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Judicial Review as a Weapon to Control Unlimited Power of Constitutional Amendment

Dr. Rama Sharma*
Ms. Vibha Srivastava**

Abstract

Law plays an effective and important role in society. It reconciles the conflicting interest of individuals, and those of individuals and society. In a democratic state, law functions as an instrument of social justice. The Constitution of a country is the most fundamental law of the land. It is enacted for the purpose of establishing the State and a certain system for the governance of the country. The Constitution then distributes the powers of the State among different institutions and sets up certain machinery for controlling the actions of the public bodies. India is lucky enough to have a constitution in which the fundamental rights are enshrined and which has appointed an independent judiciary as guardian of the constitution and protector of the citizen's liberties against the forces of authoritarianism. In a true form of democracy, the rule of a fearless independent and impartial judiciary is indispensable and cannot be over-emphasized. It is therefore judiciary plays an important role as custodian of the rights of the citizens. In a federal Constitution it has another important role of determining the limits of the powers of the Centre and the States. It is therefore necessary that the Judiciary should be independent and free from the influence of the Executive.

Key words: *Independent Judiciary, Principles and Procedures, Judicial Review and constitutional amendment, legislative actions.*

Introduction

The idea behind the doctrine of separation of powers is that a concentration of too much power in a single entity will lead to the abuse of power. The doctrine notably mooted by Montesquieu [1]and John Locke [2] embodies a number of principles. The first of which is the formal distinction between the legislative, executive and judicial branches of government. The second is of the separation of functions which entails that each branch of government exercises distinct powers and functions. The third is that of separation of personnel, which requires that each of the different branches be staffed with different officials. Lastly, the separation of powers doctrine importantly entails the principle of checks and balances where each branch of government is entrusted with special powers designed to keep a check on the exercise of the functions of others. As a consequence, the principle of checks and balance allows other branches of government a measure of intrusion into another branch's functions.[3]The legislature for example, checks the executive through reserving the

**** HOD, Noida International University, Greater Noida.***
*****(Ph.D.) Scholar in Noida International University, Greater Noida.***

power to impeach a President, while the executive on the other hand checks the legislature through presidential assent to make a bill law. The judiciary on its part checks the executive and legislature through its power of review. Conversely the executive and legislature check the judiciary through determining the appointment of the members of the judiciary.

Independent Judiciary

In any country, independent judiciary plays the important role of interpreting and applying the law and adjudicating upon controversies between one citizen and the State. In a country with a written Constitution, courts have the additional function of safeguarding the supremacy of the Constitution by interpreting and applying its provisions and keeping all authorities within the constitutional framework. In a federation, the judiciary has another meaningful assignment, namely, to decide controversies between the constituent States inter se, as well as between the Centre and the State.

Judiciary –Importance and Its Need

Judiciary – It's Importance: An endeavor is being made to highlights the judicial functioning in India, in the context of increasing cases of judicial corruptions and delays in administration of justice. The Indian judiciary has so far, gained the public confidence in discharging its constitutional functions. As an institution, the judiciary has always commanded considerable respect from the people of country.

It's Need: Expressing the needs for and importance of judiciary a learned jurist aptly remarks: "middle class people are combating with the government powers through media of the courts". The Indian judiciary is considered as Guardian of the Rights of the citizens of India, explained, argued and emphasized in several contexts.

Meaning and Definition of Judicial Review:-

Judicial Review basically is an aspect of judicial power of the state which is exercised by the courts to determine the validity of a rule of law or an action of any agency of the state. In the legal systems of modern democracies it has very wide connotations. The judiciary plays a very important role as a protector of the constitutional values that the founding fathers have given us. They try to undo the harm that is being done by the legislature and the executive and also they try to provide every citizen what has been promised by Constitution.

Hypothesis

- The scope of judicial review is somewhat limited in the sense that the review power of the courts is confined to the review of administrative actions.

Research Methodology

- In the present study doctrinal method of research is used and secondary data from various Text books, journals, newspapers and web sites is collected.

