powers of a superior Court of Record have remained unaffected even after Codification of Contempt Law.

The Contempt of Courts Act 1971 was enacted to define and limit the powers of Courts in punishing contempt of courts and to regulate their procedure in relation thereto. There is no provision therein curtailing the Supreme Court's power with regard to contempt of subordinate courts, Section 15 expressly refers to this Court's power for taking action for contempt of subordinate courts. The section prescribes modes for taking cognizance of

criminal contempt by the High Court and Supreme Court. It is not a substantive provision conferring power or jurisdiction on the High Court or on the Supreme Court for taking action for the contempt of its subordinate courts. The whole object of prescribing procedural modes of taking cognizance in Section 15 is to safeguard to valuable time of the High Court and the Supreme Court being wasted by frivolous complaints of contempt of court. Section 15(2) does not restrict the power of the High Court to the cognizance of the contempt of itself or of a subordinate court on its own motion although apparently the Section does not say so.[15]

This is based on principles of high public policy. That is why contempt power is said to be an inherent attribute of a Superior Court of Record. This power has not been given to the subordinate judiciary, but in an appropriate case, subordinate judiciary can make a reference to the High Court under Section 15 (2) of the Act, as has been done in this case. Thus when High Court exercises its power on a reference under Section 15(2) of the Act, it is virtually exercising the same as a guardian of the subordinate judiciary to protect its proceedings against an outrage and affront. In exercising such power, the High Court being a `Court of Record' and the highest judicial authority in the State is discharging its jurisdiction `in loco parentis' over subordinate judiciary in that State. Therefore, there is something in the nature of High Court's power under Section 15(2) of the Act which couples it with a duty. The duty is obviously to uphold the rule of law.[16]

Section 12 of the Contempt of Courts Act, 1971, provide that the punishment for contempt of court-

(1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both.
Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.
Explanation- An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.[17]

It may be noted that under Explanation to Section 12(1) of the Act, the Court may reject an apology if the Court finds that it was not made bonafide. Under Section 12 it has been made very clear that the apology must be to the satisfaction of the Court. Therefore, it is not incumbent upon the Court to accept the apology as soon as it is offered. Before an apology can be accepted, the Court must find that it is bonafide and is to the satisfaction of the Court. However, Court cannot reject an apology just because it is qualified and conditional provided the Court finds it is bonafide.[18]

An Apology Cannot be a Weapon of the Defence- The apology means a regretful acknowledge or excuse for failure. An explanation offered to a person affected by one's action that no offence was intended, coupled with the expression of regret for any that may have been given. Apology should be unquestionable in sincerity. It should be tempered with a sense of genuine remorse and repentance, and not a calculated strategy to avoid punishment. Clause 1 of Section 12 and Explanation attached thereto enables the court to remit the punishment awarded for committing the contempt of court on apology being made to the satisfaction of the court. However, an apology should not be rejected merely on the ground that it is qualified or tempered at a belated stage if the accused makes it bona fide. There can be cases where the wisdom of rendering an apology dawns only at a later stage.[19]

Undoubtedly, an apology cannot be a defence, a justification, or an appropriate punishment for an act which is in contempt of court. An apology can be accepted in case the conduct for which the apology is given is such that it can be ignored without compromising the dignity of the court, or it is intended to be the evidence of real contrition. It should be sincere. Apology cannot be accepted in case it is hollow; there is no remorse; no regret; no repentance, or if it is only a device to escape the rigour of the law. Such an apology can merely be termed as paper apology.[20]

An apology is not a weapon of the defence forged to purge the guilt of the offences nor is it intended to operate as panacea. It is intended to be evidence of real contriteness, the manly consciousness of a wrong done, if an injury inflicted and the earnest desire to make such separation as lies in the wrongdoer's power.[21]

In the case of In Re**: Hiren Bose,**[22] apologies submit as an apologia to the contemner's other contentions are to exhibit a desire to escape punishment without really being contrite. Courts should not accept such qualified apologies. It is also not a matter of course that a Judge can be expected to accept any apology. Apology cannot be a weapon of defence forged always to purge the guilty. It is intended to be evidence of real contrition, the manly consciousness of a wrong done, of an injury inflicted and the earnest desire to make such reparation as lies in the wrong-doer's power. Only then is it of any avail in a Court of justice But before it can have that effect, it should be tendered at the earliest possible stage, not the latest. Even if wisdom dawns only at a later stage, the apology should be tendered unreservedly and unconditionally, before the Judge has indicated the trend of his mind. Unless that is done, not only is the tendered apology robbed of all grace but it ceases to be an apology It ceases to be the full, frank and manly confession of a wrong done, which it is intended to be.

I consider the apology tendered by the contemner as bereft of its full grace, firstly, because it was offered coupled with a justification and, secondly, because it was offered at a late stage. The apology certainly has this virtue that it minimises the gravity of the offence committed by the contemner, but it does not wholly absolve him of the guilt.[23]

It is well-settled that an apology is neither a weapon of defence to purge the guilty of their offence; nor is it intended to operate as a universal panacea, it is intended to be evidence of real contriteness.[24]

In **T.N. Godavarman Thirumulpad through the Amicus Curiae v. Ashok Khot & Anr**.,[25] a three Judge Bench of Supreme Court had an occasion to consider the question in the light of an `apology' as a weapon defence by the contemner with a prayer to drop the proceedings. The Court took note of the following observations of this Court in **L. D. Jaikwal v. State of U. P.,**[26] "We are sorry to say we cannot subscribe to the 'slap-say sorry and forget' school of thought in administration of contempt jurisprudence. Saying 'sorry' does not make the slipper taken the slap smart less upon the said hypocritical word being uttered. Apology shall not be paper apology and expression of sorrow should come from the heart and not from the pen. For it is one thing to 'say' sorry-it is another to 'feel' sorry".

The Court, therefore, rejected the prayer and stated; "Apology is an act of contrition. Unless apology is offered at the earliest opportunity and in good grace, the apology is shorn of penitence and hence it is liable to be rejected. If the apology is offered at the time when the contemnor finds that the court is going to impose punishment it ceases to be an apology and becomes an act of a cringing coward".[27]

Apology must be such as serving a large purpose, as a deterrent to those who treat the orders of the court with callous disregard or indifference. The ritualistic and formal apology in affidavit is not sufficient.[28]

In Re: Bal Thackeray, Editor Samna,[29] the Supreme Court accepted the apology tendered by the contemnor as the Court came to conclusion that apology was unconditional and it gave an expression of regret and realisation that mistake was genuine.

An apology for criminal contempt of court must be offered at the earliest since a belated apology hardly shows the contrition which is the essence of the purging of contempt. However, even if the apology is not belated but the court finds it to be without real contrition and remorse, and finds that it was merely tendered as a weapon of defence, the Court may refuse to accept it. If the apology is offered at the time when the contemnor finds that the court is going to impose punishment, it ceases to be an apology and becomes an act of a cringing coward.[30]

In the case in **Ranveer Yadav vs State of Bihar,**[31] Supreme Court held that an apology in a contempt proceeding must be offered at the earliest possible opportunity. A belated apology hardly shows the `contrition which is the essence of the purging of contempt.' This Court in the case of **Debabrata Bandopadhyay v. The State of West Bengal,**[32]observed that an apology must be offered and that too clearly and at the earliest opportunity. A person who offers a belated apology runs the risk that it may not be accepted for such an apology hardly shows the contrition which is the essence of the purging of a contempt. Apart from belated apology in many cases such apology is not accepted unless it is bonafide. Even in a case of civil contempt this Court held in the case of **Principal, Rajni Parekh Arts, K.B. Commerce and B.C.J. Science College, Khambhat and another vs. Mahendra Ambalal Shah**[33] that an apology offered at a late stage would encourage the litigants to flout the orders of Courts with impunity and accordingly the Court refused to accept the apology. Equally in the case of Secretary, **Hailakandi Bar Association v. State of Assam**,[34] this Court in a case of criminal contempt refused to accept an apology which was belated. The Court held that such belated apology cannot be accepted because it has not been given in good faith. Even if it is not belated where apology is without real contrition and remorse and was merely tendered as a weapon of defence, the Court may refuse to accept it.[35]

Conclusion

The Judiciary is the final interpreter and guardian of the Constitution, the Supreme Court is also the guardian of the Fundamental Rights of the people. Truly, the Supreme Court has been called upon to safeguard civil and minority rights and plays the role of "guardian of the social revolution."[36] The rule of law is the cornerstone of civilized life, and free and fearless justice demands an independence court. The purpose of contempt jurisdiction is to uphold the majesty and dignity of the courts of law. This jurisdiction is not exercised to protect the dignity of an individual judge but to protect the administration of justice from being maligned. No one affects by his conduct this sanctity and purity of the court, he deserves condemnation. Apology is a remedy against punishment of contempt of courts, but it is not use as weapon of defence. Apology may or may not be accepted by the court. It is discretionary power of the court. An apology does not entitle the contemner to a discharge as a matter of right. An apology should not only be genuine and sincere but also prompt. Tender the apology at the earliest opportunity in the first court itself and should be unconditional, unreserved, unqualified, and sincere as an outpouring of a penitent heart. It should not be half hearted or as mere formality and should not justify act.

References:

[1] In re, Vinay Chandra Mishra, 1995 AIR 2348 : (1995) 2 SCC 584: JT 1995 (2) 587 : 1995 SCALE (2)200; Ishwarbhai Marghabhai Patel vs State Of Gujarat, (2000) 4 GLR 425.

[2] In re, Ajay Kumar Pandey, Advocate, (1998) 7 SCC 248.

[3] Helmore v. Smith, [1886] 35 Ch.D. 436 at 455.

[4] Laws of England, 3rd Edn., Vol. 8, p. 7, cited in AIR 1967 SC 1494,1497 & Just. Mehrota, V. K.., V. G. Ramachandra's Contempt of Court, (Estern Book company, Luck now-2002) 6th edn., p. 136.

[5] Offutt v.U.S., [1954] 348 US 11; Delhi Judicial Service Association Tishazari Court, Delhi v. State Of Gujrat And Ors., 1991 AIR 2176: 1991 SCR (3) 936: (1991) 4 SCC 406 : JT 1991 (3) 617: (1991) 2 SCALE 501.

[6] E. M. Sankaran Namboodiripad v. T. Narayanan Nambiar, AIR 1970 SC 2015.

[7] In re, Ajay Kumar Pandey, Advocate, (1998) 7 SCC 248; In re, Vinay Chandra Mishra, 1995 AIR 2348 : (1995) 2 SCC 584: JT 1995 (2) 587 : 1995 SCALE (2)200; Attorney-General v. Times Newspapers, (1974) A.C. 273 at p. 302.

[8] Delhi Judicial Service Association Tishazari Court, Delhi v. State Of Gujrat And Ors., 1991 AIR 2176: 1991 SCR (3) 936: (1991) 4 SCC 406 : JT 1991 (3) 617: (1991) 2 SCALE 501.

[9] (1991) 3 SCC 600.

[10] Article 129 of the Constitution of India, 1949 provides that the Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. Article 215 contains similar provision in respect of High Court.

[11] Wharton's Law Lexicon: Words & Phrases (Permanent Edi- tion) vol. 10 p. 429: Halsbury's Laws of England Vol. 10 p.319 referred in Delhi Judicial Service Association Tishazari Court, Delhi v. State Of Gujrat And Ors., 1991 AIR 2176: 1991 SCR (3) 936: (1991) 4 SCC 406 : JT 1991 (3) 617: (1991) 2 SCALE 501.

[12] CAD, Vol. VIII, p. 852 (882) referred to Dr. J. N. Pandey, The Constitution of India, (CLA, Allahabad, 2012 .), 49the ed., p.509.

[13] In re Vinayachandra Mishra 1995 (2) SCC 584.

[14] Rex v. Aimon, 97 ER 94; Rainy v. The Justices of Seirra Leone, 8 Moors PC 47 at 54; Surendra Nath Banerjee v. The Chief Justice and Judges of the High Court at Fort William in Bengal, ILR to Calcutta 109; Rex v. Parke, [1903] 2 K.B. 432 at 442; King v. Davies, [1906] 1 K.B. 32; King v. Editor of the Daily Mail, [1921] 2 K.B. 733; Attorney General v. B.B.C., [1980] 3 ALR 161; Venkat Rao 21 Madras Law Journal 832; Mohandas Karam Chand Gandhi [1920] 22 Bombay Law Re- porter 368; Abdul Hassan Jauhar's AIR 1926 Allahabad 623; Shantha Nand Gir v. Basudevanand, AIR 1930 Allahabad 225 FB; Mr. Hirabai v. Mangal Chand, AIR 1935 Nagpur 46; Harkishan Lal v. Emperor, AIR 1937 Lahore 497; Mohammad Yusuf v. Imtiaz Ahmad Khan, AIR 1939 Oudh, 131 and Legal Remembrancer v. Motilal Ghosh, ILR 41 Cal. 173,

[15] Sukhdev Singh Sodhi v. The Chief Justice and Judges of the PEPSU High Court, [1954] SCR 454 and R.L. Kapur v. State of Tamil Nadu, AIR 1972 SC 858,

[16] Ranveer Yadav vs State of Bihar on 12 May, 2010 CRIMINAL APPEAL NO. 188 OF 2009.

[17] Contempt of Court Act, 1971, Section 12. Punishment for contempt of court-

(1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both. Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court. Explanation.- An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.[17]

(2) Notwithstanding anything contained in any law for the time being in force, no court shall impose a sentence in excess of that specified in sub- section (1) for any contempt either in respect of itself or of a court subordinate to it.

(3) Notwithstanding anything contained in this section, where a person is found guilty of a civil contempt, the court, if it considers that a fine Will not meet the ends of justice and that a sentence

of imprisonment is necessary shall, instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period not exceeding six months as it may think fit.

(4) Where the person found guilty of contempt of court in respect of any undertaking given to a court is a company, every person who, at the time the contempt was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of each such person: Provided that nothing contained in this sub- section shall render any such person liable to such punishment if he proves that the contempt was committed without his knowledge or that he exercised all due diligence to prevent its commission.

(5) Notwithstanding anything contained in sub- section (4), where the contempt of court referred to therein has been committed by a company and it is proved that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the com- pany, such director, manager, secretary or other officer shall also be deemed to be guilty of the contempt and the punishment may be enforced. with the leave of the court, by the detention in civil prison of such director, manager, secretary or other officer. Explanation.- For the purpose of sub- sections (4) and (5),-

(a) "company" means anybody corporate and includes a firm or other association of individuals; and

(b) " director", in relation to a firm, means a partner in the firm.

[18] Ranveer Yadav vs State of Bihar on 12 May, 2010 Criminal Appeal No. 188 OF 2009.

[19] Vishram Singh Raghubanshi vs State Of U.P. on 15 June, 2011 Criminal Appeal No. 697 of 2006.

[20] Ibidem.

[21] DDA v. Skipper Construction, (1995) 3 SCC 507.

[22] AIR 1969 Cal 1: 72 Cal WN 82.

[23] In re Hiren Bose, AIR 1969 Cal 1, 1969 CriLJ 40, 72 CWN 82.

[24] M. Y. shareaf v. Hon'ble Judges of the High Court of Nagpur, (1955) 1 SCR 757; M. B. Sanghi v. High Court of Panjab & Haryana, (1991) 3 SCR 312.

[25] 2006 (5) SCC 1,

[26] (1984) 3 SCC 405.

[27] Patel Rajnikant Dhulabhai & Ors. V. Patel Chandrkant Dhulabhai & Ors.,AIR 2008 SC 3016.

[28] K. .P. Isar & Sons (P) Ltd. V. K. Prathydhanan, 1992 Cr LJ 2587.

[29] (1998) 8 SCC 660.

[30] Mulkh Raj v. The State of Panjab, AIR 1972 SC 1197; The Secretary, Hailakandi Bar Association v. State of Assam, AIR 1996 SC 1925; C. Elumalai and Ors. V. A. G. L. Irudayaraj and Anr., AIR 2009 SC 2214; and Ranveer Yadav v. State of Bihar, (2010) 11 SCC 493.

[31] On 12 May, 2010 Criminal Appeal No. 188 OF 2009.

[32] AIR 1969 SC 189.

[33] 1986 (2) SCC 560.

[34] (1996) 9 SCC 74; Shri Baradakanta Mishr v. Registrar of Orissa High Court, AIR 1974 SC 710; The Bar Council of Maharashtra v. M. V. Dabholkar etc. AIR 1976 SC 242; Ashram M. Jain v. A. T. Gupta & Ors., AIR 1983 SC 1151; Mohd Zahir Khan v. Vijai Singh & Ors., AIR 1992 SC 642; In Re: Sanjiv Datta, (1995) 3 SCC 619; and Patel Rajnikant Dhulabhai & Ors. v. Patel Chandrakant Dhulabhai & Ors., AIR 2008 SC 3016.

[35] Chandra Shashi vs. Anil Kumar Verma, (1995) 1 SCC 421.

[36] G. Austin, The Indian Constitution Cornerstone of Nation, p. 169, referred to Dr. J. N. Pandey, The Constitution of India, (CLA, Allahabad, 2012 .), 49th ed., p.497.

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Quasi-Parliamentary form of Government is more suitable in the Present Context of India

Dr. Jay Prakash Yadav*

The term 'democracy' in political sense comes from two Greek words: demos (the people) and kratos (authority or power). It means government by the people, not by one person (a monarch, a dictator, a priest) or government by the few (an oligarchy or aristocracy) Democracy is a popular form of Government. Our founding fathers of Constitution were committed to framing a democratic Constitution for India, and there was little doubt that this democracy should be express in the institutions of direct, responsible government. They had three major types of Executive: the American presidential system, the Swiss elected executive, and British cabinet government. Which of these should the Assembly adopt? Alternatively, could have some workable combination of them?[1]

The Assembly chose a slightly modified version of the British cabinet system. India shall have a President, indirectly elected for a term of five years, who would be a Constitutional head of the State in the manner of the monarch in England. He could be removing by impeachment proceeding brought against him by the Parliament.

Parliamentary democracy is work as a mechanism of delegation from voters via politicians to civil servants. We, then begin to develop our own Principal- Agent approach to the challenges of delegation and accountability in parliamentary democracies.

A Parliamentary or cabinet system works on the well-accepted principles that Ministers are responsible to the legislature for all their official acts and they remain in office as long as they retain its confidence. In Britain, legally, Ministers hold office during the pleasure of the King/Queen. Nevertheless, a legal truth in Britain is a political untruth and the pleasure of the King/Queen means the pleasure of Parliament. The Constitution of India also provides it, that Ministers hold office during the pleasure of the President. [2]
President of India is indirectly elected by the electoral collegial. The Electoral College was to be the two house of the federal Parliament plus the lower house of the Provincial Assemblies-where the votes were to be calculate according to a formula devised by N. G. Ayyanger to give just weight to the provincial population.[3]

The Presidential form of Government is base on the principle of separation of powers between the executive and the legislative organs. It envisaged that the legislative, executive and judicial functions in a state ought to be keeping separate and distinct from each other. There ought to be separate organs for each, working together, but none of them should be dependent on, and discharge the function belonging to, the other, as for example, the Executive should have no legislative or judicial power.[4]

* ***Principal/Dean, Jagran School of Law, Dehradun***

The thesis underlying the Doctrine is that, 'Power corrupts and absolute power corrupts absolutely'. An implication of the doctrine of separation is that each of the three branches of government ought to be composed of different persons. Neither the president nor any of his secretaries of State can be a member of the Congress. A member of the Congress can join the government only after resigning his membership therein.

Democracy is a form of government in which people are governed by their own elected representatives. It is a government of the people, for the people and by the people. In this system of government, it is the people who are supreme and sovereign. They control the government. They are free to elect a government of their own choice. Freedom of choice is the core of democracy.

Indian is the largest democracy in the world. The Constitution of Indian was enforced on 26 January, 1950. It ushered in the age of democracy. India became a democratic republic infused with the spirit of justice, liberty, equality and fraternity. The Preamble, the Directive Principles of State Policy and the Fundamental Rights reflect the Indian ideology as well as the caste, creed, religion, property, or sex has the right to cast their vote. After an election, the majority party or coalition forms the government and its leader becomes the Prime Minister.

Political parties are the vehicles of ideas. Parties act as the bridge between social thought and political decision in democracy. The Indian politics system is a multiparty system. However, gradually politics has become a game of opportunism and corruption. Most political parties are only interested in coming to power. Every party adopts different caste politics. Some try to influence the people thought caste politics. Some try to raise the religious sentiments of the people. The Indian ideology today is replaced by caste and religion.

We enjoy every right in theory, but not in practice. real democracy will come into being only when the masses are awakened and take part in the economic and political life of the country. There is inequality in every sphere- social, economic and political. Illiteracy is the main cause of inequality. The illiterate masses get easily lured by money during such an event. Also some of our legislators have criminal records against them. The people who make the laws themselves break them.

Both form of 'Democratic Government' has their pros-cons. Constitutional maker has selected Parliamentary form of government just because of two reason, firstly, Indian were well acquainted about such form of government. Secondly, it would provide responsible government to the native.
Now time has come to give over view on the thought of our founding on the vision of democracy that they have selected for us. Even after more than sixty six years of Independence, one fourth of the population today goes to bed with an empty stomach, live below the poverty line without access to safe and clean drinking water, sanitation or proper health facilities. Governments have come and gone, politics have been framed and implemented, crores of rupees have been spent, yet many people are still struggling for existence.

Today, Casteism is more pronounced that it even was. Untouchability remains abolished only in theory with frequent newspapers reports of Dalits being denied entry to temples

or other public places. Violence has been taken a serious turn in country, Bandhs, strikes and terrorist activities have become a common affair. Every sphere of national life is corrupted. Our democracy is capitalistic. Here, the rich exploit the poor who have no voice or share in the democratic structure. For a successful democracy, all these need to be checked. The numerous families of Dalit Communities have compelled to shift from their own village, Mirchpur of the district of Hisar of the State of Haryana to the relief camp at Hisar. These peoples have to compel to live exile life since 2010, even in their own country.

However, India, as a democratic country, has progressed in many aspects. It has archived self-sufficiency in food grains as a result of the green revolution. People vote for change whenever a government fails to come up to the expectations of the people. India has been a successful democratic country only because the people are law-abiding, self-disciplined and has the sense of social and moral responsibilities.

Status of the President should be changing from nominal head to quasi-head i.e. A Head with strong say in the government. President as (quasi-head) then, he could interfere in the matter of national interest like corruption, regionalism, internal security, black money and national pride etc. Therefore, his powers have to enhance suitably. President of India should be electing by general election. So that he could represent India in true sense and not be, influence by the ruling party, opposition party and regional parties' Head, or their whip.

Any person who does not belong to any existing national or regional party should be right person for the candidature of the election of President. Therefore, non-political person will be right person for the post of President.

The President of India is the integral part of Indian legislature and no 'Bill' will become Law until he does not give assent. Henceforth, the power of President in this regard should be increase and Article 111, of the Indian Constitution should be amending suitably.

Article 74(1), of the Indian Constitution declare that there shall be a Council of ministers with the Prime Ministers at the head, to aid and advise the President for the exercise of his functions. Nevertheless, what is happening, since adopting the Constitution, in spite of advising him, they do just inform about the decision of the Government, less often President refuse their advice or information. Therefore, Article 74(1) shall be suitably amend and gives the teeth to the President of India.

The office of Comptroller and Auditor-general of India has borrowed from the U.K. Unlike, U.K., Comptroller and Auditor-General of India are merely an Auditor rather than Comptroller. Henceforth the status of the same should be elevated like U.K., and if, it could happen than rate of corruption can be easily curb.
It should be empowered with the real power of the controlling funds, and just not to be limiting itself, to audit the account of the Government of India and State Governments respectively.

Article 149, of the Indian Constitution should be amending accordingly. Therefore, we should strengthen our existing institutions, rather than to frame new ones like Ombudsman or Lokpal for the proper functioning of Government of India.

For a democracy to be fully successful, the electorate should be literate and politically conscious. They should be fully aware of their rights and privileges. The illiterate masses of India should be given education so that they can sensibly vote for the right leaders. The U.S.A, Britain, Germany and Japan are successful democratic countries and gave progressed in every sphere because the masses are literate.

There should be quality in every sphere of life. The politicians should also respect the true spirit of democracy. They should refrain from corruption caste and communal politics. The citizens should elect leaders with good moral values and integrity. People should be guided to choose their representatives. They should not be influenced by anyone in this respect. Individuals should learn tolerance and compromise and understand that freedom in not unbridled but dependent on not harming another individual's well being.

Democracy demands from the common man a certain level of ability and character, like rational conducts, an intelligent understanding of public affair, unbiased justice and unselfish devotion to public interest. People should not allow communalism, separatism, Casteism, terrorism, etc to raise their heads. They are a threat to democracy. The government, the NGOs and the people together should work collectively for the economic development of the nation. Changes should come through peaceful, democratic and constitutional means. The talented youth of today should be politically educated so that they can become effective leaders of tomorrow.

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[1] Granville Austin, "The Indian Constitution Cornerstone of a Nation" p. 116

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[3] Granville Austin, "The Indian Constitution, Cornerstone of a Nation" p. 122

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Electoral Reforms in India Contemporary Constitutional Perspectives & Judicial Approach

Harish Kumar Tiwari*
Prof. (Dr.) Priti Saxena**

The Preamble of our Constitution proclaims that we are a Democratic, Republic. Democracy being the basic feature of our constitutional set up. There is an opinion that free and fair election to our legislative bodies alone would guarantee the growth of a healthy democracy in the country.[1] Democracy is a system of living on the basis of certain social values. Freedom, Equality, Fraternity, fundamental rights, Social Justice and independence of Judiciary Democracy is not just a form of government, but also a way of life election reflects the attitudes, values, beliefs of people towards their political environment and good governance the government organizes the machinery of the state for good governance in to secure and achieve economic and social justice. If government fails in good governance according to expectation of the people their reaction is reflected in changing the ruling party by opposition or any new party for good governance. Elections are foundation stone of any democracy. Elections are the most important event in a country political system as it paves the way for development of a civilized society.

Meaning of Election

Black's Law Dictionary emphasized, that election means choice of person to fill public office. Election means the expression by, vote of the will of the people or of a numerous bodies of elections.

Cambridge learner's dictionary, 'election' means a time when people vote in order to choose someone for a political and official job.[2]

History of election Reforms in Independent India:-

Democracy is an elected form of government for the people, of the people and by the people. Independent India, having chosen the path of democratic governance, set up a institutions. When its constitution was ushered in 1950, establish the election commission of India. Whose task to conduct the elections to the parliament and state legislature, and local bodies also in a free and fair manner. Which sign of healthy democracy?

The first Lok Sabha elections were conducted in 1952. The Indian National Congress came to power with 364 Seat the elections reported an electoral participation of 44.87% and Jawaharlal Nehru become the first Prime Minister by getting 75.99% of the votes cost. The election conducted after independence were held in a fair transparent and peaceful manner as it was the era of one-party system mostly ruled by the INC. The trend continued till sixth Lok Sabha in 1977.[3]

**** LL.M. IV Semester, DHR, SLS, BBA University, Lucknow.***
*****Dean, School of Legal Studies, BBA University, Lucknow.***

The emergency declared by Indira Gandhi in 1975 disabled the congress and it was the main poll plank of the major opposition parties. This decided to the fight the 1977 elections. Under a single party called the Janta Party. The party successfully would the voters on issues such a human rights violations during the emergency, compulsory sterilization, etc. Morarji Desai became the first non-congress Prime Minister on 24-3-1977.[4] The coming years saw a major change in the Indian election scenario and the one-party and coalition politics. In 1980's the era of coalition politics and it was from hence that the maladies in the Indian election started creeping in some committees and commissions on electoral reforms. Some legislation made by Parliament and Judiciary important role play in electoral reforms.

Constitutional Provisions related to Elections:

Our Indian Constitution preamble declared that we are a democratic republic free and fair election in a most significant healthy democracy. Part XV of the Constitution deals with election. It contains six articles Art 324-329.

Art 324- provides that the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of all elections to parliament and to the legislature of every state and of elections to the offices of president and vice-president shall be vested in the Election Commission.

Art 325- provides that there shall be one general electoral roll for every parliamentary constituency for election to either house of parliament or to the house or either house of the legislature of a state and that no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of the religion race, caste, sex or any of them.

Art 326 - provides confers a right upon every citizen of this country to be included in the electoral roll provided he has completed 18 years of age on specified state and is not otherwise disqualified under any of the provision of the constitution or any la made by parliament or the appropriate legislative.

Art 327- Empowers parliament to provide by law with respect to all matters relating to , or in connection with election to either house of the legislature of a state including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such house or houses.

Art 328- confers a similar power upon the legislature of a state in so far as a provision in that behalf is not made by parliament.

Art 329- This article creates a bar to interference by courts in electoral matters.

Relevant provision of the Representation of the People Act, 1951 –

Section 3-6 which deals with qualification of candidates for parliament as well as state legislative assemblies and legislative councils.

Sec-7 to 11 : Deal with Disqualification of candidates on grounds of their being convicted for certain offences under the Indian Penal Code, 1860 or some other acts of parliament, electoral offences like impersonation , bribery as well as on ground of corrupt practices and for failure to lodge account of election expenses.

Sec 19-25: provide details of the administrative machinery for conducting elections.
Sec 58-A empowers the Election commission for suspension of a poll or for countermanding of elections.

Sec 77- lays dawn that an accurate account of all expenditure by the candidate and his agent.

Sec -79-122: lay down the procedure for dealing with electoral disputes and disposal of election petitions.

Sec -123 to 136 - specify in detail corrupt practices and electoral offences and punishments prescribed for the same. The Indian Penal code, 1860 is used to categories certain actions in connection with election as punishable offences.

Committees on Electoral Reforms: -
In recent years in full recognition of the problems that the malformation of our electoral system has created there, have been many exercise aimed at reforming it. In the last four decades exercise by the government addressed to electoral reforms, these are -

- Tarkunde Committee report (1975)
- Goswami Committee on Electoral Reforms (1990)
- Vohra Committee Report (1993)
- Indrajit Gupta Committee on State Funding of Election (1998)
- Law Commission Report on Reforms of the Electoral Laws (1999)
- National Commission to review the working of the Constitution (2001)
- Election Commission of India - proposed electoral reforms (2004)
- The Second Administrative Reforms Commission (2008)
- Core - Committee on Electoral Reforms 2010
- These all are committees and Commission worked on Electoral Reforms.[5]
- 20th Law Commission is work on the electoral reforms.

There have also been a number of Committees which have examined the major issues pertaining to our electoral system and made a number of recommendations. But there remain some critical issues that might need legislative action to bring about the required changes.

Challenges before Electoral Reforms

- Criminalization of Politics
- Expenditure
- Booth Capturing
- Opinion Polls and Exit Polls
- Paid News
- Abuse of Caste, Communalism, Religion.
- Buying Voters/Corruptions.
- First-Past-the-Post system: Legacy of Colonialism.

Criminalization of Politics
The Compulsions of coalition politics which began in the early 1980's started to malign the political system and with it began the downfall of the Indian politics. During the past two or three decades a host of small parties have mushroomed up which give support to major parties in coalition, obtaining concessions and other favors. These practices have cadent and

track records of the candidate are in most cases doubtful but have to be ignored owing to coalition dharma.[6]

Due to loopholes in the electoral laws or due to the incapacity of the system to punish deviant and in many ways unacceptable behaviour. There have been constant reference to 3 MPs - Money powers, muscle power and mafia power and to 4C's - Criminalization, communalist, corruption and casteism.[7]

There have been several instances of person charged with serious and heinous crime like, murder, rape, dacoity etc. contesting election, pending their trail and even getting elected. This leads to a very undesirable and embracing situation of law breakers become law makers and moving around under police protection.

The Vohra Committee report on Criminalization of politics submitted to the government in 1993 stated that the political leaders had become the leaders of gangs. Over the years criminals have been elected to local bodies, state assemblies and parliament. Indian Parliament faced criminal charges including trafficking, immigration on rackets embezzlement, rape and even murders. Section 8- of the representation of the People Act, 1951, provides for disqualification of candidates from contesting an election on conviction by a court of law.

In case of **K. Prabha Karan vs. P. Jaya Rajan**[8] In this case constitutional bench of the Supreme Court in 2005 interpreted sub-section (4) of section 8 of the R.P., Act, 1951.

Lily Thomas vs. Union of India[9]
A bench comprising, J. A.K. Patnaik and Sudhansu Jyoti Mukhopadhyay held section 8 (4) of R.P. Act 1951 , ultra virus of the constitution sub clause (4) which has been struck down by the court read as follows :

"Notwithstanding anything [in sub-section (1) subsection (2) or sub-section (3)] a disqualification under either sub-section shall not, in the case of person who on the date of the legislature of a state, take effect until three months elapsed form that date or, if within period an appeal or application for revision is bought in respect of the conviction or the sentence, until that appeal & application is disposed of by the court".

This provision offended the principle of equality. The court struckdown this provision which would have required it to examine whether the classification of elected member as a separate class deserving specific treatment was justified. Instead, the court found it easy to declare it ultra-virus because it was glaringly inconsistent with the constitutional provisions relating to the disqualification for membership of parliament and state assemblies.

Under Article 102(1) and Art 191, these articles make no distinction between being "chosen" and "for being" a member. The court had no difficulty in concluding that Parliament had no power to make a law to undo these express provisions of the constitutions.

Once a person who was a member of either houses of Parliament. Most of the state legislature becomes disqualified by or under any law made by parliament his seat automatically falls vacant by virtue of Article - 101(3)(a) and 190 (3)(a) of the Indian Constitution.[10]

This judicial decision is trying to ban the criminalization of politics.

Expenditure:

The expenditure incurred on election and the money spent by the candidates is extremely high. This gives rise to a high degree of corruption as funding for the elections is done from unaccounted criminal money. Unaccounted funds from business group which expect favours in return for this high investment and commissions on contracts. Currently the ceiling expenses are Rs. 25 lakh for LokSabha seat and Rs.10 lakh for assembler seat but proposal inRs. 40 lakh for LokSabha and Rs. 16 lakh for state Assembly's seats.[11] There are no direct legal provisions on elections funding or any other aspect of political party finance. It was only in 1996 that the Supreme Court laid certain guidelines in - **common cause (A Registered Society) vs. U.O.I.**[12] which required political parties to file income tax return as per section 13A of the income tax Act, 1961. Supreme Court said in a democracy where the rule of law prevails this type of naked display of blackmoney by violating the mandatory provisions of law, cannot be permitted.

In the USA the federal Election Campaign Act of 1971 required candidates to disclose source of campaign contribution and campaign expenditure. This act placed limits of $5000 per Campaign on political action committees.

Exit Polls/ Opinion Polls

An exit poll is a poll of voters taken immediately after they have cast their vote and existed the polling stations to know whom the voter actually voted for, the exit polls voter actually voted, for the exits polls voter actually voted for, the exit polls have been the subject of a lot of controversy. As the elections are conducted in various phases, the publishing of exit polls is likely to affect the voting pattern and behaviour of subsequent phases. Some countries such as United Kingdom, Germany, New Zealand and Singapore have made a criminal offence to release exit polls figures.[13]

Paid News

The Phenomenon of paid new shall become the most raging topic in view of the ongoing debate on electoral reforms paid news can be as any news or analysis appearing in any media (print or electronic) for a price in cash or kind as consideration.

The media which is also a pillar of the democratic system and a part of the development and governance process is expected to perform its role in a responsible manner so as not to prove prejudicial to the society at large. The phenomenon has specially gained - momentum during elections where media purportedly reports in favour of a candidate to bias public opinion and to give undue favour or advantage or eulogies him and denigrate for consideration. Paid news is the most blatant example of abuse of pure by media where the former grossly misuses the power given to it by Art.19(1) (a) of the Indian Constitution.

Abuse of Caste, Religion and Communalism

The question of abuse of caste and Religion is of greater magnitude. The political parties trend to allow only those candidate to fight elections who can muster the minority groups and castes to their favour Communal loyalties are used at the time of election, campaigning loyalties are used at the time of election to attract the minority voters and it is very well observed that the electorates too cast their vote taking into consideration the caste and religious prejudices.[14]

In **MotilalYadav vs Chief Election Commissioner[15],**Lucknow Bench of the Allahabad High Court, Comprising j. Uma Nath Singh and J. MahendraDayal pronounced a brief interim order on July 11, directing that there shall be no caste-based rallies with political motive throughtUttar Pradesh until the court heard the petition.

Buying Voters

The practice of enticing the voters by distribution of stuffs in cash and kind to the masses are done since them from the major change of the voter bank. To the extent they are also served with liquor and drugs to gather votes, thinks to the slothful and sluggish people. And it these tricks don't fetch votes then intimitation and coercion serves as the last resort. By manipulating tampering of electoral rolls or by use of force, intimidation and coercion the process of rigging of election has been quite successful down the line of several decades.

First-Past the Post-system: Legacy of Colonialism

In our Country the structural defect is in the procedure of election. The process followed in our country is first-post-the-post-system. The ideal principle of election is the "Majority Rules Principles" whichever party gets more than 50% votes emerge out to be victorious in irrational ground since according to this principle a person can win election even if the margin less than 100 votes and the party which gets just 30-35% votes will count to emerge victorious in the Election. Hence he or she cannot be the choice of majority. The Election commission therefore proposed to replace this system with two stage election. If no candidate gets majority more than 50% then second round will take place of top two candidate and whoever gets more than 51% shall be deemed elected.[16]

Initiatives by the Election Commission

The Balloting Procedure: Indian Elections follow a balloting system based on symbols, a necessity because of the large extent of illiteracy in India.

The Election Commission published its opinion on the matter in 1991 which came to be known as the Model Code of Conduct for the Guidance of Political parties and candidates. The Model Code of Conduct serves as 'bible' for the Election observers and it is this Code that they are expected to see being adhered to.[17] This Code application is ensure that it has seemed the true purpose of democracy in a fair and balanced manner.

Electronic Voting Machine (EVM):

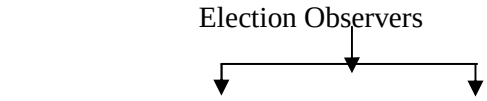
EVM were first used in the 1980's on a trial basis. Firstly used in 16 select Constituencies during the November 1998. Goa became the first state to use EVM to conduct in entire polling in the assembly election in June 1999. In the 14th & 15th general election held in 2004, 2009 the entire polling was done by EVM.

In August 2013 the Election Commission has conducting the sub Election in Nagaland and decided to give voter slip to voters it is the proof of voter to cast your votes.

Election Observers:

Though India is a developing nation it has neither invited foreign observers or has it encouraged them to come to India and pass judgment on its electoral institutions. It has instead developed its own system of internal observation.

To ensure free and fair polling the Election Commission appoints election observers under powers conferred upon it by Sec. 20B of the Representation of the People Act, 1951.[18]



The commission has taken numerous new initiatives in the recent past. Prominent among these are a scheme for Electronics media as a Medium for broadcast by Political parties, checking criminalization of Politics, computerization of electoral rolls, providing election with Identity cards, Electoral Rolls maintain with voters photo also.

Judicial Approaches

The electoral system in any country should support and strengthen the empowerment of the people of the country to exercise the system to guarantee an equitable frame work of economic and social justice.

In **V.V. Giri vs D.S. Dora.**[19] In this case Supreme Courtheld that Equality has been accorded to each citizen in the matter of franchise and the electoral roll is prepared on a secular basis.

In **N.P. Ponnuswami vs Returning officer,** [20] the Supreme Court has declared that right to vote stand as a candidate for election is not a civil right but is a creative of statute the must be subject to the limitation imposed by its. In Art 324 (5) is not to be removed from office except on the recommendation of the CEC. This provision also ensures the independence of the ECs as the S.C. has observed in **T.N. Seshan vs. U.O.I.**[21] the recommendation for removal must be based on intelligible and cogent considerations which would have relation to efficient functioning of the ECs. This is so because the power is conferred on the C.E.C. to ensure the independence of ECs from political executive bossed of the day. They have been placed under the protective umbrella of the Independent CEC.

In. Union of India Vs. Association for Democratic Reforms[22]S.C. directed the election commission to issue certain direction to Candidate to file an affidavit detailing information about themselves under certain specific heads. This was done to stop criminalization of politics. People have a right to know about the candidate for when they are being urged to vote. The right to know flows from Art. 19 (i) (a).

In Indira Nehru Gandhi Vs. Raj Naryan.[23]Declared free and Fair Elections the basic teacher of the constitution. In **S. Subramaniam Balaji Vs Govt. of T.N.**[24] The Cart however agreed with the appellant that distribution of freebies of any kind undoubtedly influenced all people shake the root of free and fair election to a large degree." it said the Court directed the E.C. to frame guidelines for the some in consultation with all the recognized political parties. The court also suggested the enactment of a separate Law for governing political parties.

In Sanjay Duttvs. State of Maharashtra tribunal C. B.I. Bombay [25]

In this case S.C. laid down principles -

(i) Convicted and sentenced person cannot be given permission to contest election, however well-known he is not habitual offender.
(ii) Power conferred under section 389 of Cr.P.C. is exercisable only in exceptional cases.

In **Lily Thomas Vs union of India**[26]Supreme Court held that Section 8 sub- clause 4 of Representation of People Act 1951 ultra-virus of the Constitution. **In Chief Election Commissioner Vs Jan Chaukidar**[27]S.C. held that a person who has no right to vote is not an elector, & therefore is not qualified to contest the election to the latest or the state Assembly even if he found his name on the electoral Rolls.

According to J.M. Lyngdoh had once referred to corrupt politician, as "cancer of society" only a clean "*Satvic*" image of parliament can provide stability.

NOTA(None of the above) :- also known as "against all" vote is a ballot or EVMs option is some jurisdiction, designed to allow the voter to indicate disapproval of all of the candidates inviting system -

The NOTA option as made mandatory by the S.C. of India so that people who did not want to vote for any of the candidates in their respective constituencies had the option of rejecting all of them without giving up their right to a secret vote.[28] Experts though assert for more electoral reform but claim that NOTA are still positive step 'It will have some effect on the political parties. If people prefer for NOTA over others, at will send a message to them that their choice of candidates is not right and via are unhappy." said Nikhil Day of Rajasthan Election Watch. Also it will encourage those who restrained from voting over the choice of candidates field. At least now they have option to express their displeasure.[29]

Conclusion

Elections are the most important event in a country's political system as it paves the way for development of a civilized society. Where leaders are chosen to govern the nation and pave the way for development and in democratic countries it assumes all the more importance as it is a reflections of people. Conduct of free and fair elections is therefore 'sinequanon' for good governance and development. Their ambitions are at stake in India, the world's largest democracy every five years as elections are conducted after such period.

Unfortunately the elections in India are suffering from many diseases for the past three to four decades. If there electoral reforms are implemented in true spirit and sincere earnest. It will pave a long way in eradicating these social and electoral evils and melodies and fulfilling in true sense the aspirations and expectations of the citizenry.

Suggestions

The maintain the purity of election and in particular to bring transparency in the process of elections the E.C. has taken many such steps and has thus deservely earned world-wide respect. The Judiciary too has contributed a lot in making the election process free and fair. In spite of some short coming exist in Electoral process –

- De - Criminalization of Politics.
- Political parties Reforms such as Inner Party Democracy.
- Sec-127 of R.R. Act. 1951 should be an amended and which would restrict the paid News.
- There should also be a provision for periodical reviews of the parties registered with the Election Commission of India every two or three years and a provision should be made for deregistration of the parties which have become defunct or which do not contest elections as her three years of registration.
- The need of hour is therefore to denounce the practice of conducting exit polls opinion is poll.

- Enhancement of punishment for electoral offence.
- Prohibition on Government sponsored advertisements.
- Make a provision for Negative / Not Right to vote.
- Provision for Right to Recall.
- E.C. proposed to replace this system (F.P.P.S.) with two stages election. If no candidate gets majority more than 50% then second round will take place consisting of top two candidates and whoever gets more than 51% shall be deemed elected.
- Recognize the opinion of civil society group journals and Law scholars and other observer of the process have been playing an important role in identifying a number of the weaknesses of own existing systems.

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Understanding the legal effects to the Resolutions passed by the Security Council and General Assembly

Ashalika Pandey*

Abstract

This paper discusses about the legal effects of the resolutions passed by the General Assembly and the Security Council. It starts with the notion that resolutions passed by the General Assembly have no binding effects in legal sense and on the other hand resolutions passed by the Security Council have binding effects. But it proceeds with the assumption that provisions of U.N. Charter are not the deciding factors regarding the legal effects of resolutions. Sometimes it depends upon the interpretation of the operating words used by the General Assembly or the Security Council. There are certain other cases in which legal effects of the resolutions vary from its norms prescribed under UN Charter.....**United Nations General Assembly Resolutions**

Introduction

General Assembly is not a world legislative body. It cannot legislate in regard to most political matters; it can only recommend[1]. A United Nations General Assembly Resolution is voted on by all member states of the United Nations in the General Assembly. General Assembly resolutions usually require a simple majority (50% of all votes plus one) to pass. However, if the General Assembly determines that the issue is an "important question" by a simple majority vote, then a two –thirds majority is required.
Now the question arises what are those "important questions"?

"Important questions" are those that deal significantly with: (Article 18 of the UN Charter)

- maintenance of international peace and security,
- admission of new members to the United Nations,
- suspension of the rights and privileges of membership,
- expulsion of members,
- operation of the trusteeship system, or
- budgetary questions[2].

General Assembly: no authority to enact or amend the law:

Article 10 of the UN Charter states: "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make *recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

Actually, the UN Charter does not grant the General Assembly authority to enact or amend international law. Professor Judge Schwebel[3], former President of the

**** Assistant Professor (Law) Uttaranchal University, Dehradun***

International Court of Justice, has stated that: "… the General Assembly of the United Nations can only, in principle, issue 'recommendation' which are not of a binding character, according to Article 10 of the Charter of the United Nations."

Sir Hersch Lauterpacht, a former member judge of International Court of Justice has declared that: "… the General Assembly has no legal power to legislate or bind its members by way of recommendation."

Professor Julius Stone pointed out that:
"In his book The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations, Professor Gaetano Arangio-Ruiz is led to conclude that the General Assembly lacks legal authority either to enact or to 'declare' or 'determine' or 'interpret' international law so as legally to bind states by such acts, whether these states be members of the United Nations or not, and whether these states voted for or against or abstained from the relevant vote or did not take part in it."[4]

Effects: according to type of resolution
The effects differ according to the type of resolution.[5] The term 'resolution' as used in UN practice has a generic sense, including ***recommendations*** and ***decisions***, both of which have a vague and variable meaning in the UN Charter.[6] The Court, on the other hand, reserves the expression 'decision' for binding resolutions and 'recommendations' for non-binding ones. A resolution is 'binding' when it is capable of creating obligations on its addressee(s). The resolutions of General Assembly are not in and of themselves law in the same sense as are enactments of national parliaments.

UN's General Assembly Resolutions are a declarative statement of sentiment and lacks the legal authority to enact or amend international law that legally binds states[7]
The UN Secretary-General, the General Assembly, and now the international Court of Justice (ICJ) seem ignorant of the General Assembly's powers or perhaps prefers to ignore them. These UN organs even fail to note that "affirmation" means merely a declarative statement of sentiment. It is not a directive. It is not law. One does not even have to be an experienced judge to see this; one need only to read the UN Charter to establish this fact. It is clear both from a reading of the U.N. Charter (**Article 18**) and its historical background that *the General Assembly has not been conferred any law-making power over States*[8].

General Assembly Resolutions: non-binding (Recommendatory nature)
The General Assembly has recommendatory powers. As far as the legal effect of the General Assembly Resolutions is concerned, they are all non-binding yet they carry special weight in the law making process. It means that states are legally free to accept and implement or oppose and disregard. For example, in its eighth preambular paragraph, the General Assembly resolution concerning the Review of the Role of International Court of Justice[9] states that the development of international law may be reflected, *inter alia*, in resolutions of the General Assembly, which may be taken into consideration by the International Court of Justice. [10] **Article 10 and 14 of the UN charter** refer to General Assembly as "recommendation", the recommendatory nature of General Assembly resolution has repeatedly been stressed by the International Court of Justice.

However, some General Assembly resolutions dealing with matters internal to United Nations, such as budgetary decisions or instructions to lower-ranking organs, are clearly binding on their addressees.