Historical background of Judicial Review U. S

The doctrine of judicial review was for the first time propounded by the Supreme Court of America. Originally, the United States Constitution did not contain an express provision for judicial review. The power of judicial review was however, assumed by the Supreme Court of America for the first time in 1803, the Supreme Court, led by Chief Justice John Marshall, decided the landmark case of William Marbury v. James Madison[4], Secretary of State of the United States4 and confirms the legal principle of judicial review the ability of the Supreme Court to limit Congressional power by declaring legislation unconstitutional in the new nation.

Judicial Review as a part of the Basic Structure

In the celebrated case of *Keshavananda Bharati v. State of Kerala*[5] the Supreme Court of India the propounded the basic structure doctrine according to which it said the legislature can amend the Constitution, but it should not change the basic structure of the Constitution, The Judges made no attempt to define the basic structure of the Constitution in clear terms. S. M. Sikri, C.J mentioned five basic features:

- Supremacy of the Constitution.
- Republican and democratic form of Government.
- Secular character of the Constitution.
- Separation of powers between the legislature, the executive and the judiciary.
- Federal character of the Constitution.

He observed that these basic features are easily discernible not only from the Preamble but also from the whole scheme of the Constitution. He added that the structure was built on the basic foundation of dignity and freedom of the individual which could not by any form of amendment be destroyed. It was also observed in that case that the above are only illustrative and not exhaustive of all the limitations on the power of amendment of the Constitution.

Judicial review of constitutional amendment

Provision for amendment of the Constitution is made with a view to overcome the difficulties which may encounter in future the working of the Constitution. If no provisions were made for the amendment of the Constitution, the people would have recourse to extra constitutional method like revolution to change the Constitution.[6] The legislature is the fundamental organ of the State and "the repository of the Supreme Will of Society". The drafters of the Indian constitution closed off paths of judicial interpretation through strict definitions and a legal culture that discouraged free-wheeling interpretations. Thus, the Supreme Court of India thus emerged at the outset with only a limited power of judicial review. Although India's 1950 constitution expressly recognized judicial review,[7] the

Indian political elite at the time disfavored broad judicial review powers and thought the court's role ought to be a deferential one.

The Era of Sankari Prasad's Case to Golaknath's Judgment

In 1951, the Indian Supreme Court's decision in *Shankari Prasad v. Union of India* set the tone for the relationship between parliament and the Supreme Court.[8] In Shankari Prasad the Court was asked to decide if Parliament's legislative power under Article 368 of the Constitution was limited by a constitutional prohibition that forbade the abridging fundamental rights.[9]

Active Judicial Review: The Supreme Court as an Umpire

The Supreme Court's first move toward active judicial review came from the recognition of the Constitution's supremacy and the document's limiting role over the Parliament. In this case the Constitution (Seventeen Amendment) Act, 1964 was challenged an upheld. Within a short period of two years the same Seventeen Amendment Act, 1964 was once again challenged in *Golak Nath v. State of Punjab* and the Supreme Court once again invited to reconsider its decision in the earlier two cases. The Supreme Court by a majority of 6 to 5 prospectively overruled its earlier decisions in *Shankari Prasad and Sajjan Singh*[10] case and held that Parliament had no power, from the date of the decision to amend part III of the Constitution so as to take away or abridge the fundamental rights[11].

The Era of letter to Golak Nath scenario – Keshavananda Bharti's case

In its 1967 decision in *I. C. Golanknath v. State of Punjab*, the Indian Supreme Court revisited the issue of constitutional limits on the legislature, first discussed in Shankari Prasad. In a complete turnaround from Shankari Prasad, the court declared that Parliament could not amend the Constitution in any way that would abridge or limit fundamental rights. The court reasoned that parliament had wide legislative powers, however, it could not alter the basic structure of the Constitution including by abridging fundamental rights. The Court reaffirmed the basic structure doctrine in *Kesavananda Bharti v. Kerala*[12] Where the Indian Supreme Court asserted the power to strike down even constitutional amendments as being unconstitutional if they altered the basic structure of the Constitution. Checking parliamentary power through the Constitution set the foundation for the meaningful emergence of judicial review that soon followed in India