The Charter does not provide any formula whereby General Assembly resolutions can be regarded as anything more than recommendations. In general international usage, a recommendation may describe a legal act which expresses a desire, but which is not binding on addressees. In the present context, General Assembly resolutions as such do not have any legislative character whatsoever: they can only form the basis for presuming the creation of general principles. Yet, general principles can only be regarded as legally binding if they are expressly recognised by the UN member states. Unfortunately, no express recognition to that end has occurred. The legislative history of the Charter also confirms that the attempt to grant the General Assembly a law- making function was rejected.

The ICJ in the ***South- West Africa case*** decided that 'Resolutions of the United Nations General Assembly... are not binding, but only recommendatory in character.[11]

Resolution can't interpret as conclude into an agreement:
The resolution cannot be interpreted as the conclusion of an agreement under international law, because the provisions of the charter state that states' consent does not express an intention to enter into a legally binding obligation.

Addressees of General Assembly Resolutions and Operative words used in it:
The General Assembly has addressed its Resolutions to the members of the United Nations collectively, to a particular member or members, to states, to non- member states, to the security council,, the Economic and Social Council and the Trusteeship Council, to committees, commissions and specialized agencies, to the Secretary-General, the Secretariat, and even to groups of private individuals. In addition there have been declaratory resolutions with no particular addressee. Finally there are resolutions in which the General Assembly performs a specific act, as, for example, the election of members of a council, the establishment of subsidiary organ, the approval of an agreement, of a report, or of a budget, and the appropriation of funds.

Resolutions have not been forced into a stereotyped form. On the contrary, the General Assembly has shown considerable ingenuity in its selection of operative words. In resolutions addressed to states it has employed such words as 'recommend', 'requests', 'invites', ' urges', 'calls upon', ' express the hope', 'considers', firmly maintains', and 'appeals to'. In resolutions addressed to the Security Council or to its members will be found the following: 'requests', 'recommends',' express its confidence that', 'earnestly requests the permanent members'. In addressing other councils, commissions and committees , the General Assembly has also employed similar words as 'recommend', 'requests', 'urges' and 'invites', but in addition it has used 'directs' and 'instructs'. From this rapid glance at the resolutions of the General Assembly it is evident that no single conclusion can be made concerning the legal status or binding force of every resolution. In other words, the effect of the resolution must vary with the circumstances peculiar to each resolution.

Two major considerations are involved:

1. The first concerns: the authority or competence of the General Assembly in regard to the subject matter, to the addressee, and to the contemplated action or decision.
2. The second concerns: the intention of the General Assembly in adopting a given resolution, for even where a body may be competent to make a binding decision it may voluntarily limit its action to something less.

General Assembly Resolution: fundamental importance as evidence of customary rule of international law:

It is common to argue that a General Assembly resolution is of fundamental importance as evidence of customary international law. But the resolution itself does not constitute customary rules of international law, nor does it create an international agreement despite the affirmative views expressed in favour of it by the members of the United Nations. A resolution may at best help to crystallize emerging customary international law or contribute to the formation of new customary international law. Indeed, as the *Final ILA Report on the Formation of Customary General International Law notes,* General Assembly resolution don't ipso facto create new rule of international law.

According to **Brownlie**, resolution relating to legal questions in the General Assembly may, however, constitute material sources of custom.

Test[12] to determine: Whether General Assembly resolutions constitute customary rules of international law:

The first test to determine whether General Assembly resolutions constitute customary rules of international law is to establish the existence of uniform and consistent state practice. Such practice has to be recognized by state as 'obligatory'; that is an established *opinion juris* has to be found.

CASE: ***North Sea Continental Shelf***

In this case, the ICJ ruled on the strict requirement of proving an established *opinio juris.*[13] The question was: Where the text of General Assembly resolution expressly points out that the states are expressing an *opinion juris* with their vote, or where it is evident from the circumstances that the vote in the Assembly constitutes an *opinion juris,* Does the resolution then necessarily constitute a rule of customary international law? **Simma** has argued that to a certain extent contemporary international communication and interaction expressed through the General Assembly resolutions in the form of statements rather than actions qualify as evidence of *opinion juris* .

In short, we can say that General Assembly resolutions do not constitute rules of international law in accordance with Article 38(1)(a) or Article 38(1)(b) of the ICJ statute.

In response to an inquiry addressed to the Department of State concerning the legal effect of resolutions and declarations of the General Assembly, a Deputy Legal Advisor of the department responded:

....It is fair to state that General Assembly resolutions are regarded as recommendations to Member States of the United Nations. To the extent, which is exceptional, that such resolutions are meant to be declaratory of international law, are

adopted with the support of all members, and are observed by the practice of States, such resolutions are evidence of customary international law on a particular subject matter.
It is clear from the above that these are substantial conditions. The statement speaks of resolutions which are "declaratory" of international law, which may be read to exclude resolutions which are frankly lawmaking rather than declaring. Such resolutions must be adopted with the support of "all members", not simply with the support of the major groups. And such resolutions must be "observed" in state practice, though it is not specified how universally. If these conditions are met, then such resolution are "evidence" of customary international law.[14]

General Assembly resolutions: strong evidence in law-making as well as in decision making:
General Assembly resolutions have provided strong evidence in law-making in general, as well as in the decision-making in the World Court. The resolutions have contributed to international treaty law by developing principles which are later incorporated into international agreements. In addition to the **two Covenants of 1966**, we may cite the **Outer Space Treaty of 1967**, which is based on a declaration of the General Assembly dating from 1963 on the activities of states in the exploration and exploitation of outer space. [15] Similarly, the extension of the scope of International humanitarian law to wars of national liberation by Article 2(4) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, has codified the substantive content of resolution 3103 (XXVIII).

General Assembly resolutions symbolize evidence of customary international law and have an important function in the development of customary law. *General Assembly resolutions form the basis upon which states may act properly and can accelerate the generation of norms of customary international law by swiftly articulating new problems.*

Likewise, individual General Assembly resolutions have had significance in the judgments of the ICJ in determining customary international law.
For example, in its advisory opinions in the ***Namibia*** **and** ***Western Sahara*** **cases,** the ICJ referred to the Declaration on the Granting of Independence to Colonial Countries and People[16] as the basis for the process of decolonization.

In the ***Nicaragua*** **case**, the ICJ referred to the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[17] as regards the principles of non-intervention.
Thus, the importance of at least some of the General Assembly resolutions is beyond any doubt. Some go a step further to argue that such special resolutions at some point may constitute a peremptory norm – *jus cogens* [18]

General Assembly Resolution: if passed by consensus Another consideration regarding General Assembly resolution is: If a resolution of general Assembly is passed by all member states i.e. with consensus or without any negative vote then would it amount to any change in the legal effects of the resolution or would it amount to creation of Customary International law?

Eric Suy, the Legal Counsel of the United Nations, has said:"The General Assembly's authority is limited to the adoption of resolutions. These are mere recommendations having no legal binding force for member states. Solemn declarations adopted either unanimously or by consensus have no different status, although their moral and political impact will be an important factor in guiding national policies. Declarations frequently contain references to existing rules of International law. They don't create, but merely restate and endorse them. Other principles contained in such declarations may appear to be new statements of legal rules. But the mere fact that they are adopted does not confer on them any specific and automatic authority. The most one could say is that overwhelming (or even unanimous) approval is an indication of *opinion juris sine necessitaits;* but this does not create law without any concomitant practice, and that principle will not be brought about until states modify their national policies and legislation. It may also arise, however through the mere repetition of principles in subsequent resolutions to which states give their approval. The General Assembly, through its solemn declarations, can therefore give an important impetus to the emergence of new rules, despite the fact that the adoption declarations per se does not give them the quality of binding norms."[19]

Suy's analysis rightly emphasizes the importance of state practice. However, it also give weight to "the mere repetition of principles in subsequent resolutions to which states give their approval" which is open to question.

There is an arbitral award by **Professor Rene-Jean Dupuy,** acting as Sole Arbitrator in the case of ***Texaco Overseas Petroleum Company and California Asiatic Oil Company* v. *The Government of the Libyan Arab Republic***[20] Professor Dupuy's extensive analysis of the legal force of declarations of the General Assembly supports the following conclusions:

First, the award clearly contemplates that a General Assembly resolution may be declaratory of international law.

Second, however, in order to be so, it must be "accepted" by at least a majority of member states representing all of the various groups, or, at least, of the relevant group; a resolution voted through by two – thirds of the General Assembly which did not, for example, attract the support of the market economy states on questions of interest to them cannot be an authoritative exposition of the content of international law.

Third, acceptance must be manifested by the practice at large of the states in conformity with a resolution as well as their votes for the resolution.

Fourth, member states may effectively register their acceptance or rejection of purported declarations of international law contained in General Assembly resolution not only by voting but by what they say, for example, in statements of reservation recorded at the time of the adoption of a resolution.

Fifth, a resolution supported without the support of the major groups- without the support of the international community as a whole- does not serve to "delegitimize" an existing rule of customary international law.

These are important holdings. Some – especially perhaps the last – may prove controversial..[21]

Prof Samuel A. Bleicher remarked, "There are several ways in which a resolution, by being linked to one or more of the traditional sources of international law can serve as a law -creating mechanism. A resolution can interpret the United Nations Charter or other treaty, accelerate the development and clarify the scope of a customary rule or identify and authenticate a 'general principle of law recognised by civilised nations'. A resolution tied in this way to a traditional source of international law may reasonably be relied upon as a definite statement of international law.[22]

In one of his dissenting opinions, **Judge Abjandro Alvarez** of the **International Court of Justice** remarked that the declarations by and resolutions of the General Assembly, though not of binding character in themselves, may acquire a binding force on receiving the support of public opinion. In this connection **Prof. Krzysof Skubisewski** has remarked that since the resolutions of the General Assembly are addressed to member States and Govenment, their effectiveness naturally depend upon the backing and compliance of the member states.

Moreover, a General Assembly resolutions may sometimes focus, crystallise, formulate and express world opinion. As remarked by **F. Blaine Sloan** "The Assembly's moral force, "is in fact a nascent legal force which may enjoy in the rounded words of Justice Cardozo, a twilight existence hardly distinguishable from morality and justice until the time when the 'imprimatur' of the world community will attest its jural quality."

Conclusion

There are circumstances under which a resolution of the General Assembly produces important juridical consequences and possesses binding legal forces. As a general rule, however, resolutions, for lack of intention or of mandatory power in the Assembly do not create binding obligations in positive law. With regard to these resolutions, 'recommendations' within the normal meaning of the word, there remain important problems of status and effect.

Although a large majority supports the view that most recommendations have *no legal force,* the opinion also prevails that General Assembly recommendations possess *moral force* and should, as such, exert great influence. Representatives in describing the effect of General Assembly recommendations have used such phrases as 'moral force', 'moral authority', 'moral weight', 'moral power', 'moral judgement', 'moral obligation' and 'morally binding'. The exact nature of this moral force is not easy to define. Although it is true that early hopes in regards to Assembly resolutions have not been immediately realizes, the view that the expression 'moral force' has no positive content and is merely a diplomatic way of indicating that there is no legal, i.e. binding force, cannot be accepted.

Various reasons have been advanced to explain why General Assembly recommendations should exert great influence. Emphasis has been placed on the fact that the recommendations represents the will of the majority of nations and is an expression of world opinion.

The force of the recommendation is not derived from a judgement made in an internal court of conscience, but from a judgement made by an organ of the world community and supported by many of the same considerations which support positive international law.
The resolution by the General Assembly as a collective world conscience is itself a force external to the individual conscience of any given state. It is submitted that in view of those considerations the 'moral force' of the General Assembly is in fact a nascent legal force which may enjoy, in the rounded words of Justice Cardozo, a twilight existence hardly distinguishable from morality or justice until the time when the authority of the world community will attest its jural quality.

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[1] Gabrielle Rosner Lande, "*The Changing Effectiveness of General Assembly Resolutions"* Proc. ASIL., April, 23 -25, 1964. P.162, available at http://www.jstor.org/stable/pdfplus/25657622.pdf?acceptTC=true, last accessed on 22 march, 2014.

[2]United Nations General Assembly resolution, available at, http://en.wikipedia.org/wiki/United_Nations_General_Assembly_Resolution, last accessed on 22 marchl,2014.

[3] Judge Schwebel has served on the International Court since 15 January 1981. He was Vice-President of the Court from 1994 to 1997 and has been President from 1997 to 2000. A former Deputy Legal Adviser of the United States Department of State and Burling Professor of International Law at the School of Advanced International Studies of The Johns Hopkins University (Washington). Judge Schwebel is the author of several books and over 150 articles on problems of international law and organization. He is Honorary President of the American Society of International Law. Opinions quoted in this critique are not derived from his position as a judge of the ICJ.

[4] Professor Julius Stone (1907-1985), "Israel and Palestine, Assault on the Law of Nations" The Johns Hopkins University Press, 1981, p. 127. The late Professor Julius Stone was recognized as one of the twentieth century's leading authorities on the Law of Nations. His work represents a detailed analysis of the central principles of international law governing the issues raised by the Arab-Israel conflict. He was one of a few scholars to gain outstanding recognition in more than one field. Professor Stone was one of the world's best-known authorities in both Jurisprudence and International Law.

[5] According to *Black's Law Dictionary*: A resolution is a 'formal expression of an opinion, intention, or decision by an official body or assembly'. It is therefore an unilateral instrument.

[6] Marko Divac Oberg, The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ, available at http://www.ejil.org/pdfs/16/5/329.pdf, last accessed on 28 march, 2014.

[7] Eli E. Hertz, *The Legal Effects of United Nations Resolutions*, available at http://www.mythsandfacts.org/Conflict/10/UN-resolutions.pdf, last accessed on 30 Feb, 2014.

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[11] South-West Africa case (Second Phase), ICJ Reports (1966) at 50.

[12]Available at http://www.turkishweekly.net/article/323/the-complementary-role-of-the-united-nations-general-assembly-in-peace-management.html#_ftn54

[13] See ICJ Reports(1969) at 3.

[14] Stephen M. Schwebel, *The effect of Resolutions of the General Assembly on Customary International Law,* Proceeding of the Annual Meeting (American Society of International Law , Vol. 73 (April 26-28, 1979), pp. 301-309, available at http://www.jstor.org/stable/25658015, last accessed on 2 April,2014.
[15] General Assembly Resolution 1962 (XVIII), Dec. 12(1963).
[16] Genaral Assembly Resolution 1514 (XV), Dec. 14 (1960).
[17] General Assembly Resolution 2625 (XXV), Oct. 24 (1970).
[18] Gennady M. Danilenko, 'International Jus Cogens: Issues of Law-Making', 2*Eur. J. Int'l L.* (1991) 42, 44, available at http://207.57.19.226/journal/Vol2/No1/art3.html, last accessed on 12 April. 2012. He provides the example that during the Third United Nations Conference on the Law of the Sea a large majority of states, particularly developing countries, claimed that the principle of the common heritage of mankind, as proclaimed by the 1970 United Nations General Assembly resolution on the sea-bed, was a principle of *jus cogens.*
[19] Stephen M. Schwebel, *supra n. 14.*
[20] 17 ILM 1, 27 (1978).
[21] *Supra n.14.*
[22] *Ibid.*

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Right to Health is Basic Human Rights – Is it a Distant Dream in India

Dr. Kiran Sharma*

Introduction

The "enjoyment of the highest attainable standard of health has been recognized as a fundamental rights" by the International community since the adoption of the constitution of the World Health Organization (WHO) in 1946 well before the Universal Declaration of Human Rights (UDHR) in 1948.The World Health Organization is the principle organization which is concerned with public health . Its aim is "Health for all from conception till death". Right to health is not a fundamental right in India but it is a fundamental right in various countries including U.S.A, Canada and United Kingdom. .It is a state issue; hence it is left on the State to take care of the health of citizens. Right to health includes –

1) Right to pollution free environment
2) Right of doctors help and assistance
3) Right to good health – physical , as well as mental

Measures in India

Constitution of India- Article 21 speaks about right to life which is inclusive of good health, medical assistance by doctors and pollution free environment.

Article 41- States that the right is to be protected from sickness and disablement.

Article 42- States that the state should maintain human condition of work and maternity relief.

Article 47-State should raise or increase the level of nutrition , standard of living and protection of public health . It also prohibits the consumption of intoxicated drugs and drinks except if it is required for medical purposes

Article 51(A) (g.)- It is the duty of every citizen to protect the natural environment and protect the forest, rivers, lakes, etc. from pollution and damages because its damage affects the health and life of a person.

Article 48(A) - It is the duty of the state to protect the natural environment and maintain public health.

Factories Act 1948- It has the provisions for ensuring safe working condition. Each state of India have formed" Employees State Insurance Corporation" for protection of health of workers and their family members like parents , wife, children's.

International Measures

World Health Organization –It is a basic organization for protection of health of the world people through various policies and assistance.

* ***Assistant Professor, SNDTWU Law School, Mumbai.***

Universal Declaration of Human Rights- Article 25 of the UDHR states that " Everyone has the right to standard of living adequate for the health and well being of himself and of his family , including food , clothing , housing , medical care and necessary social services".

International Convention on Economic Social and Cultural Rights-Article 12 expressed concern for child mortality, still birth and environmental hygiene and obliged State parties to take steps to prevent or control epidemics and occupational diseases. Particular emphasis was laid on healthy development of the child.

International Convention on Civil and Political Rights-Article 10(1) and 10(3) make provisions for the health and well beings of prisoners by ensuring proper treatment for them. There are other international convention and treaties which deals with the rights of particular class of persons to health for eg. CEDAW which provides that state parties shall take all appropriate measures to eliminate discrimination against women in the enjoyment of the rights to protection of health and to satisfy working conditions including the safe guarding the the function of reproduction.

Co- relation of health with

(a) Law of Contract – In case of doctors if he or she treats and there is under influence due to his or her higher position , he or she will be liable to pay damages under Section 75 of the Act. "Spondes Peritimarits" means one who has the skill must exercise it in correct way. This maxim is equally applicable to doctors as well and under the law of contract falls on the doctor to take care of the health of the parties and protect his health and life and not to violate this contract by negligence.

(b) Law of Tort - For the negligence of doctor remedies is available under law of Tort.

(C) Law of I PC-Mercy killing is an offence under this law which has direct nexus to right to health.

(d)Law of Consumer Protection Act-Under this law if the health of a consumer is affected by the product or appliances and services manufactured by industries or companies the consumer can go for the compensation.

Other Provisions-Human Organ Transplant Act 1995 prevent and prohibits the removal of the body like kidney ect. except in two conditions –

1. Medically it has to protect the life of the persons which is to be proved satisfactorily.
2. With the consent of the patient and his relatives when his recovery is not possible. for example if the dying person wants to donate eyes , kidney will be allowed.

9th Plan 1997-2002- The main objectives including providing the basic requirements such as health, drinking water, sanitation. 11th Plan 2007-2012- The major objects including poverty alleviation, health etc.

Facts and Figures(Magnitude of the Problem)- Despite of various national and international measures to protect the health of the people in India situation is worst . Poverty is the main reason for poor health which is deeply rooted in Indian soil .Poverty line has been measured in India based on three basic component –

a) The minimum nutritional level of subsistence.
b) The cost of minimum diet that may provide the minimum level
c) The per capita consumption expenditure incurred on diet.

As per the World Bank Report 2003 almost 80% of India's vast population is below poverty line. More than 70% people are living in rural areas. India has 22% world's poor population. The planning Commission of India estimated that 27.5% of the population is still living below poverty line in 2004-2005. The criterion used was monthly per capita consumption expenditure of below Rs 356.35 for rural areas and Rs 538.60 for urban areas. One study found anemic in over 95% of girls aged 6 to 14 in Calcutta, around 67% in Hyderabad, 73%in the New Delhi and 18% in Madras. Anemia increase women's susceptibility to diseases such as tuberculosis and reduces the energy women have available for daily activities such as household chores, child care and agriculture labour .Medical facilities are mostly not available on time.

Indian Organ Bazar

Due to poverty various Indian go to foreign countries and sale their body parts organ. More than 1.3 billion people are poor and around 60 million children are unnourished. Therefore poverty is the main cause which affects the human health by non consumption of good and nutrient food.

Remedies

If the health of a person is violated due to any reason like pollution, environmental or ecological damage etc. being it is a fundamental right of a person under Article 21 of the Constitution of India he can go to High Courts or Supreme Court under Art. 226 or 32.

Conclusion

As we have seen from above there is a gross violation of right to health in India despite of laws and the role of judiciary. Therefore Right to Health is Basic Human Rights is a Distant Dream in India is a true fact. There should be strict implementation of laws and awareness amongst people should be daily routine about basic rights for the protection of health. Definition of poverty should be changed and below poverty line should be define as per the actual expenses to live healthy life. Right to health is basic human right and all other rights can be enjoyed only when we are healthy.

Right to "Healthy mind resides in healthy body". It is said in Vedas "Vayam Rakshami"means protect the health. For good health, healthy atmosphere is necessary because health is related with nature ecology. So clean atmosphere free from air pollution, water and noise pollution is needed. The progress and prosperity of the nation depends upon healthy citizens as they are the assets of the nations and in all the constitution of the world the right to health in included which is to be protected by rule of law because life means healthy life. For good health natural resources like forest, lakes, rivers, seas etc. must be protected. Hence the development should be sustainable development then only the life of the people will be safe and health will be protected because without good health right to development has no meaning. Hence right to health and clean environment and "health for all" should be our moto, because "Health is Wealth".

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Role of Prosecutors in Criminal Justice Administration: An Analysis

Dr. M. Asad Malik*

Introduction

Criminal justice system is an established arrangement which leads to the attainment of a particular object. It reflects the response of the society to crimes and criminals. In a country, it is designed to protect the citizens of the country from the onslaught of criminal activities of a section of the community which indulges in such acts. The main aim of criminal justice system is to punish the guilty and protect the innocent. The key components engaged in this role are the police, prosecution, courts, and defence. Each of these has an important role to play in the criminal justice administration. A fair and effective administration of justice is the cornerstone of a free society and an essential component of public confidence in the institutions of a Government.

There are two legal systems prevailing in the world i.e. the *Adversarial system* (Accusatorial or the Common law system) and the *Inquisitorial system* (Continental or the Civil law system). Adversarial system presumes that the *accused is innocent until proved guilty,* and the burden of proving guilt rests with the prosecution. It is the system of law that relies on the contest between each advocate representing his or her party's positions and involves an impartial person or group of people, usually a jury or judge, trying to determine the truth of the case. The adversarial system presumes that the best way to get the truth is to have a "contest" between the prosecution and the defence. In this system of criminal trial the prosecutors will prosecute the accused, who, in turn, will employ competent legal services to challenge the evidence of the prosecution. In contrast, in inquisitorial trial system, responsibility for the production of evidence at trial is the job of the trial judge and it is the trial judge who decides which witnesses will be called at trial and who does most of the questioning of witnesses. *This paper is aimed to make a comparative study of role of the Prosecutors in criminal justice administration in England, America and India. The paper will also discuss the duties and responsibility of Public Prosecutors in India.*

It is the obligation of the state to protect basic rights and to deliver justice to victims of crimes fairly and quickly. In the adversarial system of criminal trials on behalf of the state, prosecuting agency is responsible for prosecuting those found by the police to have committed a criminal offence. The prosecutor appointed by the state to be the proper authority to plead on behalf of the victim. In this context prosecution plays an important role and the counsel engaged by the victim has very limited role.

The word 'procurator' is derived from the Latin word *procuro* which means I care, secure, protect'. *'Public Prosecutor' is defined in some countries as a "public authority who, on behalf of society and in the public interest, ensures the application of the law where the*

**** Assistant Professor, Faculty of Law, Jamia Millia Islamia, New Delhi.***

breach of the law carries a criminal sanction and who takes into account both the rights of an individual and the necessary effectiveness of the criminal justice system.[1]

England

In the UK, the institution of public prosecutors emerged to stop the practice of private prosecution, i.e., prosecution by the victims of crimes. The private prosecution system was abused. There were vexatious litigation. Also, the absence of a functionary to take care of public interest augmented the development of public prosecution. Today, the public prosecution system in the UK has been reorganized as Crown Prosecution Service with the Director of Public Prosecutions at the top and Crown prosecutors at the lower levels.[2] The Crown Prosecution Service is responsible for prosecuting criminal cases investigated by the police. It is the principal prosecuting authority. The main object of criminal Justice System in England is to deliver justice through the independent and effective prosecution of crime, fostering a culture of excellence by supporting and inspiring each other.[3] Crown Prosecution Service prosecutors prepare cases for court and present cases in both the magistrate's courts and the higher courts.