Election case 39th Amendment

Constitution 39th Amendment Act was approved when the Election Case of Mrs. Indira Gandhi was under the consideration of the Supreme Court. He challenged her election alleging certain corrupt practices. The details of this case are contained in an excellent book[13]. The motive for quick initiation of the Bill and its passes was aimed at to take away the powers of the Supreme Court to invalidate Her Election. On august 1975 the government passed thirty ninth Amendments seeks three things to withdraw the election of Prime Minister from the scope of Judicial Review. To declare the decision of Allahabad High Court, invalidating Indira Gandhi's election void and to exclude Supreme Court

Jurisdiction to hear an appeal on the matter of Her election (section 4 Article 329 A 3-5) The Constitution 39th Amendment Act, 1975. Two days later, Mrs. Gandhi proclaimed the Emergency[14]. Amendment Thirty-Nine provided "concrete evidence of how majoritarian partisanship could cause total demise of rule of law."[15]The court's response not only jump started meaningful judicial review in India, but it also saved the rule of law and the separation of powers in India's newly established constitutional democracy.

Minerva Mills's case

situation Election case to the present scenario After the decision in Election case reiterating that there are few features which are so basic to the constitution that without them constitution cannot stand in its true spirits. Such features cannot be amended. Aggrieved by this decision the Parliament came up with 42nd Constitutional amendment amending, interalia, Article 368 making the power almost absolute.[16]

In Minerva Mill's case the validity of 42nd constitutional amendment was challenged. All five judges held the amendment to be void. This case further held that the amended art 31 is void and it upheld that there is harmony between fundamental rights and directive principles and they cannot be at conflict with each other. Further Waman Rao's case unanimously upheld Minerva mill's judgment that amendments to article 368 introducing Clause 4 and 5 are void. It was further held in this case that all laws placed in 9th Schedule after Keshavananda Bharti judgment is also available for judicial review. This was further widened by I. R. Coelho v. State of Tamil Nadu.

Amendment in Ninth Schedule

By incorporating various legislative statutes in Schedule Nine of the Constitution as introduced by Art 31B, an attempt has been made to completely destroy the power of Judicial Review in regard to these statutes, but it must be realized that these amendments themselves have to be tested on the touchstone of reasonableness, the will of the sovereign people, intention of the constitution makers and the spirit of the constitution.

It appears apparently clear that power to annihilate the right of Judicial Review is beyond the jurisdiction of the Indian Parliament. The constitutional amendments by which certain legislative Acts have been included in Schedule IX of the Constitution, intend also to include all the antecedent and subsequent amendments of these legislative Acts. But in many cases the principal Acts alone have been incorporated in Schedule Nine of the Constitution and the amending acts have not been included therein.

The Supreme Court has held that amending acts as well as the original statutes would be deemed to be included in Schedule Nine. The reason is that ordinarily if an Act is referred to by its title it is intended to refer to that Act with all the amendments made in it up to the date of reference.[17] Article 31-A was inserted as an immunity from Judicial Review of the acquisition law regarding State and also the law regarding management of any property for

a limited period, extinguishment or modification of any property for a management and amalgamation of corporation etc.

Conclusion

Active judicial review in India has meant interpretation of the Constitution in a manner consistent with the text and spirit of the Constitution. It has meant more rights for individuals, respect for the rule of law, and the court fulfilling the role described in the Constitution. Contrary to Professor Hirschl's theory judicial review was implemented in India to save the country from its ruling elite and their authoritarian leanings, not to entrench those authoritarian values. The world's most populous democracy refutes Professor Hirschl's hegemonic preservation theory and shows that judicial review emerges especially in federations or separation of powers systems in response to the need for an umpire.