In England and Wales, the office of the Director of Public Prosecutions was first created in 1880 as part of the Home Office and had its own department from 1908. Director of Public Prosecution was only responsible for the prosecution of a small number of major cases.[4] The Royal Commission reported in 1981 in favour of the establishment of an independent public prosecutor system, after debates the Crown Prosecution Service (Hereinafter referred to as CPS) was created by the *Prosecution of Offences Act 1985*. The Act created a National Crown Prosecution Service, headed by the Director of Public Prosecutions and formally accountable to the Attorney General. The CPS has a duty to take over all prosecutions instituted by the police (except for certain minor offences), and has a power to take over other prosecutions. The CPS was therefore accorded a status independent of the police.[5]

The CPS includes, as part of its overall aim, 'the consistent, fair and independent review of cases' and 'their fair, thorough and firm presentation at the court.' The Code itself spells this out in a little more detail:

"Crown Prosecutors must be fair, independent and objective. They must not let any personal views about ethnic or national origin, sex, religious beliefs, political views or the sexual orientation of the suspect, victim or witness influence their decisions. They must not be affected by improper pressure from any source."[6]

Thus, the CPS exists in England to ensure that wrong doers are brought to justice, victims of crime are supported and that people feel safe in their communities. The concept of 'Criminal Justice Unit' has been introduced in England to bring about greater coordination between the police department and the CPS.

USA

The criminal justice system in American is based on an adversarial model and characterized by the concept of '*due process'*, which involves numerous rights of defendants. In the criminal justice system of the United States, a person is innocent until proven guilty. The system of criminal justice is composed of various components, such as the police, prosecution, defense, courts, and corrections. The Prosecutor plays an important role in the criminal justice system of USA.

Prosecutors are to prosecute those for whom the evidence suggests guilt and release those against whom sufficient evidence of guilt does not exist. But the system does not always work that way. Prosecuting attorneys also possess great discretionary power. They may decide not to prosecute some cases and enter a *nolle prosequi*, which means "I refuse to prosecute." If they decide to prosecute, they normally can do so even in cases those demand a grand jury indictment, for the grand jury usually follows the recommendations of the prosecutor.[7] Prosecuting attorneys also have the power to discontinue prosecution. They may argue that the state has insufficient evidence to win the case. If the defendant is found guilty, the prosecuting attorney may recommend leniency in the sentence or the most severe sentence. Here again, the recommendations of prosecutors are often carried out.[8]

The Code of Professional Responsibility of the American Bar Association makes it clear that the prosecutor has definite functions to fulfill: "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely convict." The canon continues with specific charges: the prosecutor must make timely disclosure to the defense attorney of evidence that might point to the innocence of the defendant or to a mitigation of the degree of the offense for which the defendant is accused or which might suggest reduction in punishment. In addition, the prosecutor should not intentionally avoid pursuing evidence because he or she thinks it will damage the case of the state against the accused."[9]

The United States Supreme Court has explored and explained the role of a prosecutor in several cases.[10] In ***United States v. Wade***,[11]the court held that: "Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain and present the truth."

In ***Berger v. United States***,[12]the Court held that: "The (prosecutor) is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Thus, the prosecutor is an administrator of justice, an advocate, and an officer of the court; he must exercise sound discretion in the performance of his or her functions. It is the responsibility of the prosecutor to prepare formal charges. He may, (i) decide which charges to press; (ii) even refrain from pressing charges at all; or (iii) suspend trial that is already under way.[13] The prosecutor is to seek justice, not merely to convict. It is also an important function of the prosecutor to seek to reform and improve the administration of criminal justice.[14]

India

In India we adopted the adversarial system based on the accusatorial method. The accused is presumed to be innocent and the burden is on the prosecution to prove guilt beyond reasonable doubt. Indian system owes its origin to the office of public prosecutors from the British Colonial Rulers. The State being the custodian of the interests of the society has an obligation to prosecute the person committing an offence and get him punished. If any offence is committed, the police will start investigation and files the charge-sheet. When the prosecution is initiated by filing a charge-sheet, the Public Prosecutor comes into the picture. Actually the Public Prosecutor is essentially counsel for the state for conducting the prosecution on behalf of the state. Thus, the prosecution is the wing of the State that has been entrusted with this duty of appearing on its behalf and securing justice to the victim of a crime.

The Central Government and each State Government have power to appoint Public Prosecutors for conducing the prosecutions and other criminal proceedings on their behalf in the High court, Session Court or the Court of Magistrate.[15] It is undoubtedly true that the Public Prosecutor is the officer of the court, as indeed every advocate practising before the court is, and he owes an obligation to the court to be fair and just: he must not introduce any personal interest in the prosecution nor must he be anxious to secure conviction at any cost. He must present the case on behalf of the prosecution fairly and objectively.[16]

Provisions under the Code of Criminal Procedure

Public Prosecutor means any person appointed under section 24, and includes any person acting under the directions of a Public Prosecutor.[17]

Section 24 of Cr.P.C. provides: (1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutor, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district, or local area.

(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district: Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion fit to be appointed as Public Prosecutor or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4)

(6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:

Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4).
(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years
(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor. Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.
(9) For the purposes of sub-section (7) and sub-section (8), the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.

Section 25 provides for the appointment of Assistant Public Prosecutors by the State Government or by the Central Government for conducting prosecutions in the Courts of Magistrates. No police officer shall be eligible to be appointed as an Assistant Public Prosecutor as a general rule. But if no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case, Provided that such police officer is below the rank of Inspector and he has not taken any part in the investigation into the offence with respect to which the accused is being prosecuted.[18]

The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.[19] If any such case any private person instructs a pleader to prosecute any person in any Court, he shall act under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.[20] Further, it has been provided that the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor shall be entitled to conduct the prosecution without permission.[21]

Other than above mentioned provisions it has been specifically provided that in every trial before a Court of Session the prosecution shall be conducted by the Public Prosecutor.[22] The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried.[23]If the matter relates to the Central Government and prosecutor is not appointed, he may seek the withdrawal from the prosecution only after obtaining the permission of the Central Government.[24] The Public Prosecutor also plays a very important role in plea bargaining. The Public Prosecutor, the police officer who has to investigated the case, the accused and the victim of the case to participate in the meeting to work out a satisfactory disposition of the case.[25]

The Law Commission in its 154th report suggested: "……a separate prosecution department may be constituted and placed in charge of an official who may be called a 'Director of Public Prosecutions'. [26] **Section 25-A**, as inserted by *the Code of Criminal Procedure (Amendment) Act, 2005* empowers the State Government to establish the Directorate of Prosecution consisting of a Director of Prosecution and as many Deputy Directors of Prosecution as it thinks fit. The Director shall work under the administrative control of the Home Department.[27] A person shall be eligible to be appointed as a Director of Prosecution or a Deputy Director of Prosecution, only if he has been in practice as an advocate for not less than ten years and such appointment shall be made with the concurrence of the Chief Justice of the High Court.[28]

The state governments are yet to implement these provisions. Reorganization of the public prosecution system in this pattern may help a lot in preventing police torture, harassment and delays. There would be more transparency in the police-citizen relationship if the public prosecutor were an independent functionary interposed between the police and the court.[29]

Judicial Pronouncements

The Cr.P.C. does not mention about the spirit in which the Public Prosecutors are suppose to perform their duties and responsibilities. The Judiciary has highlighted the importance of the office of the Public Prosecutor and their role in the criminal trials. A Public Prosecutor is an officer of the court and plays the important role in the administration of criminal justice. The Allahabad High Court in ***Queen-Empress v. Durga***,[30] has pointed out the role of a Public Prosecutor as follows:

"It is the duty of, a public prosecutor to conduct the case for the Crown fairly. His object should be, not to obtain an unrighteous conviction, but, as representing the Crown, to see that Justice is vindicated; and in exercising his discretion as to the witnesses whom he should or should not call, he should bear that in mind. In our opinion, a Public Prosecutor should not refuse to call or put into the witness box for cross-examination a truthful witness returned in the calendar as a witness for the Crown, merely because the evidence of such witness might in some respects be favourable to the defence. If a Public prosecutor is of opinion that a witness is a false witness or is likely to give false testimony if put into the witness box, he is not bound, in our opinion, to call that witness or to tender him for cross-examination."

The Supreme Court has held in the case of ***Ghirrao v. Emperor***,[31] that: "The object of the criminal trial is to find" out the truth and to determine the guilt or innocence of the accused. The duty of the prosecutor in such a trial is not merely to secure conviction at all costs but to place before-the Court whatever evidence is possessed by the prosecutor, whether it be in the favour of the accused or against the accused and to leave to Court to decide upon all such evidence whether the accused was or was not guilty of the offence alleged."[32]

In ***State of Bihar v. Ram Naresh Pandey***[33], which is the first important case dealing with the interpretation and application of Section 321, this Court while deliberating on the role of a Public Prosecutor said: ".. .it is right to remember that the Public Prosecutor (though an executive officer as stated by the Privy Council in *Bawa Faqir Singh v. King Emperor*[34]) is, in a larger sense, also an officer of the court and that he is bound to assist

the court with his fairly considered view and the court is entitled to have the benefit of the fair exercise of his function. It has also to be appreciated that in this country the scheme of the administration of criminal justice is that the primary responsibility of prosecuting serious offences (which are classified as cognizable offences) is on the executive authorities. Once information of the commission of offence reaches the constituted authorities, the investigation, including collection of the requisite evidence, and the prosecution for the offence with reference to such evidence, are the functions of the executive. But the Magistrate also has allotted functions in the course of these stages….In all these matters he exercises discretionary functions in respect of which the initiative is that of the executive but the responsibility is his."[35] (*Ed.:* emphasis in original)

In the case of ***Subhash Chander v. State***,[36] the Apex Court has thus observed: "It is the public prosecutor alone and not any other executive authority that decides withdrawal of prosecution. Consent will be given by the Public Prosecutor only if public justice in the larger sense is promoted rather than subverted by such withdrawal. In doing so, he acts as a limb of the judicial process, and not as an extension of the executive. He has to decide about withdrawal by himself, even where displeasure may affect his continuance in office. None can compel him to withdraw a case. The public prosecutor is an officer of the Court and is responsible to the Court."

Per Bhagwati, C.J. and Oza, J. ,in ***Sheonandan Paswan v. State of Bihar***,[37] "The Public Prosecutor is the counsel for the Government for conducting prosecution on behalf of the State Government or the Central Government, as the case may be. He is an officer and like every advocate practicing before court, he also owes an obligation to the court to be fair and just; he must not introduce any personal interest in the prosecution nor must he be anxious to secure conviction at any cost. He must present the case on behalf of the prosecution fairly and objectively. He is bound to assist the court with his fairly considered view and the fair exercise of his judgment."[38]

In ***Shrilekha Vidyarthi v. State of U.P.***[39] wherein the following observations have been made: (SCC p. 233, para 14) "This power of the Public Prosecutor in charge of the case is derived from statute and the guiding consideration for it, must be the interest of administration of justice. There can be no doubt that this function of the Public Prosecutor relates to a public purpose entrusting him with the responsibility of so acting only in the interest of administration of justice. In the case of Public, Prosecutors, this additional public element flowing from statutory provisions in Cr.P.C; undoubtedly, invest the Public Prosecutors with the attribute of holder of a public office which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it."

A very significant aspect of the role of the prosecutor as interpreted by the Supreme Court in the case of ***Shiv Kumar v. Hukam Chand***,[40] is that the duty of the Public Prosecutor is to ensure that justice is done. It stated that if there is some issue that the defense could have raised, but has failed to do so, then that should be brought to the attention of the Court by the Public Prosecutor. Hence, she/he functions as, an officer of the Court and not as the counsel of the State, with the intention of obtaining a conviction.

This Court in ***Hitendra Vishnu Thakur v. State of Maharashtra***[41] held: " .... A Public Prosecutor is an important officer of the State Government and is appointed by the State under the Criminal Procedure Code. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before Submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation.' He is no merely a post office or a forwarding agency. A Public Prosecutor mayor may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had n progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation."[42] (emphasis in original)

In ***State of U.P v. Johri Mal***[43], a three-Judge Bench of this Court held the Public Prosecutors have greater responsibility to perform statutory duties independently having regard to various provisions contained in the Cr.P.C. The Court further said that the Public Prosecutors and the Government Counsel play an important role in administration of justice. Efforts are required to be made to improve the management of prosecution in order to increase the certainty of conviction and punishment for most serious offenders and repeaters.[44]

It is also important to note the active role which is to be played b court in a criminal trial. The court must ensure that the Prosecutor is doing his duties to the utmost level of efficiency and fair play. This Court, in ***Zahira Habibulla H. Sheikh v. State of Gujara***[45], has noted the daunting task of in a criminal trial while noting the most pertinent provisions of the law. It is useful to reproduce the passage in full: "The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of court to elicit all necessary materials by playing an active role in the evidence- collecting process.

The Apex Court has in the famous case of ***Zahira Habibullah Sheikh v. State of Gujarat***,[46] has held; "Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of fair trial is as much injustice to the accused as is to the victim and the society, Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witness or the cause which is being tried is eliminated."

In ***Manu Sharma v. State (NCT of Delhi),***[47] the court held: "The Public Prosecutor is a statutory office of high regard. He does not represent the investigating agencies, but the State. He has wider set of duties than to merely ensure that accused is punished, the duties of ensuring fair play in proceedings, all relevant facts are brought before court in order for determination of truth and justice for all parties including the victims. These duties do not allow e Prosecutor to be lax in any of his duties as against the accused. The court must also ensure that Prosecutor is doing his duties to utmost level of efficiency and fair play".[48]

The Court further observed: "Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the

countries in the world. The criminal justice administration system in India places rights and dignity for human life at a much higher pedestal. An accused is presumed to be innocent till proved guilty. The alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, parent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India."[49]

In a very recent judgment in the case of ***Mohd. Shahabuddin v. State of Bihar,***[50] the Supreme Court while casting a responsibility upon the State and securing the independence of the prosecution and other agencies has held that, 'When the State representing the society seeks to prosecute a person; the State must do it openly. In dispensation of justice, the people should be satisfied that the State is not misusing the State machinery like the police, the prosecutors and other public servants. The people may see that the accused fairly dealt with and not unjustly condemned.

A Public Prosecutor is really a minister of justice and his job is none other than assisting the State in the administration of justice and in fact he is not a representative of any party. The role of a Public Prosecutor in a criminal justice system has been very aptly put in the following words: [51] "The Prosecutor has a duty to the State, to the accused and to the court. The Prosecutor is at all times a minister of justice, though seldom so described. It is not the duty of the prosecuting counsel to secure a conviction, nor should, any prosecutor even feel pride or satisfaction' in the mere fact of success."

In ***Deepak Aggarwal v. Keshav Kaushik***,[52] the Supreme Court held that The Public Prosecutor has a very important role to play in the administration of justice and, particularly, in criminal justice system. He has at all times to ensure that an accused is tried fairly. He should consider the views, legitimate interests and possible concern of witnesses and victims. He is supposed to refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods. His acts should always serve and protect the public interest. The State being a prosecutor, the Public Prosecutor carries a primary position. He is not a mouthpiece of the investigating agency.

Therefore, a Public Prosecutor has a wider set of duties to ensure that rights of an accused are not infringed and he gets a fair chance to put forward his defence so as to ensure that a guilty does not go scot free while an innocent is not punished. It must be noted that these duties do not allow the Prosecutor to be lax in any of his duties as against the accused.

Conclusion

It can be concluded that an efficient criminal justice system is one of the cornerstone of good governance. Protecting the rights of the accused as well as the victims is the essence of the criminal justice system in the democratic countries governed by the rule of law. The integrity of Criminal Justice System depends upon the sense of devotion by its various functionaries towards their duties. The prosecution is one of the essential functionaries for the administration of criminal justice system. The role of Public Prosecutors in ensuring a fair trial is of paramount importance. The main objective of the prosecution proceeding is to protect the innocent and seek conviction of the guilty. There

is a need to improve the competence of the prosecutors and enhance the efficiency of the criminal justice system for satisfaction of the victims. The outcome of any criminal justice system must be to inspire confidence and create an attitude of respect for the rule of law. In a democratic society judiciary can only work satisfactorily when it is supported by all the components engaged in this role.

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Ambit of 'Relationship in the Nature of Marriage'

Monica Kharola & Prakash Chandra Mishra *

Abstract

In this article the ambit of 'relationship in nature of marriage' as given under Section 2(f) of The Protection of Women from Domestic Violence Act, 2005 is discussed through different case laws. This act was enacted with a purpose to protect women from violence in the confines their homes. However the Supreme Court in Indra Sarma case thereby narrowed the scope of the Act while interpreting "relationship in nature of marriage. In current trend court are not willing to provide remedy to an unmarried lady who has lived together for 14 years in shared house hold with a married man.

Key words: Live-in, *Relationship in the Nature of Marriage*, The Protection of Women from Domestic Violence Act, 2005.

Introduction

According to the preamble of the The Protection Of Women From Domestic Violence Act 2005 (herein after called DV Act, provides for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and matters connected therewith or incidental thereto. It is important here to consider as to what "family" is and what "joint family" is. As per Black's Law Dictionary (VI Edition) "family" means a collective body of persons who live in one house, under one head or management. It further states that the meaning of word "family" necessarily depends on field of law in which word is used, but this is the most common meaning. "Family" also means a group of blood relatives and all the relations who descend from a common ancestor or who spring from a common root and all those related by adoption and marriage. The purpose of DV Act where the object is to protect violence against women and it include women who are in relationship in the nature of marriage[1].

In the era of liberalisation, where individuals go outside and perform their jobs in different organisation like companies, government jobs far away from their families, where they live isolated lives. These people form a relationship akin to domestic relationship. Here 'domestic' means according to Black Law dictionary of relating to one's own jurisdiction or of relating to the family or house hold commonly known as domestic dispute. Domestic dispute means a disturbance at a residence that occasionally occurs between the a non-matrimonial relationship between two persons of the same or opposite sex who live together as a couple for a significant period of time. Here the object is to give wider meaning to the term domestic.

The scope of DV Act is intended to protect even women living in relationship without a marriage in a common household. Domestic relationship here will include both joint family and nuclear families. The meaning of any term varies from fact to fact. In United States of America in Marvin Case (1976), this case was relating to film actress Marvin,

**** Faculty Member, Faculty of Law, ICFAI University, Dehradun (UK).***

who lived with a man. She filed a case for palimony and court allowed it. T some extent this has also been accepted under Indian laws.

Relationship in the Nature of Marriage

Legislature makes the law, executive enforces it and the judiciary removes the ambiguities and interprets the law. The legislature has enacted The Protection of Women from Domestic Violence Act, 2005 to prevent violence in domestic arena. The condition that needs to be proved is that they come within *domestic relationship* as given under Section 2(f). It deals with a relationship between two persons (of the opposite sex) who live or have lived together in a shared household are related by (a) Consanguinity(b) Marriage(c) Through a relationship in the nature of marriage(d) Adoption or (e) Family members living together as joint family.

Victim (woman) has to prove that she comes in any one of the five clauses mentioned above. While examining these five grounds, the third ground is very ambiguous and uncertain. To understand what is meant by "through a relationship in the nature of marriage", it will be relevant to examine the famous case ***D. Velusamy v. D. Patchaiammal***[2]. In this case the Honourable Supreme Court said that, in our opinion a 'relationship in the nature of marriage' is akin to a common law marriage. Common law marriages require that although not being formally married:

a) The couple must hold themselves out to society as being akin to spouses.
b) They must be of legal age to marry.
c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.
d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

Further court said, in our opinion a 'relationship in the nature of marriage' under the DVAct, 2005 must also fulfil some of the above requirements, more importantly the parties must have lived together in a 'shared household' as defined in Section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a 'domestic relationship'. In our opinion not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the DV Act of 2005, for that the time factor is crucial, like in Australia where such relations are considered as de-facto relationships.

Objective of Legislature

In feudal society sexual relationship between man and woman outside marriage was totally taboo and regarded with disgust and horror, as depicted in Leo Tolstoy's novel 'Anna Karenina', Gustave Flaubert's novel 'Madame Bovary'. This is also seen in the novels of the great Bengali writer Sharat Chandra Chattopadhyaya. However, Indian society is changing, and this change has been reflected and recognized by Parliament by enacting The Protection of Women from Domestic Violence Act, 2005.

This Act has been enacted to provide a remedy in Civil Law for protection of women from being victims of domestic violence and to prevent occurrence of domestic violence in the society. The DV Act has been enacted also to provide an effective protection of the rights of women guaranteed under the Constitution, who are victims of violence of any

kind occurring within the family. "Domestic Violence" is undoubtedly a human rights issue, which was not properly taken care of in this country even though the Vienna Accord 1994 and the Beijing Declaration and Platform for Action (1995) had acknowledged that domestic violence was undoubtedly a human rights issue.

UN Convention on Elimination of All Forms of Discrimination against Women, 1979 described as a bill of rights for women, it defines discrimination as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status". It also exhorted the member countries to take steps to protect women against violence of any kind, especially that occurring within the family, a phenomenon widely prevalent in India.

The DV Act is intended to provide for protection of rights of women who are victims of violence of any type occurring in the family. The DV Act is intended to achieve the constitutional principles laid down in Article 15(3)[3], and reinforced by Article 39[4]. Similarly in the Malimath Committee report it was and submitted that a man who marries a second wife, during the subsistence of the first wife, should not escape his liability to maintain his second wife, even under Section 125 Code of Criminal Procedure 1973[5].

Judicial approach on 'Relationship in Nature of Marriage'

There is no straitjacket formula to get the meaning "of relation in nature of marriage". In ***Lata Singh v. State of U.P***[6] Justice Markandey Katju quoted, *That , "Live-in relationship, as such, as already indicated, is a relationship which has not been socially accepted in India, unlike many other countries. It was observed that a live-in relationship between two consenting adults of heterosexual sex does not amount to any offence even though it may be perceived as immoral. However, in order to provide a remedy in Civil Law for protection of women, from being victims of such relationship, and to prevent the occurrence of domestic violence in the society, first time in India, the DV Act has been enacted to cover the couple having relationship in the nature of marriage, persons related by consanguinity, marriages etc. We have little other legislations also where relief has been provided to women placed in certain vulnerable situations.* Keeping in mind the interpretation of the lines quoted it is clear that live in relationships also come within the DV Act.

In the case ***Indra Sarma Vs V.K.V. Sarma***[7] dealing with the question whether a "live-in relationship" would amount to a "relationship in the nature of marriage" falling within the definition of "domestic relationship" Under Section 2(f) of the Protection of Women from Domestic Violence Act, 2005.the failure to cover such cases under domestic relationship prevents women from seeking the protection from domestic violence given under section 3 of DVAct.[8] In this case Indra Sarma ,33 years old unmarried lady lived with a married man from 1992 to 2006. She performed all domestic work in house. She left her job and lived in the shared household. Man started a business in her name and that they were earning from that business. After some time, the man shifted the business to his residence and continued the business with the help of his son, thereby depriving her right of working and earning.

She had also stated that both of them lived together in the shared household and, due to their relationship, She became pregnant on three occasions, though all resulted in abortion. It was also stated that the man took a sum of Rs. 1, 00,000/- from her, stating that he would buy a land in her name, but the same was not done. In year 2006 the man started harassing the her by not allowing her to publically call herself as being married to him. In this case trial and session's court after considering the fact and circumstances admitted that it comes in the meaning of domestic relationship. Unfortunately the higher court rejected this relationship as "domestic relationship" and the Supreme Court has ignored few facts.

> *The Court has not treated her as victim .Court ignored the length of time (14 years) that they stated together and the undue advantage(in monetary form) that the man taken. In fact the Court has held lady for committing intentional tort.*

The Patna High Court has cleared the concept on 'Relationship in the nature of marriage' "In our opinion not all live-in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence. If a man has a "keep" whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage. No doubt the view we are taking would exclude many women who have had a live-in relationship, from the benefit of the 2005 Act, but then it is not for this Court to legislate or amend the law. Parliament has used the expression "relationship in the nature of marriage" and not "live-in relationship". The Court in the garb of interpretation cannot change the language of the statute[9].

The Bombay High court in case of Pratibha, she was said to be the second wife. They cohabited for 4-5 years in his house, where he was living with first wife. It is her case that the man and his first wife drove her out of the matrimonial house on 1.11.2007 after severely ill treating her. It is her case that the respondent was asking her to bring money and gold ornaments from her parents and was compelling her to do hard labour work. It is her case that she was mentally and physically harassed by the respondent and his first wife and they were demanding Rs. 50,000/- from her parents for purchasing the motorcycle. She further contended that she was unable to maintain herself and that the man has refused and neglected to maintain her. The Bombay High court held that this case was governed by domestic violence as the DVAct has wide amplitude[10].

Conclusion

The court restricting and narrowing the scope of section 2(c) of The Protection of Women from Domestic Violence 2005. In Indra Sarma case, Supreme Court not only refused to accept the case under "domestic relationship" but went a step further by holding the unmarried lady liable for intentional tort. This not only defeats the purpose of the Act to provide protection to women who are victims of violence but have also closed all avenues for them for seeking justice. The court needs to be more pragmatic and widen the scope of the DV Act in order to implement the legislation in its true spirit. The words 'relationship in nature of marriage' needs some more clarity.

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[1] See section 2(f) of The Protection of Women from Domestic Violence Act, 2005.
[2] (2010) 10 SCC 469.
[3] Article 15(3) says- Nothing in this article shall prevent the state from making any special provision for women and children.
[4] Article 39-Certain principles of policy to be followed by the state-
[5] Section 125.Order for maintenance of wives, children and parents.
[6] . AIR 2006 SC 2522.
[7] 2013(14)SCALE448.
[8] See section 3 of The Protection Of Women From Domestic Violence Act 2005. It gives various type of violence that a women faces in domestic arena.
[9] Krishna Murari Singh Vs. The State of Bihar and Anr. 2013(2)PLJR120.
[10] Pratibha vs. Bapusaheb 2012BomCR(Cri) 605.

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Human Rights and their Implication: In a Changing Scenario

Anita*

Introduction

Human Rights – Two simple words but when put together they constitute the very foundation of our existence. Human Rights are commonly understood as "inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being.[1]

India being a diverse country with its multicultural, multi-ethnic and multi-religious population, the protection of human rights is the *sine qua non* for peaceful existence. It is indeed impossible to give an inclusive definition of Human Rights owing to its vast nature; however, the legislators have tried their hands in defining Human Rights.

Section 2(d) of The Protection of Human Rights 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.[2]

Prof *Louis Hawkins* of Columbia University explained Human Rights as "…..claims which every individual has or should have upon the society in which she or he lives to call them human right suggest that they are universal ;They are due of every human being in every human society . They do not differ with geography or history, culture or ideology, political or economic system or stage of development, they do not depend on gender or race, class or status. They need not to be earned or deserved .They are more than aspiration or assertion of the 'good' but claims of entitlement and corresponding obligation in some political order under some applicable laws .."[3]

Thus Human Right are rights inherent to all human beings, whatever our nationality, place or residence ,sex national and ethnic origin colour and religion language or any other status .We all are equally entitled to our human rights without discrimination.

Human Rights and Ancient India

It is commonly held view in western circles that Asia in general and India in particular possessed a concept of duty but not of rights and that the concept of human rights is of western origin.[4] The concept of human rights is not entirely western in origin nor it is so very modern references occurs as early in the Rig-Veda to the three civil liberties of tan(body), skridhi (dwelling house), and jibasi (life). Long before Hobbs the Indian epic Mahabharata described the civil liberty of individual in a political state. Ancient Indian society was highly structured and well organized affair with the fundamental rights and duties of the people. [5]The ancient idea that has survived in the consciousness of the millions of the ordinary Indians has been that of the welfare and happiness of all (sarve bhavantu sukhina, sarve bhavantu nirmaya).The concept of human right is not alien to

* ***Assistant Professor, Jagran School of Law, Dehradun.***

the Indian political thinkers and philosophers, they have expressed concern to secure human rights and fundamentals freedom for all human beings. What the world today has discovered in the field of human rights has been an accepted principle of India's rich legacy of historical tradition since time immemorial.[6]

Significant aspect of the Hindu view on Human Rights is its emphasis on duties. In fact Hinduism doesn't support the idea of separation of Rights and Duties. Thus in Hindu discourse no Right is absolute. All the Rights bestowed upon a section enjoin upon another section corresponding Duties too. And for a Hindu the highest obligation is *Karma* – performance of his Duty. For example, the Right to Happiness was prominently emphasized in the *Artha Shastra* of Chanakya. But it also enjoined upon the King the obligation to ensure that those Rights of all his subjects are protected.

Prajasukhe Sukham Rajnah Prajanam cha Hite Hitam
Naatmapriyam Hitam Rajnah Prajanaam tu Priyam Hitam

"In the happiness of the subjects lies the happiness of the King; in their welfare his welfare. The King shall not consider what pleases himself as good; whatever pleases his subjects is only good for him" (*Artha Shastra*)

In the *Bhagwat Gita*, Lord Krishna declares to Arjuna:
Dharmenaavirodheshu Kaamosmi Bharatarshabha
"I am those desires that are not against the Dharma''[7]

Indian culture and civilization were based on certain spiritual and ethical values termed as *'Dharma'*. It maintains stability of the social order and promotes well being and progress of mankind. The principle of' '*Dharma'* promotes cluster of human rights, such as equality, education , religion social security ,justice happiness etc. dharma is the Vedic tradition is associated with many aspect of human life .There is the *'Dharma'* of individual , *'Dharma'* of family '*Dharma'* of the society, '*Dharma'* of a nation '*Dharma'* of a king etc.[8]

The Vedas which constitute the source of *'Dharma'*, emphasized the right to equality of all human being happiness is not possible when there is inequality. The Hindu concept of equality is understood from the following verses of Rig –Veda which is similar to Article 14 of the Constitution of India which provides that the state shall not deny any person equality before law.

"No one is superior (ajystasa) or inferior (akanishtasa). All are brothers (bhrathra). All should survive for the interest of all and should progress collectively."[9] Thus what the world today has discovered in the field of human rights has been an accepted principle of India's rich legacy of historical tradition since time immemorial.

Human Rights and State Obligation

States have the legal obligation to respect, protect and fulfill the human rights set out in the international human rights conventions they ratify. Similar responsibilities, though usually not legally binding, result from the human rights declarations and other such political commitments that States make.

ICCPR (Part II, Art. 2): "Each State Party … undertakes to respect and to ensure to all individuals within territory and subject to its jurisdiction the rights recognized in the present covenant"[10]

ICESCR (Part II, Art. 2): "Each State Party… undertakes to take steps … to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all in appropriate means"[11]

The obligation of States to respect human rights means that they must refrain from interfering with or curtailing the enjoyment of human rights. Their obligation to protect human rights requires them to protect individuals and groups against human rights abuses, including by business enterprises. Their obligation to fulfill human rights means that States must take positive action to facilitate the enjoyment of basic human rights.[12]

Human Rights and State Obligation in Indian Perspective

India became independent in 1947, had its Constitution adopted in 1950, with provision guaranteeing basic human rights to the people in the form of fundamental rights. Prior to independence it signed the *United Nations Charter* and then after independence the *Universal Declaration of Human Rights* in 1948.

The historical and political developments in India made it inevitable that a Bill of Rights or Fundamental Rights, as we all call them, should be enacted in our constitution. Part III of the Constitution embodies those rights. The rights embedded in this part are ensured as effective guarantees against the state action. It has been aptly observed that 'enshrining of these rights makes our constitution sublime'. The observations of Dr. B.R. Ambedkar on the object and purpose of Fundamental Rights in the Constitution were very clear when he said: "The object of the Fundamental Rights is two-fold. First, that every citizen must be in a position to claim those rights. Secondly, they must be binding upon every authority."

The framers of the Indian Constitution were influenced by the concept of human rights and guaranteed most of human rights contained in the UDHR. The UDHR contains Civil and Political as well as Economic Social and Cultural rights. While Civil and Political rights has been incorporated in Part III of Indian Constitution i.e. Fundamental Rights, as Economic Social and Cultural rights have been incorporated in Part IV of the Constitution i.e. Directive Principles of States Policy.

Further India has signed the *International Covenant of Civil and Political Rights, 1966* and the *International Covenant on Economic, social and Cultural Rights, 1966*. In 1979 India satisfied the Covenants too. Another important development in the area of human rights in India is the enacting of the *Protection of Human Rights Act, 1993*, to provide for the constitution of a National Human Rights Commission, State Human Rights Commissions in States and Human Rights Courts for better protection of human rights and matters connected there with or incidental thereto.

Role of Judiciary

The Judiciary with no doubt has played a vital role in protection of Human rights over the decades. India has a hierarchical judicial system in which Supreme Court of India is the

apex court .It is the final interpreter of law and the ultimate court of appeal .It are also the final protector of people's fundamental and human rights.[13]

Judicial review is not only an integral part of the constitution but is also a basic structure of the constitution which cannot be abolished even by an amendment of the constitution .The supreme court is invested with the power of judicial review under article 32 article. Article 32(1) guarantees the right to move the Supreme Court for the enforcement of fundamental rights and article 32(2) invests the Supreme Court with the power to issue directions, orders, writs, for the enforcement of these rights. The right to move the Supreme Court is itself a fundamental right.

Article 136 which is in the nature of a residuary reserve power of judicial review in the area of public law lays down that the supreme court may in its discretion , special leave to appeal from any judgment, decree determination ,sentence or order in any case or matter passed or made by any court or tribunal .[14]

For some time now, the courts in India have started relating the fundamental rights in the constitution to the International Human Rights. For example, many a time while interpreting provisions of fundamental rights under the Constitution the Supreme Court has expressly referred to international instruments on Human Rights. In *Chairman, Railway Board v. Chandrima Das*[15], the Supreme Court has referred to the Universal Declaration of Human Rights, when it observed: "The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read if need be, into the domestic jurisprudence" The concept of fundamental rights thus represents a trend in the modern democratic thinking. The enforcement of human rights is a matter of major significance to modern constitutional jurisprudence.

Public Interest Litigation

The origin of public interest litigation lies in the liberalization of *locus standi* by the Supreme Court. Protection and promotion of the human rights of the people is an important task before the state. If the state fails in this task, by miss-performance or nonperformance, the question is how to make the people enjoy their basic human rights, perhaps, *"public interest litigation"* is a partial answer to this .Active assistance of the social activists and public interest litigators, the judiciary in India is promoting innovative remedial attention for vindication of the governmental commitment to the welfare and relief of the oppressed and in protecting and promoting human rights of the people.

Limitation of Judiciary

Judiciary has its own limitation. According to justice Krishna Iyer "judicial activism is only a passing phase. It has become a timely device to meet the socio- political crisis which is the result of bureaucratic administrative inefficiency and legislative shortsightedness .It is true that judicial activism cannot bring out a permanent solution to the existence crisis in the society."[16]

Public consciousness is also required for protection of public interests by social action litigation device used by the activist judges. In the context the following observation borne in mind, "A society so riven that the spirit of moderation is gone, no constitution can save; a society where that spirit is flourishes, no constitution needs save; a society

which evades its responsibility by thrusting upon the courts the nurture of that spirit, in the end will perish"[17]

The challenge before the Indian Judiciary lies in the arena of liberalization and globalization .The Supreme Court of India must constantly improves its ability to ameliorate the miseries of India's most impoverished denisens district.[18]

Human Rights and Their Implication: In A Changing Scenario

The state's obligations are to *respect*, *protect*, *fulfill* and *promote* human rights. States are accountable for their human rights record. In the context of economic, social and cultural rights, states have to report periodically to the CESCR, where their performance is reviewed and recommendations made so that the states can progressively realize these rights. In some states, such as South Africa, India, and Australia, citizens have been able to proceed against the state by using legal means for the fulfillment of their ESC rights. National and legal frameworks and mechanisms exist, which in the event of a violation allow the violated party to take the specific violator to court, and seek a legal remedy. The judicial process makes governments accountable, and that accountability is rooted in public recognition of the primacy of human rights.[19]

The State's obligations are derived from four key principles. These are:
Equality and non-discrimination, which requires the State to take measures to prevent discrimination, is including taking affirmative measures.

Indivisibility and interdependence of rights, **Accountability** and **Participation**, which requires that policies must be devised, implemented and monitored in a manner that allows for popular participation.[20]

State Responsibility for State Controlled Corporations

Do human rights obligations apply to companies? Some companies have argued that human rights treaties are signed by states and states are primarily accountable for human rights. Being non-state actors, companies argue, they have no legal obligations towards protection of human rights. They may choose to protect human rights voluntarily, but they are not obliged under international law.[21]

There is, however, another category of situations which is not so narrow. Where a state actually controls or directs a company to act in a certain way, then there will be state responsibility for the acts of the company, where there is evidence that the corporation was exercising public powers, or that the state was using its ownership interest in, or control of, a corporation specifically in order to achieve a particular result. This is the conclusion of the ILC in their commentary to Article 8, which reads:

'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.'

Obligation of non state actor

An orientation that is heavily state –centered fails to take into adequate account the changing environment, at both the national and international level, where non state-actor such as corporation, fundamentalist group and armed opposition groups are having an

increasing impact on the enjoyment of ESC rights. The history of human rights law indicates that human rights were intended to protect the individuals against excessive use of state power. The key convention and treaties make explicit that only state hold human right obligation.[22]

International human right laws thus do not oblige private actors whether corporation or others to act in a particular way and therefore they cannot bring to account directly through human right laws. The State has the primary responsibility to respect, protect, fulfill and promote human rights. Access to certain services is so essential that denial of access to such services can constitute violation of human rights While governments are required to ensure access, international human rights instruments do not require that governments must own the production or delivery systems of essential services This means that the State, can be, but does not have to be the sole provider of essential services. Court judgments in India have shown that private actors can indeed play a role in the realization of human rights.[23]

In *Krishnan v State of Andhra Pradesh* (1993)[24].Supreme Court of India held that "This does not, however, mean that this obligation (of providing access to primary schools) can be performed only through state schools. It can also be done by permitting, recognizing and aiding voluntary non-governmental organizations, who are prepared to impart free education to children. This does not also mean that unaided private schools cannot continue. They can, indeed, as they too have a role to play. They meet the demand of that segment of the population who may not wish to have their children educated in state-run schools."

"Vincent v. Union of India"[25] In this case, when the petitioner addressed a writ to the Supreme Court on behalf of someone dying due to the non-availability of immediate medical treatment, the Court extensively dealt with the professional ethics of the medical profession and issued a number of directions to ensure that an injured person was instantaneously given medical aid. It confirmed then that the right to medical treatment is a Fundamental Right of the people under article 21 of the Constitution, and issued directions to the Union of India, the Medical Council of India, and the Indian Medical Association etc. to give wide publicity to the Court's decision on this regard.

Now the need is to change corporate governance law that rebalance power within multinational corporations will inure to the financial benefit of domestic investors and the human rights interests of citizens abroad.

Improvements in the success rate of human rights initiatives will require a broad multi-dimensional approach in which multinational corporations, acting alone or collaboratively with and responsively to, government and NGOs can play an important role. Thus this new context, there is undoubtedly a new thinking has been start about how to best ensure respect for human dignity: indeed, if human rights were historically granted to individuals to shield them against the State's abusive action, then argue that these entities should be called upon to respect human rights obligations towards the individuals.

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Social Justice by Sentinel Qui Vive: Attempting the Impossible?

Amitabh Singh*

Equality and Justice are the core values that lie at the very root of human dignity. Without these, proper manifestation of human personality becomes very difficult. Similarly, in the life of a nation, if the tree of political liberty is to bloom, social equality and social justice is indispensable. In other words, a democracy can survive and succeed only when true social justice is established in society.

In Indian Democracy the concept of social justice has always assumed great significance. In the past in Indian society there was intense and extensive social and economic discrimination due to irrational prejudices, which resulted in certain sections of society to suffer severe handicaps in practically all walks of life. Our founding fathers of the nation were cognizant of this reality. They felt that without the establishment of social justice in our country, political democracy would have no meaning. Recognizing the reality of prevailing social inequalities that the masses had suffered for so long, ***Dr. Ambedkar***, in the Constituent Assembly, on 25th November, 1949, stated:

"On the 26th January, 1950, we are going to enter upon into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment else those who suffer from inequality will blow up the structure of democracy which this Constituent Assembly has so laboriously built up."

Hence our founding fathers sought to establish an egalitarian social order in which justice is accessible to all sections of the society, in all facets of human activity. They dreamt of establishing a socio-economic set-up in which all persons would be assured of a decent minimum standard of life, equitable distribution of national cake and equality of opportunity in matters of uplifting oneself to the upper ladder of life. This 'dream' of our constitution makers to establish social justice found expression in the Constitution of India, in its Preamble as well as in Part III and IV, where the essence of social justice is embodied implicitly and explicitly.

It has been recognized that social solidarity is the outcome of the concept of social justice. Therefore the Constitution of India through its various provisions has spelled out the concept of justice and mandated the state to maintain or to restore equilibrium in the society. Justice is often understood, in a narrow sense, to mean justice according to law

**** Asst. Professor, Dept of Law, Assam University, Silchar.***

or justice of law. But, nowadays, the word "justice" is used in a wider sense and includes its different forms like social, economic and political justice. The concepts of social justice are varied, but equality is integral to most contemporary theories of justice.[1]

The Supreme Court explained the concept of social justice in the case of ***M. Nagraj* v. *Union of India***[2] in the following words:

"…Social justice is one of the sub-divisions of the concept of justice. It is concerned with the distribution of benefits and burdens throughout a society as it results from social institutions - property systems, public organisations etc. The problem is - what should be the basis of distribution? Writers like Raphael, Mill and Hume define 'social justice' in terms of rights. Other writers like Hayek and Spencer define 'social justice' in terms of deserts. Socialist writers define 'social justice' in terms of need. Therefore, there are three criteria to judge the basis of distribution, namely, rights, deserts or need. These three criteria can be put under two concepts of equality - "formal equality" and "proportional equality". "Formal equality" means that law treats everyone equal and does not favour anyone either because he belongs to the advantaged section of the society or to the disadvantaged section of the society. Concept of "proportional equality" expects the States to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy. Under the Indian Constitution, while basic liberties are guaranteed and individual initiative is encouraged, the State has got the role of ensuring that no class prospers at the cost of other class and no person suffers because of drawbacks which is not his but social… Therefore, axioms like secularism, democracy, reasonableness, social justice etc. are overarching principles which provide linking factor for principle of fundamental rights like Articles 14, 19 and 21."

Thus, from the verdict of the Supreme Court, the concept of social justice emerges as a positive measure in the comprehensive form to remove social imbalances by law harmonising the rival claims or the interests of different groups and/or sections in the social structure or individuals by means of which alone it would be possible to build up a welfare State. In every society social equality and social justice is achieved through the instrument of law. . Law is the ultimate aim of every civilised society, as a key system in a given era, to meet the needs and demands of its time. Justice, according to law, comprehends social urge and commitment. The Constitution commands justice, liberty, equality and fraternity as supreme values to usher in the egalitarian social, economic and political democracy. Social justice, equality and dignity of person are cornerstones of social democracy. The concept of "social justice" which the Constitution of India engrafted consists of diverse principles essential for the orderly growth and development of personality of every citizen. "Social justice" is thus an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species. Social justice is a dynamic device to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person. Social justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor etc. from handicaps, penury, to ward off distress and to make their life liveable, for greater good of the society at large.

The Preamble, Fundamental Rights (Part III) and Directive Principle (Part IV) - trinity setting out the conscience of the Constitution deriving from the source "We, the people", a charter to establish an egalitarian social order in which social and economic justice with dignity of person and equality of status and opportunity, are assured to every citizen in a

socialist democratic Bharat Republic. The Constitution, the Supreme law heralds to achieve the above goals under the rule of law. Life of law is not logic but is one of experience. Constitution provides an enduring instrument, designed to meet the changing needs of each succeeding generation altering and adjusting the unequal conditions to pave way for social and economic democracy within the spirit drawn from the Constitution. The word justice envision in the Preamble is used in broad spectrum to harmonise individual right with the general welfare of the society. The Constitution is the supreme law. The purpose of law is realisation of justice whose content and scope vary depending upon the prevailing social environment. Every social and economic change causes change in the law. In a democracy governed by rule of law, it is not possible to change the legal basis of socio-economic life of the community without bringing about corresponding change in the law. Justice in the Preamble implies equality consistent with the competing demands between distributive justice with those of cumulative justice. Justice aims to promote the general well-being of the community as well as individual's excellence. The principal end of society is to protect the enjoyment of the rights of the individuals subject to social order, well-being and morality. Establishment of priorities of liberties is a political judgment.

The founding fathers of the Constitution, cognizant of the reality of life wisely engrafted the Fundamental Rights and Directive Principles in Chapters III and IV for a democratic way of life to every one in Bharat Republic. The Fundamental Rights, through Articles 14, 15, 16 and 17 reflect the right to equality in its various aspects and aim to foster social equality by empowering the citizens to be free from any form of coercion or restriction by the state or private people. The Directive Principles aim at creating an egalitarian society whose citizens are free from the abject physical conditions that had hitherto prevented them from fulfilling their best selves. They are the creative part of the Constitution, and fundamental to the governance of the country. It is interesting to note that at the time of drafting of the Constitution, some of the Directive Principles were part of the declaration of fundamental rights adopted by the Congress party at Karachi. Mr. Munshi had even included in his draft list of rights, the “rights of workers” and “social rights”, which included provisions protecting women and children and guaranteeing the right to work, a decent wage, and a decent standard of living. The primordial importance of Part IV can be understood by the following words of ***Dr. Ambedkar***[3], when he insisted on the use of the word “strive” in Article 38:

“We have used it because it is our intention that even when there are circumstances which prevent the Government, or which stand in the way of the Government giving effect to these directive principles, they shall, even under hard and unpropitious circumstances, always strive in the fulfillment of these directives. … Otherwise it would be open for any Government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go.”

The State under Article 38 is enjoined strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political shall inform all the institutions of the national life and to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. Article 39(a) provides that the State

shall direct its policies towards securing the citizens, men and women equally, the right to an adequate means of livelihood; Clause (d) provides for equal pay for equal work for both men and women; Clause (e) provides to secure the health and strength of workers. Article 41 provides that within the limits of its economic capacity and development, the State shall make effective provision to secure the right to work as fundamental with just and humane conditions of work by suitable legislation of economic organisation or in any other way in which the worker shall be assured of living wages, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities to the workmen. The poor, the workman and the common man can secure and realise economic and social freedom only through the right to work and right to adequate means of livelihood, to just and humane conditions of work, to a living wage, a decent standard of life, education and leisure. To them, these are fundamental facets of life. Article 43A, brought by 42nd Constitution (Amendment) Act, 1976 enjoins upon the State to secure by suitable legislation or in any other way, the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry. Article 46 gives a positive mandate to promote economic and educational interest of the weaker sections of the people.

Correspondingly, Article 51A imposes fundamental duties on every citizen to develop the scientific temper, humanism and to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement. To make these rights meaningful to workmen and meaningful right to life a reality to workmen, shift of judicial orientation from private law principles to public law interpretation harmoniously fusing the interest of the individual entrepreneur and the paramount interest of the community. Article 39A furnishes beacon light that justice be done on the basis of equal opportunity and no one be denied justice by reason of economic or other disabilities. Courts are sentinel in the qui vive of the rights of the people, in particular, the poor. Thus, the enforceability of measures relating to social equality was never envisaged as being dependent only on the availability of state resources. Going further, though the Fundamental Rights and Directive Principles may resemble Western constitutional provisions, they can be distinguished in their innate desire to end the inequities of traditional social relations and enhance the social welfare of the population. Other provisions furthering social equality include Article 334, and those relating to the uplifttment of Anglo Indians. Article 335 enjoins that the claims of the members of the Scheduled Castes and Scheduled Tribes to the services and posts in the Union and the States shall be taken into consideration. Article 338 provides for appointment by the President of a Special Officer for the Scheduled Castes and Scheduled Tribes to investigate all matters relating to the safeguards provided for them under the Constitution. Article 341 enables the President by public notification to specify castes, races or tribes which shall be deemed to be Scheduled Castes in the States and the Union Territories. Article 342 contains provision for similar notification in respect of Scheduled Tribes. Article 366(24) and (25) defines Scheduled Castes and Scheduled Tribes.