The growth of judicial review is the inevitable response of the judiciary to ensure proper check on the exercise of public power. Growing awareness of the rights in the people; the trend of judicial scrutiny of every significant governmental action and the readiness even of the executive to seek judicial determination of debatable or controversial issues, at times, may be, to avoid its accountability for the decision, have all resulted in the increasing significance of the role of the judiciary.

It must always be remembered that a step taken in a new direction is fraught with the danger of being a likely step in a wrong direction. In order to be a path-breaking trend it must be a sure step in the right direction. Any step satisfying these requirements and setting a new trend to achieve justice can alone be a New Dimension of Justice and a true contribution to the growth and development of law meant to achieve the ideal of justice.

References:

[1] Baron de Montesquieu, The Spirit of the Laws (first published 1750, Thomas Nugent Sr, Hafner Publishing Co. 1949) book 11, chs 6 -20.
[2] John Locke, Two Treatises of Government (first published in 1690, Peter Laslett ed, Cambridge University Press 1988) 366-67.
[3] Nicholas W Barber, 'Prelude to the Separation of Powers' (2001) 60 Cambridge Law Journals 59, 60.
[4] 5 U.S. 137 (1803)
[6] AIR 1973 SC 1461
[6] Keshavananda Bharti vs. State of Kerla, AIR 1973 SC 1461
[7] The Indian Constitution provides for judicial review in Article 13, 32, 124, 131, 219, 228 and 246.
[8]S. P. Sathe, Judicial Activism in India: Transgressing Boarders and Enforcing Limits 3 (2002).
[9] Ibid.
[9] Ibid, see also Sathe; supra note 300, at 7.
[10] AIR 1967 SC 1643
[11] Ibid.

[12] AIR 1973 SC 1461
[13] Prashant Bhusan. *The Case That Shook India Vikas Publishing House Pvt. Ltd*,
[14] F S. Nariman, *Turning Points*, (2006) 8 SCC (J)13.
[15] Sathe, supra note 300, at 77.
[16] The amendment introduced two sub clauses in Article 368. According to clause (4) no constitutional amendment can be challenged in courts and clause (5) was for clarifying the doubt that no limitation can be imposed on the constituent power of the legislature
[17] State of Maharashtra v. Madhav Rao, AIR, 1968 SC 1395, Paras 12 and 11, Sikai J.

Social construction of widowhood in India: Some Issues

Dr. Bibha Tripathi*

Abstract

Number of studies has already been conducted to discern the pitiable condition of widows. Present paper aims to raise certain fundamental questions regarding the plight of widowhood. Widowhood is a social construction since inception and deeply rooted in patriarchal notions. A woman, if, divorcee, faces more prejudices than a widow. Since feminists used to say that marriage is a root cause of women's oppression, therefore, should a widow realize herself happier and free from all sorts of so called atrocities? Since marriage remains in existence even after the death of husband, therefore number of issues appear at front viz; how sexuality should be handled? How property rights should be dealt with? How her remarriage should occur? How patriarchal notions create havoc in a widow's life is another important dimension? There is immense subjectivity in understanding the crisis of widows. Therefore present paper attempts to look into those myth and reality which are related with widow's plight.

If you are not a myth…
Whose reality are you…
If you are not a reality…
Whose myth are you…

Mrs. Parvati Athavale[1] was born in 1870 in the village Darukh in Konkan South of Bombay. She became widow at the age of twenty when she was mother of two living children. She explains how Hindu widows used to live during those days with shaved heads, when her elder sister was remarried, they were boycotted even by their barber and washer man. She joined widow's home founded by Prof. Karve, her brother in law at the age of 26 without any education. From there she went to America without money and learnt English there by serving as a house maid for gaining her object.

She writes in her autobiography that like other women of that time she did not have the moral strength to say whether she wished or did not wish to be married. Situation has not been changed considerably till now. This auto bio-graphy has been instrumental for writing this article. Her story is still reflected in number of cases despite enormous legal provisions for widow's emancipation.