The classification by the impugned rule and the order is with a view to securing adequate representation to Scheduled Castes and Scheduled Tribes in the services of the State as otherwise they would stagnate in the lowest rung of the State services. Article 335 of the Constitution states that claims of members of the Scheduled Castes and Scheduled Tribes shall be taken info consideration in the making of appointments to the services and posts

in connection with affairs of the State consistent with the maintenance of efficiency of administration. Again, Article 23 prohibits the trafficking of human beings and other forms of forced labour and Article 24 protects children under the age of fourteen from enduring the hazards of employment in difficult conditions. Freedom of Religion, freedom of conscience and free profession, practice and propagation of religion; freedom to manage one's religious affairs; and freedom to attend religious instruction or religious worship in certain educational institutions has been ensured through Articles 25, 26, 27 and 28 of the Constitution. Articles 29 and 30 deal exclusively with the Cultural and Educational Rights of Minorities while ensuring equal opportunity for all citizens to take admission in any educational institution.

It is to be noted that the framers of Indian Constitution have not incorporated a strict doctrine of separation of power but have rather envisaged a system of checks and balances. However the Indian Supreme court in ***Delhi Laws Act*** case[4] has noticed that the Indian Constitution does not vest the legislative and judicial powers in the legislature and the court in clear terms. The framers, in effect, have imported the essence of separation of powers applying the doctrine of constitutional limitation and trust. Therefore, none of the govt, such as legislature, executive and court under the constitution can usurp the function and powers which are assigned to another organ by the constitution.

Importantly, the most visible aspect of the doctrine of separation of power in India has been reflected in the **Rajnarain** case[5] It was held by the court that 'the doctrine of rigid separation of powers in the American sense does not obtain in India, the principles of check and balances, underlying the doctrine constitutes a part of the basic structure of the constitution or one of its basic features which cannot be impaired even by amending the constitution, if any such amendment of the constitution is made the court would strike it down as unconstitutional and invalid. Importantly, the application of the theory to modern governments has shown consistently that the separation of powers has to be reconciled with the need for their co-operation with each other to provide social justice[6].

The Constitution therefore imposes a duty on the court to interpret its various provisions in such a manner which would help to build up continuity of socio-economic empowerment to the poor to sustain equality of opportunity and status and the laws interpreted by the courts should constantly meet the needs and aspiration of the society in establishing the egalitarian social order.

In ***His Holiness Kesavananda Bharati Sripadagalvaru V State of Kerala and Anr[7].*** this Court observed as follows:

"The fundamental rights and the directive principles constitute the 'conscience' of our Constitution....To ignore Part IV is to ignore the sustenance provided for in the Constitution, the hopes held out to the Nation and the very ideals on which our Constitution is built there is no anti-thesis between the fundamental rights and the directive principles. One supplements the other. ...Both Parts III and IV "have to be balanced and harmonized".then alone the dignity of the individual can be achieved....They (fundamental rights and directive principles) were meant to supplement each other.

Mathew,J.[8] while adopting the same approach remarked:

The object of the people in establishing the Constitution was to promote justice, social and economic, liberty and equality. The modus operandi to achieve these objectives is set out in Part III and IV of the Constitution. Both parts III and IV enumerate certain moral rights. Each of these parts represents in the main the statements in one sense of certain aspirations whose fulfillment was regarded as essential to the kind of society which the Constitution- makers wanted to build. Many of the articles, whether in Part III or IV, represents moral rights which they have recognized as inherent in every human being in this country. The tasks of protecting and realizing these rights are imposed upon all organs of the state, namely, legislative, executive and judicial. What then is the importance to be attached to the fact that the provisions of Part III are enforceable in a court and the provisions in Part IV are not? Is it that the rights reflected in the provisions of Part III are somehow superior to the moral claims and aspirations reflected in the provisions of Part IV or not? I think not. Free and compulsory education under Article 45, Freedom from starvation is as important as right to life. Nor are the provisions in Part III absolute in the sense that the rights represented by them can always be given full implementation"

The essence of the Fundamental Rights and Directive Principles Of State Policy have been materialised by judicial innovation and it has become possible to march towards the objective of attaining social justice by the various innovative and creative efforts of the judiciary in various aspects .the judiciary time and again though its various pronouncements have upheld the goal of establishing social justice in the country.

The Right to Education &Child Welfare

Child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to the humanity. Mankind has best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood - socially, economically, physically and mentally-the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry. The founding fathers of the Constitution, therefore, have emphasised the importance of the role of the and the need of its best development***. Dr. Bhimrao Ambedker,*** who was far ahead of his time in his wisdom, projected these rights in the Directive Principles including the children as beneficiaries.

Their deprivation has deleterious effect on the efficacy of the democracy and the role of law. Today, education is perhaps the most important function of State and a local government…. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these

days, it is doubtful any child may reasonably be expected to succeed in life if he is denied the opportunity of education.

In **Unnikrishnan, J. P and Ors. v. State of Andhra Pradesh and Ors**[9] Hon'b Apex Court upheld the right to education for children of age of 14 as fundamental right. In para 165, this Court observed as follows:

It is thus well established by the decisions of this Court that the provisions of Parts III and IV are supplementary and complementary to each other and that Fundamental Rights are but a means to achieve the goal indicated in Part-IV. It is also held that the fundamental Rights must be construed in the light of the Directive Principles.

In **Lakshmikant Pandey v. Union of India**[10] S.C deals the status of child as follows:

It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a "supremely important national asset" and the future well being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said: "Child shows the man as morning shows the day" and the Study Team on Social Welfare said much to the same effect when it observed that "the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages". The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fulness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. Now obviously children need special protection because of their tender age and physique mental immaturity and incapacity to look-after themselves. That is why there is a growing realisation in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect and a balanced view of life with full appreciation and realisation of the role which they have to play in the nation building process without which the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process. In India this consciousness is reflected in the provisions enacted in the Constitution. Clause (3) of Article 15 enables the State to make special provisions inter alia for children and Article 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Clauses (e) and (f) of Article 39 provide that the State shall direct its policy towards securing inter alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that children are given facility to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the constitution makers to protect and safeguard the interest and welfare of children in the country. The Government of India has also in pursuance of these constitutional provisions evolved a National Policy for the Welfare of Children. This Policy starts with a goal-oriented perambulatory introduction:

The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become

robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice.
The National Policy sets out the measures which the Government of India proposes to adopt towards attainment of the objectives set out in the perambulatory introduction and they include measures designed to protect children against neglect, cruelty and exploitation and to strengthen family ties,so that full potentialities of growth of children are realised within the normal family neighbourhood and community environment....

In ***M.C. Mehta v. State of T.N. and Ors.***[11] Supreme Court observed that: *Article 24 has been a fundamental right ever since 28th January, 1950. Article 45 too has been raised to high pedestal by Unni krishnan, which was decided on 4th February, 1993. Though other articles are part of directive principles, they are fundamental in the governance of our country and it is the duty of all the organs of the State (Article 37) to apply these principles. Judiciary, being also one of the three principal organs of the State, has to keep the same in mind when called upon to decide matters of great public importance. Abolition of child labour is definitely a matter of great public concern and significance.*
It would be apposite to apprise ourselves also about our commitment to world community. For the case at hand it would be enough to note that India has accepted the convention on the Rights of the Child, which was concluded by the UN General Assembly on 20th November, 1989. This Convention affirms that children's right require special protection and it aims, not only to provide such protection, but also to ensure the continuous improvement in the situation of children all over the world, as well as their development and education in conditions of peace and security. Thus, the Convention not only protects the child's civil and political right, but also extends protection to child's economic, social, cultural and humanitarian rights.

From the above judgements it is clear that the Supreme Court has been constantly working judiciously, emphatically and effectively in matters of child welfare .The sincere efforts of the Supreme court can be realised from the fact that today by the 86th Amendment 2002,the Directive Principle as mentioned under Article 45 of the Constitution has been elevated to assume the status of Fundamental Rights under Article 21A of the Constitution.

Women Empowerment

It is a fact that although numerically women constitute at least half of the human race today however they have always been forced to occupy a secondary place in the world in relation to men. This has resulted in women being unable to take a place of human dignity as free and independent entities, associated with men on a plane of intellectual and professional equality. Women have been the victims of discrimination, neglect and violence all through the ages, in all ages, in all societies, cultures, regions or religious communities in the world. It is, indeed, ironic that in India, which has given rise to apostles of peace and non-violence, women have to bear the burnt of violence---domestic as well as public, physical as well as emotional and mental.

Today, offences against women in India have assumed an alarming proportion. According to one estimate, there are about thirty specific forms of violence against women from the pre-nated stage to their death. Such forms include foeticide,

infanticide, deliberate check on the supply of supply of sufficient or/and nutritious food, medical neglect, deprivation of educational opportunities, child marriages, sexual abuse of the girl child, forced marriages, rapes, prostitution, sexual harassment, pregnancies at small intervals, wife-battering, bride-burning, cursing the widows, witch-hunting, neglect of the old women etc. In view of the rising atrocities against women, the judiciary has taken various steps in strengthening the hands of women who have been suffering from various disabilities, inequalities and gender discrimination.

In **Madhu Kishwar and Ors. v State of Bihar and Ors**[12]- A challenge was made to certain provisions of Chotanagpur Tenancy Act, 1908 providing succession to property in the male line in favour of the male on the premise that the provisions are discriminatory and unfair against women and, therefore, ultra vires the equality clause in the Constitution. The Court while upholding the fundamental right of the Tribal women to the right to livelihood held that the State was under an obligation to enforce the provisions of the Vienna Convention on the elimination of all forms of discrimination against women (CEDAW) which provided that discrimination against women violated the principles of equality of rights and respects for human dignity.

In **Kerala Samsthana Chethu Thozhilali Union v. State of Kerala and Ors**[13], this Court held: When an employer gives employment to a person, a contract of employment is entered into. The right of the citizens to enter into any contract, unless it is expressly prohibited by law or is opposed to public policy, cannot be restricted. Such a power to enter into a contract is within the realm of the Indian Contract Act. It has not been and could not be contended that a contract of employment of a women in the toddy shops would be hit by Section 23 of the Indian Contract Act. So long as the contract of employment in a particular trade is not prohibited either in terms of the statutory or constitutional scheme, the State's intervention would be unwarranted unless there exists a statutory interdict. Even to what extent such a legislative power can be exercised would be the subject matter of debate but in a case of this nature there cannot be any doubt that the impugned rules are also contrary to the provisions of the Indian Contract Act as also the Specific Relief Act, 1963.
It was further observed:

Furthermore, a person may not have any fundamental right to trade or do business in liquor, but the person's right to grant employment or seek employment, when a business is carried on in terms of the provisions of the licence, is not regulated.

In Vishaka and Ors. v. State of Rajasthan and Ors.[14] , the writ petition was filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India with the aim of finding suitable methods for realization of the true concept of "gender equality"; and preventing sexual harassment of working women in all work places through judicial process to fill the vacuum in existing legislation. This Court while framing the guidelines and norms to be observed by the employers in work places to ensure the prevention of sexual harassment of women, inter alia, relied on the provisions in the Convention on the Elimination of All Forms of Discrimination against Women as also the general recommendations of CEDAW for construing the nature and ambit of constitutional guarantee of gender equality in our Constitution.

Gender equality today is also recognized by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe. Court follows the verdict of Abdulaziz, Cabales And Balkandali v. United Kingdom[15] [where the court held:

As to the present matter, it can be said that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention.

In **Randhir Singh v.Union of India and Ors.**[16] this Court while holding that non-observance of the principle of 'equal pay for equal work' for both men and women under Article 39(d) of the Constitution amounted to violation of Article 14 and 16, recognized that the principle was expressly recognized by all socialist systems of law including the Preamble to the Constitution of the International Labour Organization.

Upliftment of the Weaker Sections of Society

From ancient times our Indian society has been divided on caste and class lines. As a result a vast section of our society particularly known as the SC's , ST's and OBC's had remain a victim of social and economical inequalities. Our great nationalist leaders had always condemned such discriminate behaviour meted towards these people who have been labelled as the 'weaker sections of society'. It was once said by Swami Vivekananda who demanded shudra raj and refuted the in capabilities of the groaning untouchables:

"Aye, Brahmins, if the Brahmin has more aptitude for learning on the ground of heredity than the Pariah, spend no more money on the Brahmin's education but spend all on the Pariah. Give to the weak, for there all the gift is needed.... Our poor people, these downtrodden masses of India, therefore, require to hear and to know what they really are. Aye, let every man and woman and child, without respect of caste or birth, weakness and strength, hear and learn that behind the strong and the weak, behind the high and the low, behind everyone, there is that Infinite Soul, assuring that infinite possibility and the infinite capacity of all to become great and good. Let us proclaim to every soul 'Arise, awake and stop not till the goal is reached.' Arise, awake!"

Mahatma Gandhi, the Father of the Nation, had staked his life for the harijan cause. Baba Saheb Ambedkar-a mahar by birth and fighter to his last breath against the himalayan injustice to the harijan fellow millions stigmatised by their genetic handicap-who was the Chairman of the drafting committee of the Constituent Assembly. There was Nehru, one of the foremost architects of Free India, who stood four squares between caste suppression by the upper castes and the socialist egalitarianism implicit in secular democracy

These visions of our forefathers nurtured the roots of our constitutional values among which must be found the fighting faith in a casteless society, not by obliterating the label but by advancement of the backward, particularly that pathetic segment described colourlessly as Scheduled Castes and Scheduled Tribes. The Supreme Court of India has accordingly taken due steps to restore the social and economic personality of these backward most sections and have attempted to make democracy functional and republic

real. It has tried to provide adequate means of livelihood for all the citizens and the distribution of the material resources of the community for common welfare, in order to enable the poor, the dalits and the tribes, to fulfil the basic needs to bring about the fundamental change in the structure of the, Indian society.

In Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde and Anr[17]. the question arose : whether the alienation of the lands assigned to Scheduled Tribes was valid in law? In that context considering the Preamble, the Directive Principles and the Fundamental Rights including the right to life, this Court had held that economic empowerment and social justice are Fundamental Rights to the tribes. The basic aim to the welfare State is the attainment of substantial degree of social, economic and political equalities and to achieve self-expression in his work as a citizen, leisure and social justice. The distinguishing characteristic of the welfare State is the assumption by community acting through the State and as its responsibilities to provide the means, whereby all its members can reach minimum standard of economic security, civilised living, capacity to secure social status and culture to keep good health. The welfare State, therefore, should take positive measure to assist the community at large to act in collective responsibility towards its member and should take positive measure to assist them to achieve the above.

In R. Chandevarappa and Ors. v. Stale of Karnataka and Ors[18]. This Court was to consider whether the alienation of Government lands allotted to the Scheduled Castes (subheading) was in violation of the Constitutional objectives under Articles 39(b) and 46. It was held that economic empowerment to the Dalits, the Tribes and the poor as a part of distributive justice is a Fundamental Right; assignment of the land to them under Article 39(b) was to provide socio-economic justice to the Scheduled Castes. The alienation of the land, therefore, was held to be in violation of the Constitutional objectives. It was held thus:

In fact, the cumulative effect of social and economic legislation is to specify the basic structure. Moreover, the social system shapes the wants and aspirations that its citizens come to have. It determines in part the sort of persons they want to be as well as the sort of persons they are. Thus an economic system is not only an institutional device for satisfying existing wants and needs but a way of creating and fashioning wants in the future. The economic empowerment, therefore, to the poor, the dalits and the tribes as an integral constitutional scheme of socio-economic democracy is a way of life of political democracy. Economic empowerment is, therefore, basic human right and a fundamental right as part of right to live, equality and of status and dignity to the poor, the weaker sections, the dalits and the tribes.

In Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde[19] MANU/SC/1046/1995 : this Court had held that economic empowerment is a fundamental right to the poor and the State is enjoined under Articles 15(3), 46 and 39 to provide them opportunities. Thus, education, employment and economic empowerment are some of the programmes the State has evolved and also provided reservation in admission into educational institutions, or in case of other economic benefits under Articles 15(4) and 46, or in appointment to an office or a post under the State under Article 16(4). Therefore, when a member is transplanted into the Dalits, Tribes and OBCs, he/she must of necessity also have had undergone the same handicaps, and must have been subjected to the same disabilities,

disadvantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation. A candidate who had the advantageous start in life being born in Forward Caste and had march of advantageous life but is transplanted in Backward Caste by adoption or marriage or conversion, does not become eligible to the benefit of reservation either under Article 15(4) or 16(4), as the case may be. Acquisition of the status of Scheduled Caste etc. by voluntary mobility into these categories would play fraud on the Constitution, and would frustrate the benign constitutional policy under Articles 15(4) and 16(4) of the Constitution.

Prison Management

Another interesting arena in which the judiciary has initiated certain refreshing steps in the light of social justice is prison management. In India, the prisons are considered to be the basic indicator of human right violations. Insufficient accommodations, unhygienic conditions, sub-standard water supply and insufficient food reflect the callous attitude of the executive machinery to identify the basic right of the prisoners.

The prisons in India are governed by the antiquated and colonial *Prison Act of 1894* which advocates retributive and deterrent form of punishment and consider the prisoners as slaves of the state. The Supreme Court taking cognizance of the state in action in recognising prisoners' basic right through the implementation of a progressive legislation and by giving a dynamic interpretation to the provisions of the Constitution in rendering social justice. There is no specific provision in the Constitution which deals with prisoners' right. Hence the Supreme Court adopted a socialist & humanistic approach and read the Articles 14, 19 and 21 in Part III along with Article 38,39,39-A and 42 in Part IV to spell out the various basic rights available to the prisoners.

In *Francis Carolie v. Administrator, Delhi* [20] Supreme Court held that 'a convicted man is not reduced from a person to a non-person so as to be subject to the whim of the Prison Administration.

In *Sunil Batra v. Delhi Administration*[21] it was held that keeping a man 'under sentence of death' in solitary confinement is violative of Article 21.In this case the Supreme Court laid down five principles:

a) Under trial prisoners should be separated from convicted prisoners.
b) Hard labour is not harsh labour. Hard labour under Section 53 of Indian Penal Code must be given a human meaning.
c) Young prisoners should not be exposed to sexually frustrated adult prisoners.
d) The visits of the family members of the prisoner to him should be fairly increased.
e) Confinement in irons should be allowed only where safe custody is impossible.

In *Hussainara Khatoon's Case II*[22] Supreme Court held that Right to Free Legal Aid as given under Article 39-A was implicit in Article 21; it renders social justice to such an accused person, who owing to his poverty cannot afford a lawyer and who would, therefore, have to go through the trial without legal assistance cannot be possibly treated as just, fair and reasonable.

In *Khatri v. State of Bihar*[23] it was held that legal aid should not be provided at the commencement of the trial only, but it should be provided when the person is brought before the magistrate for the first time.

In *Bhagalpur Blinding case*[24] the question that the court addressed was whether the court which cans certainly inject a state from taking any action in contravention of Article 21 could give compensation as a form of relief when the state has already infringed upon the person's Right to Life. The court said that there is a mandate, according to the Constitution, it is the duty imposed on the Court to provide social justice and behave as the saviour of such helpless persons.

Conclusion

Hence it can be said that social justice is not a simple or single idea of a society but it is an essential part of complex social change to relieve the poor etc. from handicaps, penury, to ward off distress and to make their life livable, for greater good of the society at large. In other words, the aim of social justice is to attain substantial degree to social, economic and political equality, which is the legitimate expectation and constitutional goal. The judiciary, here, acts as the vehicle of transforming the nation's life and responds to the nations's needs, it interprets the law with pragmatism to further public welfare to make the constitutional animations a reality and interprets the Constitution broadly and liberally enabling the citizens to enjoy the rights. However it is the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally.

The judicial function of the Court, thereby is to build up, by judicial statesmanship the judicial review, smooth social change under rule of law with a continuity of the past to meet the dominant needs and aspirations of the present. The Court, as sentinel on the qui vive, has been invested with the freedom, to provide a golden interpretation of the Constitution as well as in the interpretation of other laws. The Court, therefore, is not bound to accept an interpretation which retards the progress or impedes social integration; it adopts such interpretation which would bring about the ideals set down in the Preamble of the Constitution aided by Part III and Part IV-a truism meaningful and a living reality to all sections of the society as a whole by making available the rights to social justice and economic empowerment to the weaker sections, and by preventing injustice to them. It is the paramount power of the judiciary as well as its duty to protect limbs of administration of justice from those whose actions created interference with or obstruction to the course of justice.

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Child Sex Tourism – An Overview

Vijeta Verma*
Jasdeep Ahuja**

Abstract

Trafficking of children is a gross violation of human rights. India has been identified as one of the Asian countries where trafficking for commercial exploitation has reached at alarming level. Child sex tourism is a highly profitable and low risk business that preys on particularly vulnerable population.

This article presents an overview on child sex tourism in India, identifies and the role of international conventions and provisions under the Constitution of India, suggest strategies to respond to sex tourism and related issues.

Introduction

"Child abuse or maltreatment constitutes all forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child's health, survival, development or dignity in the context of a relationship of responsibility, trust or power." – WHO

Child Sex- Tourism is the commercial sexual exploitation of children in which a child performs the services of prostitution, for financial benefit. The term normally refers to prostitution by a minor, or person under the local age of majority. The form of child prostitution in which people travel to foreign countries for the purposes of avoiding laws in their country of residence is known as child sex tourism.

Child sex tourism, part of the multi-billion-dollar global sex tourism industry, is a form of child prostitution within the wider issue of commercial sexual exploitation of children. Child sex tourism (CST) is tourism for the purpose of engaging children in the prostitution, that is commercially-facilitated child sexual abuse. It may be defined as the sexual attraction of an adult towards children. It is more often than not associated with the desire for pre- pubertal children. The nightmare of child sexual abuse takes a more alarming turn when placed in the context of organized exploitation for commercial gain. The last couple of years have witnessed growing media coverage of incidents of child sexual abuse. The phenomenon appears to be emerging from the closet.

Child sex tourism (CST) is a type of commercial sexual exploitation of children (CSEC), along with child prostitution, pornography, and sex trafficking. CSEC, CST in particular, is a lucrative and ubiquitous practice affecting an estimated 2 million children worldwide, every year. Child trafficking and child sex tourism is a lucrative multi-billion dollar

**** Research Scholar, Mewar University, Chittorgarh, Rajasthan [under the supervision of Dr. Suman Tomar, Professor, MMH College, GZB, Uttar Pradesh.***
*****Research Scholar Punjab University, Patiala & Assistant Professor, IIMT & School of Law (GGSIPU, University).***

industry that fuels avarice and corruption while attracting organized crime syndicates and transnational trafficking networks.

The wretched conditions of survival for the over whelming majority of our citizens compel young children to become victim of flesh trade. Street children and the children of women in prostitution are most vulnerable groups. Child sex tourism results in both mental and physical consequences for the exploited children that may include “disease (including HIV/AIDS), drug addiction, pregnancy, malnutrition, social ostracism, and possibly death[1]

Child sex tourism, part of the multi-billion-dollar global sex tourism industry, is a form of child prostitution within the wider issue of commercial sexual exploitation of children. Child sex tourism victimizes approximately 2 million children around the world. The children who perform as prostitutes in the child sex tourism trade often have been lured or abducted into sexual slavery.

What seems unimaginable is, however, a bitter reality for millions of girls and boys all over the world. They are the victims of an unscrupulous but profitable business that meets an international demand. Trafficking children is a free market in its most brutal form, a billion-dollar business for those pulling the strings in the background and those who exploit the victims.

Child trafficking is a crime known the world over and that stops at no borders. Girls and boys are sold to be used as cheap labor, prostitutes or thieves, beggars or drug couriers. Babies are also traded for commercial adoptions and girls for arranged marriages. Frequently the children of impoverished parents (or their parents) are attracted by false promises of training or good earnings, since they generally lack money and any prospect of a good life[2].

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For traffickers, human life is an object that is a means to facilitate their objectives. The cruelty and lack of compassion for human life is evident in the case illustrated above. Even after the boy handed over the stolen goods such as gold and jewellery, the trafficker was infuriated at the boy for not stealing enough. The teenager was summoned and returned back to Bangladesh. Thankfully, the trafficker later had charges laid against him3.