Introduction

Widowhood is a crisis. The plight of widowhood has been explained in a number of studies[2]. It is also established through various studies that widowhood is a global concept.

* ***Associate Professor, Law School, BHU, Varanasi.***

The difference is related with tradition and custom of widowhood. The condition was worst in catholic countries in comparison to protestant countries. There pitiable condition can be identified by L-3 ie; low status, lack of education, lack of legal aid. An attempt has been done in the present paper to have a pilot survey of such cases of widowhood which are consisting different narratives and therefore helping in establishing that there are various dimensions of crisis and plight. The cases are real narratives.

1- An aged woman who gets widowhood in the age of 78 having only six months of widowhood till.
2- One young widow, having three male children and 13 years of widowhood, living at her in-law's house.
3- One young widow, having a single male child of seven years, living at her own parent's house.
4- One extremely young widow, getting widowhood just after one year of marriage, remarried after one year of widowhood.
5- A widow who gets higher education and does love marriage.

The above mentioned cases are just a few illustrations, there may have lots of other cases having peculiar stories of their own. Number of factors is important in determining the fate and future of a widow at home. The widows living in Vrindavan and Varanasi or at any other religious places are totally excluded from the purview of present paper[3]. The paper has deliberately left the legal aspects because availability of legal provisions and obtaining the benefits of law are two different things. It is more perplexing if the beneficiary is a widow linked with so many inauspicious things.

There are two constructive notions in Indian family system, 'saubhagya' and 'durbhagya'. A cycle of 'saubhagya' and 'durbhagya' runs throughout the human life. Birth of a male child 'saubhagya' and birth of a female child 'durbhagya'. Education, marriage and job are all linked with the notion of 'saubhagya' and 'durbhagya'. 'Bechare ki ladki ki shadi hai'. But the 'u' turn appears in the life of lady after marriage if she gives birth to a male child. That moment can be explained as s- 3 means 'saubhagya' is multiplied by three because such a fantastic 'saubhagyawati' lady has enjoyed the thrill thrice by giving three male children two as twins and one as single. The irony is that the lady again stigmatized by d-3 means 'durbhagya' multiplied by three because she has lost her husband in an accidental death. The same family members and society show staunch reactions against her for no fault at all on her part.

It is aptly clear that the plight of such a widow having children is immensely high. They have to suffer a lot. They are supposed to devote their whole life for their children, but not supposed to enjoy the marriage ceremony of their own child. It has been observed that in the customary rituals of any marriage of Hindu family entertains only married, so called 'saubhagyavati' women and widows are kept aloof from such ceremonial rituals as being

'kulakshani', to avoid any misfortune further. This inhuman trend led by the society has devastating impact over the psychology of widow. Therefore, there are chances of vindictive reaction from widows. There is an old saying in the society that " raand khushi jab sabker maray", meaning thereby a widow cannot tolerate another woman as married. It is nothing but a torturous situation created by the society compelling a normal woman to have abnormal desires. Though in some other cases another old saying is there "…kone aanter poot ka, adham damad ka" meaning thereby a widow is expected to be in any corner in her son's time and in no case she should depend upon her son in law, can also be realized. The fate and future remains sometimes very subjective depending upon the widow herself as to how she is taking this part of her life.

An early widow without having child if gets married (widow remarriage act, 1856 removed the bar to remarriage), provided a man readily accepts her, because such women are considered as second hand commodity leaving very little space to get acceptance[4]. Sometimes the widow's mental condition stops her in entering in second marriage as she is deeply involved with her husband and in no circumstance can accept the other one. In such circumstances her condition becomes worst. She could even be declared mad by her own parents as she neither is neither ready to remarry nor involved in any worldly affair. She accepted her first husband as an only man with whom she can maintain conjugal relationship and with no one else. Parents as representative of a society can expect any damn thing with their daughter and if the daughter complies with their expectations making number of compromises in her own life is appreciated by parents as well as the society but the other who has once followed every wish and deed of parents/society, and now not ready to become so indifferent towards her own soul and thinking is being treated as a burden and nothing else than a living dead body. Keeping in view of the recent development in the Hindu Succession Amendment Act, 2005[5] such narrative might have a different nuance of forbidding her from claiming rights in ancestral property.

Amongst various narratives of widowhood, there is a case of remarriage of a widow who was doing her MA in English and did love marriage with a judicial magistrate. Though this marriages was also criticized by the concerned persons, but despite all odds the couples are happy[6]. Therefore the paper intends to submit that law of remarriage in itself is good provided one exercises his/her right out of his/her own wishes and not as a compulsion. Then only we would be in position to provide better safeguards to the women in general and widows in particular.

As approved and established by number of studies that widowhood has been a major problem of Hindus/elite class etc. so some narratives of widowhood sometimes demonstrate a completely different picture. One such case has shown that an old age widow could enjoy enormous power and could continue her torturous behavior against her daughters in law if she is in commanding position and her sons are like so called mama's boy. She could be vindictive, torturous and go up to any extent to satisfy her own desires.

So far as elderly widows are concerned, sexual drives are not at all a concern of them. It is said that the aged are neither capable of nor interested in sexual activity. Studies[7] have also established that women live longer than men. There are significant chances of getting widowhood in old age[8]. Another study has established that generally there could be a difference of age between boy and girl could extend up to nine years or so. So the paper attempts to suggest a 'u' turn in the matter of age at the time of marriage that a boy should be younger than a girl at least for nine years. Another important twist could be anticipated of this tentative suggestion that it can reduce the cases of wife battering or domestic violence too. But there are reasonable apprehensions in a country like India where a girl child could be given in marriage with an adult man.

It is submitted through the paper that it is not marriage and remarriage of a woman which could be seen as panacea to solve the crucial problems of widowhood rather it is the individual's own identity, choice and autonomy which should be granted to a widow.

Empowerment after getting widowhood

Till now no study has been done on this aspect of widowhood. Sometimes it can be realized as one of the realities that a lady behind the veil becomes one of the most powerful ladies of the world only because of getting widowhood. The 'Gandhi' family is an excellent example of this type, right from the first lady prime minister to UPA chair person. Apart from Mrs. Indira Gandhi and Sonia Gandhi, Maneka Gandhi can also be referred. It is not only a fact of India rather a reality of world at large that the women acquiring high post in society are either widow or remaining single in their life. For example, Aung Sen Sue Kyi, the General Secretary, National Leage For Democracy, is a widow, Cristina Fernandez, President Argentina, is also a widow, Georgina Rine Hart, Mining Tycoon and Billionaire, a widow and those who have acquired high socio - political status while remaining single are Jayalalithaa Jayaram, Chief Minister of Tamilnadu, Mayavati, Christine Legarde, Managing Director, International Monetary Fund etc.

Conclusion

Though the paper has got much food for thought from the book of Parvati Athavale but sometimes extends a few reservations too. Though she has devoted one chapter on her son's marriage but the whole chapter deals with her choice and how she prevailed in getting her son convinced to marry with a girl which was approved by her. But that chapter has not dealt with those problems which are to be faced by a widow mother at the time of any auspicious occasions. From that chapter onwards she has described her experience of gaining knowledge of English, voyage to America and other foreign countries, suffering while earning livelihood and finally succeeding in her ambition of effectively running widow's home. Her story ends with a saying that all well that ends well, which is not true to every case of widowhood.

Suggestions

Here, the point which the paper wants to highlight is that Parvati Athavale was fortunate enough to realize her dream into reality despite of various odds, so it gives a lesson that a strong will power to overcome each and every odds of our life is essentially and urgently required. Unless the sufferer itself wipes her tears, no one else will come forward to wipe it. It was strongly felt by Parvati Athavale too. She has explained in one of the chapters[9] as to how she has discarded signs of widowhood. She felt that among the many difficulties experienced by widows one of the greatest is that of the rites that compel them to the renunciation of all worldly things, with shaven head and widow's grab. She felt that such unfortunate and degrading customs should be stopped.