Child Sex Tourism in India

Human trafficking in India, whereby children are traded for criminal acts, points to organized trafficking gangs. Children are not only used as slaves, but are also being used as modern day criminals to inflict violence on others, particularly their domestic employers, for theft and robbery- an issue that has not often drawn public attention as of yet.

India is turning into a sex tourism hot spot. The children who perform as prostitutes in the child sex tourism trade often have been lured or abducted into sexual slavery. Child trafficking and prostitution are correlated. Young girls who are of 11-16 years are forced into prostitution for the pleasure and unholy satisfaction of paedophiles.

Girls of 15- 16 are forced into this profession, majority of which are trafficked into India from Nepal and Bangladesh. 25 % of the prostitutes constitute girls of 15-18 years of age out of which almost 60 % belong to scheduled castes, scheduled tribes and other backward classes who are pushed into this dark hole due to economic factor4.

If the condition of commercial sex victim is horrendous, the entry of sex tourism in India can bring the death knell for the thousands of children who will be forced into sexual slavery. In most cases of child sexual abuse the victim is a female child around the age of puberty. The advent of sex tourism will drive the age of the victim lower and pull into its net male children as well. It is well- known that male children are sexually abused routinely, but the scale of the abuse is certain to escalate with the increase in tourism. If the experiences of countries such as Thailand, Philippines and Srilanka are any pointer, India appears to be on the brink of a massive free falls into organized tourist flesh trade[5.]

Today, the number of children who are victims of sex tourism continues to rise. Although child sex tourism has existed for decades, the practice has exploded in recent years due in large part to the rapid globalization of trade and the growth of the tourist industry. As countries once insulated now open their borders to global markets, and as airfares become more affordable to consumers, sex offenders find new opportunities and easier means to travel abroad for underage sex

Sex tourism targeting children creates huge monetary incentives for traffickers. Human trafficking impacts an estimated 1.2 million child victims. The United Nations Office of Drugs and Crimes (UNODC) recently stated that 79% of all global trafficking is for sexual exploitation, which is one of the fastest growing criminal activities in the world6.

International Conventions on Child Sex Tourism

International conventions and various working groups focused on child sexual exploitation and child sex tourism offer a slight glimmer of hope in the campaign to end CSEC. The first and most comprehensive international effort to focus on the protection and rights of children is the 1989 United Nations Convention on the Rights of the Child (CRC). Ratified by all but two of the world's countries, the CRC is the most widely adopted treaty in history. Notably, the CRC includes several Articles pertaining specifically to the sexual exploitation of children.

i)The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography is a protocol to the Convention on the Rights of the Child and requires states to prohibit the sale of children, child prostitution and child pornography.
The Protocol was adopted by the United Nations General Assembly in 2000 and entered into force on 18 January 2002. As of August 2011, 145 states are party to the protocol and another 22 states have signed but not ratified it.

Article 1 of the protocol declares that states must protect the rights and interests of child victims of trafficking, child prostitution and child pornography, child labour and especially the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography to the Convention on the Rights of the Child states that child prostitution is the practice whereby a child sells his or her body for sexual activities in return for remuneration or any other form of consideration. The remuneration or other consideration could be provided to the prostitute or to another person. The 131 countries who are parties to the Optional Protocol (at May 2009) undertake to prohibit child prostitution.

The Worst Forms of Child Labour Convention, 1999 (Convention No 182) of the International Labour Organization (ILO) provides that the "use, procuring or offering of a child for prostitution" is one of the "worst forms of child labor." This convention, adopted in 1999, provides that countries that had ratified it must eliminate the practice urgently. It enjoys the fastest pace of ratifications in the ILO's history since 1919.7

ii) Conventional on Elimination of all forms of Discrimination Against Women (CEDAW) –
This convention also applicable to girls under 18 yrs of age.

iii) SAARC - *Convention on prevention and combating trafficking in women and children for prostitution.* – emphasis that the evil of trafficking in women and children for the purpose of prostitution is incompatible with the dignity and honour of human being and is violation of the basic human rights of women and children.

Since 1989, additional international, regional, and national legal instruments and monitoring mechanisms have been adopted. UNICEF notes that sexual activity is often seen as a private matter, making communities reluctant to act and intervene in cases of sexual exploitation. these attitudes make children far more vulnerable to sexual exploitation. Most exploitation of children takes place as a result of their absorption into the adult sex trade where they are exploited by local people and sex tourists. The Internet provides an efficient global networking tool for individuals to share information on destinations and procurement.

Provisions under the Constitution of India
Article 14 –"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
Article 15 (3) - Nothing in this article shall prevent the State from making any special provision for women and children.
Article 19 (1)- All citizens shall have the right— (*a*) to freedom of speech and expression
Article 21. -No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 21A - The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.
Article 23 (1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law8.

Law and Child Prostitution
The Immoral Traffic (Prevention) Act Under the amended act detention of a woman for purposes of prostitution is punishable with a minimum of seven years of imprisonment and maximum of life imprisonment Equally Stringent punishment will be awarded to those procuring children for prostitution. Earlier, the act was known as suppression of Immoral Traffic in Women and Girls Act (SITA). The name of the act has been changed and it has been made more effective and stringent. The definition of prostitute itself has been changed to include persons of both sexes. Earlier it included girls and women only. The amendment takes into account the growing menace of male prostitution especially that involving young boys[9.]
Under the new act there are three categories of victims-children, minors and majors. The children are those up to 16 years and minors are those between 16 to 18yrs and majors are those above 18 yrs. The earlier act recognized only women and girls - a women being one who has completed 21 years. Punishment for offences committed against these categories differs in severity Offences Committed against children and minors will be dealt with more severely than those against majors.

While the practice of child sex tourism can erode the economic, social, and moral integrity of a nation, the greatest victims are, of course, the defenceless children: their voices unheard, their stories untold, their plight implacable, and their innocence stolen. They must endure the immediate and long-term emotional, psychological, and physical impact of sexual exploitation. To make matters even worse, in countries with limited educational opportunities, people are ill-informed of the health risks and the severe long-term psychological harm that is inflicted on children who are sexually exploited.

Many countries have also developed national plans of action or strengthened existing laws against CSEC. Responding to mounting pressure from child welfare agencies and human rights groups, the United States under the Bush administration passed the PROTECT Act in April 2003 and affirmed its commitment to ending the sexual exploitation of children. The act established stricter laws that make it illegal for U.S. citizens and residents to travel to another country to have sex with a minor (or conspire to do so). Prior to April 2003, U.S. prosecutors had to prove that the accused travelled abroad with the *intent* to have sex with a minor.[10]

Conclusion
There are many more peats waiting in the wings to feed off the bodies and lives of our greatest national treasure, our very own children. Unless we strike at the root of the problem and ensure full gainful employment for the adults and state responsibility for the development and care of children, they will continue to the sacrificed at the altar of greed and perversion, providing anything that the market god fancies. The child sexual abuse not only has a damaging and long term impact on victim but also affects the families, communities and society. Victims suffer severe trauma or damage which can be emotional, physical and mental. Psychological problem may last a lifetime if the process

of healing does not take place. A majority of sexual offences committed against children are not even reported, let alone prosecuted. If any individual is brought to trial, convention is unlikely as cases are very difficult to prove.

"What we need is change of mindset to protect the weak and vulnerable amongst us, nurture the next generation with genuine love and sacrifice".

Suggestions

- India has to enact a new code for child rights to go by the United Nation convention on the rights of child of which India is a signatory.
- Schools should be encouraged to institutionalize "Personal Safety Education"
- Awareness should be created among the people for protecting our ever biggest assets, that is, children from being abused.
- Judicial should play an important role to curb the menace of child sexual abuse.
- Stringent laws should be enacted to completely curb child abuse and sex tourism in the country which will prevent the child trafficking indisputably.

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Child Labour: The Killing of Innocence

Dr. Kavita Lalchandani*

The children are the national assets and Child Labour is a burning issue of global concern. The prospect of the nation is dependent on the children but due to certain adverse circumstances the children are put to labour in their childhood. The root cause of child labour is poverty and being poor the working children get deprived of their fundamental rights. They do not get proper education, health care and basic needs of the life and they become an easy prey for social, economical, emotional, psychological, physical and sexual exploitation.

Child labour is continued from times immemorial and it is mostly prevalent in developing countries. The development of children is a great challenge for any nation as it encompasses caring, protection and addressing all concerns of the children.
The term child labour is defined as "any work by children that interfere with them in their full physical development, the opportunities for a desirable minimum of education and of their needed recreation."[1]

The children aged between 4 to 14 years doing work on family farms or in an occupation without wages or in factories, farms, outside home for wages constitute child labour. The phenomenon of child labour which is a consequence of the exploitative system operating at the national and international levels not only closes the future of millions of children in the third world countries, but it also restricts the development prospects of these countries drastically. The existence of child labour is a threat to overall world development, to the solidarity and peace in the world. The problem of child labour is the symptom of the disease which is widespread due to exploitative structure, lopsided development, iniquitous resource ownership with its correlate of large scale unemployment and abject poverty amongst the countries. The existing international economic order perpetuates this harsh reality because powerful multinational corporations operate and use child labour directly or indirectly, to maximize profit and minimize cost.[2]

Indian Laws concerning Child Labour:
There is a need for proper implementation of laws to prohibit and regulate the working conditions of the children in most of the employments where they are not prohibited from working and are working under exploitative conditions. In India there are number of laws having such an object and some of these are mentioned hereunder:

Child Labour (Prohibition & Regulation) Act, 1986:
Section 7 of the above Act prescribes the working conditions as:

1. No child shall be required or permitted to work in any establishments in excess of such number of hours as may be prescribed for such establishments.

**** The Author is Principal, G.J.Advani Law College, Bandra, Mumbai and Member of Board of Studies, University of Mumbai.***

2. The period of work on each day shall be so fixed that no period shall exceed three hours and that no child shall work for more than three hours before he has had an interval for rest for at least one hour.
3. The period of work of a child shall be so arranged that inclusive of his interval of rest it shall not be spread over more than six hours including the time spent in waiting for work on any day.
4. No child shall be permitted to work between 7 pm and 8 am.
5. No child shall be required or permitted to work overtime.

No child shall be required or permitted to work in any establishments on any day on which he has already be working in another establishment.[3]

Factories Act, 1948:
The said Act has introduced the changes in the minimum age for the admission of children. The age of children in to the employment has been raised from 12 to 14 years and minimum permissible daily hours of work were reduced from five hours to four and half hours. The Chapter VII of the Act deals with the prohibition of the employment of young children. The child who has not completed the age of 14 years cannot be permitted to work in any factory.[4] The working hours for children should not be more than four and half hours in any day and child is prohibited to work during night. The period of work of all children employed in all factories shall be limited to two shifts which shall not overlap or spread over more than five hours.[5]

No child shall be required or allowed to work in any factory on any day on which he has already been working in another factory. No female child shall be required or allowed to work in any factory except between 8 am and 7 pm.[6]

Beedi and Cigar Workers (Conditions of Employment) Act, 1966:
Section 24 of the said Act says that no child shall be required or allowed to work in any industrial premises. Child means a person who has not completed 14 years of age.[7] No young person shall be required or allowed to work in any industrial premises except between 6 am and 7 pm.

Mines Act, 1952:
The Part VI of the said Act prescribes in Section 40 that no person below the age of 18 years shall be allowed to work in any mine or part thereof.[8] Any apprentices or any trainees not below the age of 16 years may be allowed to work, under proper supervision, in a mine or part thereof by the manager provided in case of trainees, other than apprentices, prior approval of Chief Inspector or Inspector shall be obtained before allowing them to work.

Motor Transport Workers Act, 1961:
A Child means a person who has not completed his 14 years.[9] No adolescent shall be employed or required to work as a motor transport worker in any motor transport undertaking for more than six hours a day including half an hour rest interval in a day and he shall not be employed to work between the hours of 10 pm and 6 am.[10] The adolescent shall be required or allowed to work only if a certificate of fitness is granted.[11] Further this Act prohibits the employment of children in any capacity in any motor transport undertaking.[12]

Plantations Labour Act, 1951:
A Child means a person who has not completed his 14 years.[13] Except with permission of the State Government no woman or a child worker shall be employed in any plantation otherwise than between 6 am and 7 pm.[14] No child or adolescent shall be required or allowed to work in any plantation unless a certificate of fitness granted[15].

The Right of Children to Free and Compulsory Education (RTE) Act, 2009:
This Act represents the consequential legislation envisaged under Article 21-A, means that every child has a right to full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards.

The RTE Act provides for the:
(i) Right of children to free and compulsory education till completion of elementary education in a neighbourhood school.
(ii) 'Free' means that no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education.16
It clarifies that 'compulsory education' means obligation of the appropriate government to provide free elementary education and ensure compulsory admission, attendance and completion of elementary education to every child in the six to fourteen age groups.

Constitutional Provisions regarding Child Labour:
Several Articles of Indian Constitution provide protection to child labour. Some of the provisions are described herein below:

No child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment.[17]

Article 15 (3) empowers the State to make the special provisions relating to child, which will not be violative of right to equality.

Article 21 provides that no person shall be deprived of his life or personal liberty, except according to procedure established by law which includes life free from exploitation and to live a dignified life.

Further the, State shall provide free and compulsory education to all children of the age of six to fourteen years, in such manner as the State may, by law, determine. Where children are allowed to work, in such establishment, it is the duty of employer to make provisions for the education of child labourer.[18]

Article 23 prohibits traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this prohibition shall be an offence punishable in accordance with law.

Article 39 (e) the State shall, in particular, direct its policy towards securing the health and strength of the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.
Article 39 (f) imposes duty upon State that the State shall, in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a

healthy manner and in conditions of freedom and dignity; and that childhood and youth are protected against exploitation and against moral and material abandonment.
Article 45 the State shall Endeavour to provide early childhood care and education for all children until they complete the age of six years.

Article 51A (e) it shall be the duty of every citizen of India, who is a parent or guardian to provide opportunities for education to his child or ward as the case may be, between the age of six and fourteen years.

Judicial Approach to the problem:
The role of judiciary in India through judicial pronouncements has been unequivocal throughout in promoting the child welfare. Hon'ble Mr Justice Subba Rao, the former Chief Justice of India, rightly remarked "Social Justice must begin with child unless tender plant is properly nourished; it has little chance of growing into strong and useful tree. So, first priority in the scale of social justice should be given to the welfare of children".

In *People Union for Democratic Right* v. *Union of India*[19], in this case the Supreme Court considered the meaning and scope of the phrase "hazardous employment". The Supreme Court held that Construction work is clearly a hazardous occupation and it is absolutely essential that the employment of children under the age of 14 years must be prohibited in every type of construction work. This is a constitutional prohibition which, even not followed up by appropriate legislation, must operate proprio vigore.

The judiciary has almost brought a revolution in the life of child workers in India. It has always remembered to expand and develop the law so as to respond to the hope and aspirations of people who are looking to the judiciary to give life and content to law. Judiciary has virtually played a vital role in the task of providing political, social and economic justice to the poor child workers in this country. The judiciary has taken a stand when there is no proper enactment for the welfare of the Child Labour and goes extent to look out the problems of them and some of these case are there in which judiciary considers as poverty is the reason for the exploitation of children and other economic factor and in this situation we can left the child in the condition of lurch and they have judgment which gives us good lesson to the society for the welfare of the children.

In *Labourers Working on Salal Hydro –project* v *state of Jammu and Kashmir* [20] - Justice Bhagwati observed that construction work is a hazardous employment and therefore under Article 24 of the Constitution, no child below the age of 14 years can be employed in construction works by reason of the prohibition, enacted in Article 24 and this constitutional prohibition must be enforced by the Central Government.

In this case the Supreme Court agreed that child labour is a difficult problem and it is purely on account of economic reasons that parents often want their children to be employed to augment their meager earnings. And child labour is an economic problem, which cannot be solved by mere legislation. Because of poverty and destitution in this country it will be difficult to eradicate child labour, so attempts should be made to reduce if not to eliminate child labour because it is essential that a child should be able to receive proper education with a view to equipping itself to become a useful member of the society and to play a constructive role in the socio-economic development in the country.

They must concede that having regarded to the prevailing socio-economic conditions it is not possible to prohibit the child labour altogether and in fact any such move may not be socially or economically acceptable to large masses of people. That is why Article 24 limits the prohibition against employment of child labour only to factories, mines or other hazardous employments clearly construction work is a hazardous employment.

The Supreme Court also suggested that whenever the Central Government undertakes a construction project which is likely to last for sometime, the Central Government should provide that children of construction, workers which are living it or near the project site should be give facilities for schooling because it is absolutely essential that a child should be able to receive proper education with a view to equipping itself to become a useful member of the society and to play a constructive role in the socio-economic development of the country. We must concede that having regard to the prevailing socio-economic conditions, it is not possible to prohibit child labour altogether and in fact; any such move may not be socially or economically acceptable to large masses of people.
In *Lakshmi Kant Pandey* v *Union of India*[21], it is obvious that in a civilized society, the importance of child welfare cannot be over emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children.

The abolition of the child labour is preceded by the introduction of compulsory education; compulsory education and child labour are interlinked. *In M.C. Mehta* v. *State of Tamil Nadu*[22] the Supreme Court observed that working conditions in the match factories are such that they involve health hazards in normal course and apart from the special risk involved in the process of manufacturing, the adverse effect is a serious problem. Exposure of tender age to these hazards requires special attention. We are of the view that employment of children with match factories directly connected with the manufacturing process uplift of final production of match sticks or fireworks should not at all be permitted as Article 39(f) prohibits it.

The Court further observed that the spirit of the constitution perhaps is that children should not be employed in factories as childhood is the formative period and in terms of Article 45 they are meant to be subjected to free and compulsory education, until they complete the age of 14 years. Children can, therefore, be employed in the process of packing but packing should be done in an area away from the place of manufacture to avoid exposure to accident.

In Mohini *Jain* v. *State of Karnataka*[23] Kuldip Singh J. had held that the right to education was part of the fundamental right to life and personal liberty guaranteed by Article 21. In *Unni Krishnan* v. *State of Andhra Pradesh*[24] in this case Jeevan Reddi J, speaking on behalf of Pandian J. and himself, agreed with the dicta of Mohini Jain that the right to education flowed directly from the right to life guaranteed by article 21 of the Constitution.
The court, therefore, declared that "a child (citizen) has a fundamental right to free education up to the age of 14 years." Beyond 14 years, the right to education was subject to the limits of the economic capacity of the state. The judge concede that "the limits of economic satisfaction of the State."

In *Bandhua Mukti Morcha* v. *Union of India*[25] a writ petition Under Article 32 has been filed by way of Public Interest Litigation seeking issue of a writ of mandamus directing the government to take steps to stop employment of children in carpet industry in the State of Uttar Pradesh. The Apex court observed that child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him.

The Apex Court gave direction to the Union of India and State Government, their departments and Authorities keeping in view of the abolition of child labour. In *Brown* v. *Board of Education*[26]it was held *that* today education is perhaps the most important function of the state and local governments. It is required in the performance of our most basic responsibilities, ever service in the armed forces. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment. In these days, it is doubtful any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

In *R.D Upadhay* v. *State of Andhra Pradesh*[27], the Apex Court observed that Article 45 of our Constitution stipulates that the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years. In this case the Apex Court also laid down a guidelines for the education and recreation for children of female prisoners like (a) the child of female prisoners living in the jails shall be given proper education and recreational opportunities and while their mother are at work in crèches, under the charge of a matron / female warder. This facility will also be extended to children of warders and other female prison staff.

Conclusion:

Though there is no dearth of enactments and shortness of judicial activism to protect the rights of working children but still the child labour is prevalent in corners of the world. Due to poverty the children are still exploited and thereby creating social imbalance. We must pledge ourselves to prevent all forms of child labour that are not only hazardous, detrimental to children but also restricting the growth of any nation. It is our duty and particularly that of each and every business houses to stop putting child into labour and on the contrary we should identify the areas of concern which if heeded can support the children for their development and growth. The agencies working towards regulation and eradication of child labour should be promoted, strengthened and given government incentives as the future of nation rests in the hands of its children so let the schemes of improvement of economic and social conditions be looked in to with more seriousness and vigour to enable child to grow to the fullest.

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Changing Dimensions of Justice and Human Rights in the Era of Globalization

Prem Kumar Gautam*

"We have a right to the means that are necessary to the development of our lives in the direction of the highest good of the community of which we are a part."…….. (Bernard Bosanquet)

Globalization is a highly challenging concept in terms of its connotation, forms and implications as the literature on globalization is large and diffuse[1]. There is an important difference between internationalization, universalization and globalization. Internationalization is about nations working together for the same goals. These are things like treaties, alliances, and other international agreements. Universalization means common agenda for peace development and economic development. Globalization is about making national borders less important for those who want to buy or sell things around the world[2]. Today globalization has now become an all person catch word.

The concept of globalization interrelate multiple levels of analysis: like economics, politics and ideology[3]. A multi- dimensional approach to globalization has to take economic, technological, political, social, cultural and environmental aspects into consideration. To create or cultivate a culture of law, a broad spectrum of society needs to be involved. The government may have a lead role in providing a lawful environment for the citizenry ,civic,religious,educational, media , business ,labor, cultural and social organizations at all levels of society have important roles to play[4]. There are some global institutions and authority who can effectively promote culture of rule of law with justice while protecting the human rights of individual.

Like educational institutions ranging from primary and secondary level schools to law schools, political science departments, professional organizations and law and justice departments and centers or training academies can teach and deliver positive message about justice and the rule of law to both the next generation and those responsible for making the legal system work in this generation[5].
Here we can see the role of justice in protection of human rights and development of humanity .There are different types of justices and different kinds of human rights some of them are mentioned here.

Justice
We can divide justice in many forms but here I am dividing it in two forms *Philosophical* and *Legal. Philosophical*-Justice is a virtue by which it is ensured that each person in a society will get what he really deserves to get. *Legal*-Justice means fair and proper administration of laws. Apart from these two justice there a few other justice namely-

- Commutative Justice- it is about giving someone what he or she deserves or has a right to.
- Condign Justice- specify justice based on the kind and degree of punishment that is

**** Assistant Professor, Dr. Ram Manohar Lohiya National Law University, Lucknow.***

- appropriate for a given offence.
- Distributive Justice- specifies how things such as rights, goods and well-being should be distributed among a class of people.
- Economic Justice- the aim of economic justice is to strengthen the livelihoods of poor and marginal groups in rural and urban India.
- Natural Justice- is for the rule against bias and the right to a fair hearing.
- Personal Justice - means justice that happens between parties to a dispute, regardless of their moral values.
- Positive Justice- It means justice as it is judged, established and incompletely expressed by the civil law or some other form of human law.
- Political Justice –means participation in government and parliament.
- Preventive Justice- is intended to protect against probable future misbehavior.
- Popular Justice- means justice should be based on popular opinion. It is called domestic justice
- Reformative justice- focuses on the needs of the victims and the offenders, as well as the involved community, instead of satisfying abstract legal principles or punishing the offender.
- Substantive Justice- is based on the rules of substantive law.
- Social Justice- is based on the principle that all people are equal.

Political movements have frequently been grounded on claims of rights and justice, arguing that the status quo has failed to protect the natural rights including human rights of certain individuals or groups and that the status quo is therefore unjust. From the revolution through the abolition of slavery, women's suffrage, the civil-rights movements, women's liberation, the gay rights movements and many more, political debate has been characterize by claims for social change in terms of individual rights and justice.

The liberal concept of justice is that a person should not be disadvantaged or punished except for fault (intentional, reckless or negligent wrong doing, strict liability applying in exceptional circumstances). The idea of fault is the golden thread that runs through the fabric of the legal order.

Human Rights

Human rights are inalienable rights which all persons everywhere, at all times must have. Human rights are essential to live as human beings, it is a basic standard without which people cannot survive and develop their personality and protect their dignity. They are inherent to the human person, inalienable and universal. All human beings are born with equal and inalienable rights and fundamental freedoms. As rightly pointed out here-
"*the protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international*". (Lauterpatch, 1975, 74)

Human rights can be adequately conceptualized as absolute, non-conflicting rights that are logically co-possible and feasible in all circumstances-and that resource constraints consequently constitute a 'theoretical obstacle' to the conceptualization of human rights. Human rights enumerated in the universal declaration of human rights for the physical survival and integrity of the person include both civil , political economic , social and

cultural rights and that no categorical distinction is made between civil and political rights and economic , social and cultural rights. Kinds of Human Rights- The term "Human Rights" is all comprehensive − it includes-:

Civil-political Rights

Economic, Social and Cultural Rights Natural Rights implies that nature has endowed human beings certain inalienable or natural rights like right to life, liberty and property. The term "Fundamental Rights", which we find in the Indian constitution, refers to certain basic Rights. Socio-economic rights are not made fundamental in it. Legal Rights-refers to rights laid down in law Moral Rights-refer to rights based on general principles of fairness and justice.