Parents and close relatives are required to support a widow first to make her able to support herself and her family too. She also writes in her autobiography that like other women of that time she did not wish to be married. Situation has not been changed considerably till now.

Supreme Court should either take *suo- moto* cognizance of widow's plight and order their mothers or through public interest litigation pass orders for the maintenance of their mothers. If a widow has no such child than the government should enhance the support system to be given to the widows. If the widows living at different religious places are willing or having capacity to perform some work than depending upon their qualities they should be engaged in different type of works so that they may be able to maintain themselves by their own learning's. They should be engaged in vocational training etc[10].

References:

[1] Mrs. Parvati Athavale (1986), Hindu Widow (an autobiography), Reliance Publishing house.

[2] Varun Malik, Problems Of Widow Remarriage In India: A Study *Journal of Business Management & Social Sciences Research (JBM&SSR) ISSN No: 2319-5614 Volume 2, No.2, February 2013 www.borjournals.com Blue Ocean Research Journals 23, Nimi Mastey* Examining Empowerment among Indian Widows: A Qualitative study of the Narratives of Hindu Widows in North Indian Ashrams.

[3]Supreme Court shocked by how bodies of Vrindavan widows are ... *http://www.ndtv.com/…avan-widows-are-treated-2510143* Aug 2012 ... The Supreme Court today expressed shock over the manner in which the bodies of deceased Vrindavan widows were disposed by chopping ... Supreme court has done a good job for the widows of vrindavan. But similar things should be done to other widows living at different shelter homes in India.

[4] William Hay Macnaghten (1862)"Second marriages, after the death of the husband first espoused, are wholly unknown to the Hindu Law; though in practice, among the inferior castes, nothing is so common. "

[5] See, sec. 23 of Hindu Succession Amendment Act, 2005.

[6] Such narratives are rarest of the rare cases in widowhood.

[7] Jacob S. Siegel, "Demographic Aspects of Aging and the older population in the United States," Current Population Reports: Special Studies May, 1976. Due to two major reasons older women

face widowhood. First the greater longevity of women and the social norm for men to marry younger women. To the extent, then, that isolation is a problem of the aged, it is overwhelmingly a problem for the female elderly.

[8] www/thehindu.com/todays paper/tp-opinion/the feminization of old age/article, The Hindu, 1 Oct, 2012.

[9] Supra note one, Chap x 46- 54.

[10] Sulabh dons the mantle of Good Samaritan to save Vrindavan Widows *http://www.sulabhinternational.org/…vrindavan-widows.*

National Commission for Scheduled Tribes: An Analysis

Kabindra Singh Brijwal*

Introduction

The Constitution of India has provided specific safeguards for the social, economic and educational advancement of Scheduled Castes and Scheduled Tribes. The Constitution has also provided for a monitoring agency to monitor and oversee the implementation of these safeguards. With a view to ensuring that various safeguards are implemented satisfactorily, a special officer called the Commissioner for Scheduled Castes and Scheduled Tribes was appointed on 14th November, 1950 under Article 338(1) of the Constitution. The Commissioner was assigned the responsibility of investigating all matters relating to the safeguards and to report to the President and the Parliament about the working of the safeguards. The Commissioner was to maintain contact with the tribal people and State Government and review implementation of various programmes and schemes launched for the development of Scheduled Castes and Scheduled Tribes.

In July, 1978 a multi body called the Commission for Scheduled Castes and Scheduled Tribes was also set up to oversee various safeguards provided for Scheduled Castes and Scheduled Tribes. The functions of the Commission were modified in September, 1987 and it was renamed as the National Commission for Scheduled Castes and Scheduled Tribes making it a national level advisory body on policies and programmes of development for Scheduled Castes and Scheduled Tribes.