In an era of globalization, basic institutional structures that shape our daily interactions transcend national boundaries. According to the institutional approach to social justice favored by John Rawls, we have a special obligation to ensure that the basic terms of these interactions are just[6].

The concept of globalization interrelate multiple levels of analysis: like economics, politics and ideology. Globalization is the free movement of goods, services and people across the world in a seamless and integrated manner. The key ideas by which we understand the transition of human society turning into a global village are free flows of information, capital, goods and services. It is an accelerator of social change and as such may act as a catalyst for conflict, aggravating the tension in any given society and even creating new ones for the sustainable development and rule of law. A multi- dimensional approach to globalization has to take economic, technological, political, social, cultural and environmental aspects into consideration[7].

The phenomenon of increased interconnectedness of the world's societies, generally referred to as `globalization', is not only changing our everyday life, it also influences the legal framework we are living in[8]. If we are talking about the economic stability then trade barriers place limits upon the freedom to engage in mutually beneficial exchange, and they are predicated upon the mistaken belief that people are unable to judge what is best for themselves and their families. When the judgment of politicians and a politicized process are elevated over the judgment of individuals, governments prevent people from making decisions that are in their own best interests. Diminished opportunities and increased prices are the result of limited choice.

Electronic information technology such as computers and internet is playing a key role in promoting globalization. As a government official, NGO activist, university teacher or private consultant – the success of his / her intervention will be achieved by his/her capability to *think globally and act locally*.

No nation can secure and sustain a culture of rule of law without constant vigilance. Protecting the rights of an individual, culture and rule of law must be developed and maintained by the justice delivery system. Rule of law must be nurtured and constantly evaluated as circumstances change. If human rights laws are not based on international human rights standards, human rights may not be respected in practice and justice in the broadest sense may be absent and in the worst case a culture of impunity and violence may exist.

The presence of rule of law or culture of rule of law does not mean that every individual in that society believes in the feasibility or even the desirability of the rule of law. Rather, it means that the average person believes that legal norms are a fundamental part of justice or can be used to attain justice and that the systems employing those norms can enhance the quality of life of individuals and of society as a whole. Discriminatory or arbitrarily enforced laws deprive people of their individual and property rights, raise barriers to justice and keep the poor poor. For this reason there is a need of an effective judiciary[9].

A sensitive government trying to improve the standards of living of the members of its society by creating and making available the basic amenities of life, providing its people security and the opportunity to better their life, a hope in their heart for a promising future, providing equal and equitable basis access to opportunity for personnel growth, capacity to influence in the decision making in public affairs. Sustaining a responsive judicial system which dispenses justice on merits in a fair, unbiased and meaningful manner.

Conclusion

On the issue of human rights and justice in the era of globalization the world at large and India in particular, on the same level, face daunting challenges in the task of protecting human rights of common people regardless of the country they belong to. India opted globalization in economic system and social activities including legal and judicial activities.

The problem of past human rights and abuses needs to be resolved so that a new foundation can build, where people will be free from the fear of similar violations in the future. At the same time it is important to look forward to build a new era of prosperity and dignity in which everyone regardless of the country they belong to allowed living a decent and human life.

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New Dimensions of Right to Education under National Perspective

Ausaf Ahmad Malik[1]

"Literacy is a bridge from misery to hope. It is tool for daily life in modern society. It is a bulwark against poverty, and a building block of development, an essential complement to investments in roads, dams, clinics and factories. Literacy is a platform for democratization, and a vehicle for the promotion of cultural and national identity. Especially for girls and women, it is an agent of family health and nutrition. For everyone, everywhere, literacy is, along with education in general, a basic human right…Literacy is, finally, the road to human progress and the means through which every man, women and child can realize his or her full potential."…….. Kofi Annan

Introduction

Education is the special manifestations of man, and secures honour at the hands of the state. It provides the skills to individuals to become more self-reliant and aware of opportunities and rights. It also enhances the ability of individuals to manage health problems, improve nutrition and childcare, and plan for the future. Education in India falls under the control of both the Union Government and the States, with some responsibilities lying with the Union and the States having autonomy for others.[1] The importance of education has been stated and reiterated by many renowned scholars in various texts, reports, etc. education for all human being is a necessity of life, a social function, a direction and growth. It trains the human mind to think and take the right decision. In other words, man becomes a rational animal when he is educated. Swami Vivekananda once said that education is the manifestation of perfection already in man.[2] Education has its functionalism in almost all sphere of life. An educated society prepares the present generation for a bright future and enables the individual to galvanize the capacity of collective. "Education is most powerful weapon which you can to change the world."[3] Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth.[4] It is essential for eradicating poverty and it allows people to be more productive playing greater roles in economic life and earning a better living. In fact, it has been observed "*Vidya Vihinaha Pashuhu*" i.e., a person without education is no better than an animal. The importance of education has been strongly emphasized by great scholars in all languages. A person without education is compared to a man without eye sight.[5]

Almost two centuries ago, the State has been making some Endeavour to provide free and compulsory education since 1813 in one form or the other. Clause 43 of the Charter Act of 1813 made education a State responsibility. The Hunter Commission (1882-83) was the first to recommend universal education in India. Thereafter, the Patel Bill, 1917 was the first compulsory education legislation. It proposed to make education compulsory

[1] ***Research Scholar, Department of Law Jamia Millia Islamia University, New Delhi.***

from ages 6 to 11. The Government of India Act, 1935 provided that "education should be made free and compulsory for both boys and girl." Free and compulsory education got a further boost when the Zakir Hussain Commission recommended that the State should provide it. The 1944 Sargent Report strongly recommended free and compulsory education for children aged six to fourteen.

Right to Education under International Perspective:
In modern times, the Universal Declaration of Human Rights, 1948 proclaimed that everyone has the right to education; it must be free and compulsory at least in the elementary and fundamental stages, in order to ensure that full development of the human personality.[6] Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights, 1966[7] recognise the importance of fastening state parties with obligation to impart free and compulsory primary education to one and all.

Right to Education under the Constitution of India:
The basic principles on which education policy in India should be formulated are to be found in Part III on Fundamental Rights, Part IV containing in the Directive Principles of State Policy and also Part IV-A containing Fundamental Duties.
Article 41 deals that Right to work, to education and to public assistance in certain cases:-
"*The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.*"
Article 45 of the constitutional law of India before the 86th Amendment directed that:-
"*The state shall Endeavour to provide, within a period of ten years from the commencement of the Constitution to free and compulsory education for all children until they complete the age of 14 years*."
Article 45 was repealed and substituted by the Constitution (Eighty-sixth Amendment) Act, 2002 to provide:-
"*The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years*."

In ***Francis Coralie* v. *Union Territory Delhi,***[8] explaining the scope of *Right to Life* enshrined in Article 21, the Court observed:
The right to life includes the right to life with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse form, freely moving about and mixing and commingling with fellow human beings.

The Supreme Court in ***Bandhua Mukti Morcha* v. *Union of India,***[9] while interpreting the scope of the right to life under Article 21, held that it included *educational facilities.* The Supreme Court explained why education should be compulsory. A free educated citizen could meaningfully exercise his political rights, discharge social responsibilities satisfactorily and develop a spirit of tolerance and reform.

In a landmark judgment in ***Mohini Jain* v. *State of Karnataka***,[10] popularly known as the "*Capitation Fee case*" the Supreme Court has held that the right to education is a fundamental right under Article 21 of the Constitution which cannot be denied to a citizen by charging higher fee known as the capitation fee. The right to education flows

directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The two judge Division Bench consisting of Justice *Kuldip Singh* and *R.N. Sahai*, held that the right to education at all level is a fundamental right of citizen under Article 21 of the Constitution and charging capitation fee for admission to educational institutions is illegal and amounted to denial of citizen's right to education and also violative of Article 14 being arbitrary, unfair and unjust.

In ***Unni Krishnan* v. *State of A.P.***,[11] the Supreme Court was asked to examine the correctness of the decision given by the Court in Mohini Jain's case. The five Judge bench by 3-2 majority partly agreed with the Mohini Jain decision and held that right to education is a fundamental right under Article 21 of the Constitution as it directly flows from right to life. But as regards its content the Court partly overruled the Mohini Jain's case and held that the right to free education is available only to children until they complete the age of 14 years, but after that the obligation of the State to provide education is subject to the limits of its economic capacity and development.

In ***TMA Pai Foundation* v. *State of Karnataka***,[12] an 11 judge Constitution Bench of the Supreme Court has overruled the *Unni Krishnan* decision partly. The court held that the scheme relating to admission and the fixing of fee were not correct and, to that extent, they are overruled.
The Court by majority held that state government and universities cannot regulate the admission policy of unaided educational institutions run by linguistic and religious minorities. However, they can prescribe academic qualifications for teachers and other staff and make some rules, regulations to maintain academic standards.

New Dimension of right to education
It was the impact of judicial pronouncements that the constitution 83rd Amendment Bill 1997 was introduced in the parliament to insert a new Article, namely Art. 21A, conferring all the children in the age group of 6 to 14 years to right to free and compulsory education. The parliamentary standing committee and Human Resources Development scrutinized the said Bill and the same subject was also dealt with its 165th report by the law commission of India.[13] Finally by the constitution (Eighty-Sixth Amendment) Act 2002, Part III, Part IV and Part IV-A of the Indian Constitution were amended. The Amendment Act dealt with insertion of a new article 21A[14] deals with Right to Education. Article 51A of the Constitution was also amended and a new clause (k)[15] was added, which casts a duty on every parent or guardian. The main objective behind the amendment was to achieve the goal enshrined in the original Art 45 (DPSP), of the Indian Constitution.

To ensure proper implementation of the provisions of the 86th Amendment, 2002, in terms of not just the funds spent but the content of the implementation, Dr. Joshi said that a monitoring system would be put in place. It is hoped that the measure adopted would herald the nation's march to cent per cent literacy.

In the case of ***Superstar Education Society* v. *State of Maharashtra,***[16] the Supreme Court observed that it was the duty of the state government to provide access to education. Unless new schools in the private section are permitted it will not the possible for the state to discharge its constitutional obligation. In ***Ng. Komon* v. *State of***

Manipur,[17] The Supreme Court held that shifting of school to another village would deprive school going children.

India is a multi-religious society and majority of its citizens are believers in one or the other religious faith. Principle of secularism accepted by the Constitution keeping in view India's mixed social fabric, diverse religious traditions, has been understood as a positive concept encouraging understanding and respect amongst citizens of each other's religion. In ***Aruna Roy* v. *Union of India***[18] the question that arose before the Supreme Court was weather study of religions can be introduced in the national curriculum, it was held that education should not be for the purpose of making a child merely literate and intelligent. Real education is one in which a child gradually realizes that he is made up not only of body and mind but also some inner elemental qualities….(para 89)

In ***Avinash Mehrotra* v. *Union of India***[19] this case the Court examined the Constitutional provisions which create an obligation on the State to make right to qualitative education accessible to all children and corresponding duty on parent/guardians of children to provide them education. The Court further examined the scope of right to education as the constitutionally guaranteed constitutional basic human right. Elaborating the nature and content of the right to education guaranteed by article 21-A and the corresponding fundamental duty cast on every parent/guardian by Article 51-A. (Para 28)
We have traced the broad scope of this right in ***R.D. Upadhyay* v. *State of A.P.***[20] holding that the State must provide education to all children in all places, even in prisons, to the children of prisoners. We have also affirmed the inviolability of the right to education. (Para 30)

Unlike other fundamental rights, the right to education places a burden not only on the State, but also on the parent or guardian of every child, and on the child herself. (Para 33)
In ***State of Orissa and Others* v. *Mamata Mohanty***[21] the court held that education is the systematic instruction, schooling or training given to the young persons in preparation for the work of life. Education connotes the processes of training and developing the knowledge, skill, mind and character of students by formal schooling. The excellence of instruction provided by an educational institution mainly depends directly on the excellence of the teaching staff. Therefore, unless they themselves possess a good academic record/minimum qualification prescribed as eligibility, standard of education cannot be maintained/enhanced. (Para 29).

The Right of Children to Free and Compulsory Education Act, 2009:
In order to give teeth to Article 21A of the constitution, The Right of Children to Free and Compulsory Education Bill, 2009 was introduced, with an objective to universalize elementary education.[22] The Bill received Presidential assent on 26th August 2009.
The Right of children to Free and Compulsory Education Act came into force from April 1, 2010. This is a historic day for the people of India as from this day the right to education will be accorded the same legal status as the right to life as provided by Article 21A of the Indian Constitution. The Act secures for every child of the age of six to fourteen years a right to free and compulsory education in a neighbourhood school till completion of 'elementary education' without imposing any kind of fee or charges or expenses, which may prevent him or her from pursuing the elementary educations.[23] Children with disabilities have also been conferred this right.[24] A child above six years of age who is not enrolled in school or was unable to complete his/her education shall have

the right to be enrolled in a class appropriate to his/her age.[25] These children have a right to receive special training, in such manner, and within such time-limits, as may be prescribed in order to reach their peer group level. Elementary education shall be free until completion, even if the child is older than 14 years. To strengthen the right to education, the Act prohibits schools from charging a capitation fee or using a screening process for admissions. Both offences are punishable with a fine;[26] the prosecution, however, requires the sanction of an officer authorized by the appropriate government. It further provides that no child shall be held back, expelled, or required to pass a board examination until the completion of elementary education[27] and no child shall be subjected to physical punishment or mental harassment.[28]

The Act makes it mandatory for all schools, except minority unaided (religious and linguistic minorities included), to reserve 25 per cent of seats for children from the disadvantaged sections, the burden of which will be borne by the government. All schools will have to prescribe to norms and standards laid out in the Act and no school that does not fulfill these standards within 3 years will be allowed to function. All private schools will have to apply for recognition, failing which they will be penalized to the tune of Rs 1 lakh and if they still continue to function will be liable to pay Rs 10,000 per day as fine. Norms and standards of teacher qualification and training are also being laid down by an Academic Authority. Teachers in all schools will have to subscribe to these norms within 5 years.

Section 12 of the Act seeking compulsive cooperation of private school, aided or unaided by the Government, for providing at least 25% of the strength of class I to the children belonging to weaker sections and disadvantage group, which as defined includes children belonging to Scheduled Cast, Scheduled Tribes and other Backward Class and other groups specified by the appropriate Government, is a provision which in a way interferes with the fundamental right of "speech and expression" guaranteed by art. 19 (1) (a), and rights of citizens belonging to religious majority and minority communities under articles 28 (2), 29 (1) and 30 (1) of the constitution.

The RTE Act, 2009, providing for compulsory admission to 25% of its total strength in every minority educational institution functioning in the neighbourhood would be in violation of clause (5) of Article 15, as introduced by the constitution (Ninety-third Amendment) Act, 2005. Surprisingly, the provisions of the Act do not expressly exempt educational institutions of minorities from being compelled to admit 25% of their strength in class 1 to members of weaker sections and disadvantaged group.
All schools government or private (aided or unaided) are required to share the responsibility of imparting free and compulsory education. While government schools shall provide free and compulsory education to all admitted children Sec.12 (1) (a), aided schools shall provide free and compulsory education proportionate to the funding received, subject to a minimum of 25% [clause 12 (l) (b). *Kendriya Vidyalayas, Navodaya Vidyalayas, Sainik Schools*, and unaided schools are required to admit at least 25% of the students from disadvantaged[29] and weaker groups[30] [Sec. 12 (l) (c). The unaided schools shall be reimbursed for either their tuition charge or the per-student expenditure in government schools; whichever is lower (Sec. 12 (2). Both the Central Government and the State Government have been vested with concurrent responsibility for providing funds for implementation of the provisions (Sec. 7).

The Constitutional validity of RTE Act, was challenged in ***Society for Un-aided Pvt. School Rajasthan* v. *Union of India,***[31] the Supreme Court upheld that the Right to Education Act, would not apply to unaided minority schools.

The majority judgment by Chief Justice **S.H. Kapadia** and Justice **Swatanter Kumar** said:

"Reservation of 25 per cent in such unaided minority schools will result in changing the character of the schools if the right to establish and administer such schools flows from the right to conserve the language, script or culture, which right is conferred on such unaided minority schools. Thus, the 2009 Act including Section 12(1) (c) violates the right conferred on such unaided minority schools under Article 30(1)."

While upholding the Act in respect of others, the Bench observed:

"The Act has been enacted keeping in mind the crucial role of Universal Elementary Education for strengthening the social fabric of democracy through provision of equal opportunities to all. There is a power in the 2009 Act coupled with the duty of the state to ensure that only such government funded schools, which fulfil the norms and standards, are allowed to continue with the object of providing free and compulsory education to the children in the neighborhood school."

A Dissenting judgment

Justice **K.S. Radhakrishnan** in his dissenting judgment said:

"Article 21A, as such, does not cast any obligation on the private unaided educational institutions to provide free and compulsory education to children of the age 6 to 14 years. Article 21A casts a constitutional obligation on the state to provide free and compulsory education to children of the age 6 to 14 years."

He said though the purpose and object of the Act was laudable, "that is, social inclusiveness in the field of elementary education, the means adopted to achieve that objective is faulty and constitutionally impermissible. The law is well settled that the state cannot travel beyond the contours of Clauses (2) to (6) of Article 19 of the Constitution in curbing the fundamental rights guaranteed by Clause (1), since the Article guarantees an absolute and unconditional right, subject only to reasonable restrictions. Article 21A requires non-state actors to achieve the socio-economic rights of children in the sense that they shall not destroy or impair those rights and also owe a duty of care."

The judge said:

"The state, however, cannot free itself from obligations under Article 21A by offloading or outsourcing its obligation to private state actors like unaided private educational institutions or to coerce them to act on the State's dictates. Private educational institutions have to empower the children, through developing their skills, learning and other capacities, human dignity, self-esteem and self-confidence and to respect their constitutional rights. Children who opt to join an unaided private educational institution cannot claim that right as against the unaided private educational institution, since they have no constitutional obligation to provide free and compulsory education under Article 21A. Needless to say that if children are voluntarily admitted in a private unaided educational institution, they can claim their right against the State, so also the institution."

Private unaided school will face unwanted hardship in admitting 25 percent students of weaker section but the Art. 21A does not confer this obligation on the schools and educational institutions. It is practically very difficult to check and examine the admission procedure of big private schools like DPS etc. which are run as private enterprises and only as a profit making company. These schools argue that admitting 25 percent poor students will directly affect their standards, teaching quality and budget among others.

Conclusion

Education means knowledge and knowledge is power. A true democracy is one where education is universal, where people understand what is good for them and the nation and knows how to govern themselves. The purpose of right to education is that education should not be commercialized. Today states have their own education boards. There should be a uniform syllabus after dissolving all the boards. Only the universal education can be implemented in the country. In order to ensure the successful implementation of this Act 6% GDP is required, which is a hurdle. Issues related to the nutrition for children between the age group of 0-3 years and pre-school education between the ages of 3-6 years should be dealt with utmost care.

Education is not all about building school or bringing private sector into elementary education. The biggest crisis Indian Education System facing is the profession of teaching. It is declining both in terms of numbers and quality. A meaningful education grooms the character of a student and educated citizens yields in the progress of a nation.
We have seen in this paper Right to Education is now a Fundamental Right for all children in the age group of 6 to 14 years. In simple word, it means that the Government will be responsible for providing education to every child up to the eight standards, free of cost, irrespective of class and gender. Part III of the Constitution of India gives all force to every child to get free and compulsory education through Art.21, and insertion of Art.21-A by 86th Amendment is also a landmark in this respect. Thanks to scheme like SSA and MDM Scheme, which are providing almost all necessary requirements to the 'Future of India' Enrolment rates in schools have gone up, as the number of schools is rising through these scheme.

However, realization of the objective of 'Education to All' is not going to be very easy-not when the school system in the country, especially those rural areas continue to be plagued by problems of poor infrastructure, shortage of teachers, their lack of training motivation besides poverty and livelihood issues that are responsible for the huge drop out of rates. It is estimated that there is a shortage of nearly five lakh teachers, while about three lakh of them are untrained at the elementary school stage. Over 50% of schools have a student teacher ratio much poorer than the 1:30 prescribed under the RTE Act. About 46% schools do not have toilets for girls, which is another reason why parents do not send girl children to schools.

Indian children now have a precious right to receive free and compulsory education from the ages of 6 to 14 years of age. The government will bear all the expenditures of schooling. The act has mandated for private schools to reserve quarter of classroom strength for deprived sections of society, which will change the structure of classrooms in elite schools to school who are not yet enrolled. By pressing for 25 percent reservation for the 'weaker and disadvantaged sections' of society, government has acknowledged

poor quality in government schools where more than 90 percent of households in the country will have to enroll their children even if 25 percent reservation is implemented in true sense. This means that there will be further diversification of society in India. There are also concerns whether those enrolled in private schools will cope and adjust with education system and culture of elite schools. There are many other loop holes which are pressing and challenging in the way of RTE: quality education, funding, teacher skills and enhance of reservation policy are some major concerns.

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(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

[7] Article 13 of the Covenant requires the State parties to make Primary education compulsory and free to all. Secondary education including technical and vocational shall be made general for and accessible by progressive introduction of free education. Higher education shall be made equally accessible on the basis of capacity.

But Article 14 of the Covenant requires the state party to the present covenant which, at the time of becoming a party, has not able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

[8] AIR 1981 SC 746.

[9] AIR 1984 SC 802.

[10] AIR 1992 SC 1858.

[11] AIR 1993 SC 2178

[12] AIR 2003 SC 355.

[13] D.D. Basu, *Constitution of India*, vol 3, p. 3268.

[14] "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

[15] "To provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

[16] (2008) 3 SCC 315.

[17] AIR 2010 Gau. 102.

[18] (2002) 7 SCC 368

[19] (2009) 6 SCC 398

[20] (2007) 15 SCC 337
[21] (2011) 3 SCC 436
[22] The statement Object and reason of the Bill- "The crucial rule of universal elementary education for strengthening the social fabric of democracy through provision of equal opportunities to all bas been accepted since inception of our Republic. The Directive Principles of State Policy enumerated in our Constitution lays down that the State shall provide free and compulsory education to all children up to the age of fourteen years. Over the years there has been significant spatial and numerical expansion of elementary schools in the country, yet the goal of universal elementary education continues to elude us. The number of children, particularly children from disadvantaged groups and weaker sections, who drop out of school before completing elementary education, remains very large. Moreover, the quality of learning achievement is not always entirely satisfactory even in the case of children who complete elementary education."
[23] Sec. 2 (f) "*elementary education*" means the education from first class to eighth class;
[24] Section 3 of the RTE, Act 2009
[25] Section 4 of the RTE, Act 2009
[26] Section 13 of the RTE, Act 2009
[27] Section 16 of the RTE Act, 2009
[28] Section 17 of the RTE Act, 2009,
[29] Section 2 (d) of RTE Act, 2009, "child belonging to disadvantaged group" means a child belonging to the scheduled caste, the scheduled tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government, by notification;
[30] Section 2 (e) of RTE Act, 2009, "child belonging to weaker section" means a child belonging to such parent or guardian whose annual income is lower than the minimum limit specified by the appropriate Government, by notification;
[31] (2012) 6 SCC 1.

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ISSN 2321-1059

Journal of Legal Studies

An International Journal of Legal Studies

Volume 2 **Issue I** **January** **2014**

Published By:
Manavta Samajik Sanstha
Mughalsarai, Chandauli, U.P. India

Annual Subscription

Inland: 1000.00
Abroad: UK£ 20.00 US$ 30.00
Subscription may be sent to the Manavta Samajik Sanstha, Mughalsarai, Chandauli, U.P. India

For any information please contact:

Dr. Pradeep Kumar
Executive Editor & Managing Director:
E-mail: journalforlegalstudies@gmail.com
Contact No: +91-9450245771, +91-9026384771

ISSN 2321-1059

Journal of Legal Studies

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