Subsequently, Article 338 of the constitution was amended and substituted under the Constitution (Sixty Fifth) Act, 1990 which became effective on 7th June, 1990 providing constitutional status to the National Commission for Scheduled Castes and Scheduled Tribes. This constitutional commission replaced both the Commissioner appointed in 1950 and commissioner set up in 1987. The first constitutional commission came into existence on 12th March, 1992.

A special approach for tribal development and independent machinery to safeguard the rights of Scheduled Tribes was considered necessary; a separate National Commission for Scheduled Tribes (NCST) was set up. The National Commission for Scheduled Tribes (NCST) of India is a statutory body which came into existence with effect from 19th February, 2004 consequent upon the bifurcation of erstwhile National Commission for Scheduled Castes and Scheduled Tribes (NCSCST) into two Commissions namely

* ***Assistant Professor, Department of Law, Assam University, Silchar, Assam-788011.***

National Commission for Scheduled Castes and National Commission for Scheduled Tribes through the Constitution (89th Amendment) Act, 2003. The Constitution (89th Amendment) Act, 2003 inserted a new Article 338-A establishing the National Commission for Scheduled Tribes.

Article 338-A (1) provides for the establishment of a National Commission for the Scheduled Tribes. As per the constitutional provisions, the National Commission for Scheduled Tribes has also been established to safeguard the social, economic and political interests of tribes and to prevent their exploitation by non-tribes as guaranteed by the Constitution of India.

A. Constitution of the Commission

Subject to the provisions of any law made in this behalf by Parliament, the Commission shall consist of a Chairperson, Vice-Chairperson and three other Members and the conditions of service and tenure of office of the Chairperson, Vice-Chairperson and other Members so appointed shall be such as the President by rule determine.[1]

Article 338 A (2) empowers Parliament to regulate the rule for commission by law. In the exercise of this power Parliament has enacted The National Commission for Scheduled Castes and Scheduled Tribes Chairperson and Members (Conditions of Service and Tenure) Rules, 1990 amended in 2004. The National Commission for Scheduled Castes and Scheduled Tribes Chairperson and Members (Conditions of Service and Tenure) Rules, 2004 makes the provisions for the qualifications, term of office, resignation and removal of the members of the commission. It also stated the powers and functions of the commission. The Commission shall consist of a Chairperson, a Vice-Chairperson and three other Members.

Qualifications of the members

The Chairperson, the Vice-Chairperson and the Members shall be appointed from amongst persons of ability, integrity and standing who have had a record of selfless service to the cause of justice for the Scheduled Tribes.[2] Subject to the provisions of sub rule (1),

- The Chairperson shall be appointed from amongst eminent socio-political workers belonging to the Scheduled Tribes, who inspire confidence amongst the Scheduled Tribes by their very personality and record of selfless service.[3]
- The Vice-Chairperson and all other Members out of whom at least two shall be appointed from amongst persons belonging to the Scheduled Tribes.[4]
- At least one other Member shall be appointed from amongst women.[5]

The Chairman and the Vice-Chairman of the Commission have been conferred the rank of Union Cabinet Minister and Minister of State respectively, while the Members of the Commission have been given the rank of a Secretary to the Government of India. In

present time, the Chairperson of National Commission for Scheduled Tribes is ***Dr. Rameshwar Oraon***.

Term of Office

The Chairperson, Vice-Chairperson and other Members of the Commission shall be appointed by the President by warrant under his hand and seal.[6] The Chairperson, the Vice-Chairperson and other Members shall hold office for a term of three years from the date on which he/she assumes such office.[7] They shall not be eligible for appointment for more than two terms.[8]

Resignations and Removal

The Chairperson and Vice-Chairperson and any other Member shall give resign from his/her post by notice in writing under his/her hand addressed to the President.[9] The Chairperson shall only be removed from his office by order of the President on the ground of misbehavior.[10]

Despite anything in clause (a) the Chairperson may be removed from his or her office by the order of the President if the Chairperson is adjudged an insolvent[11] or engaged during his term of office in any paid employment outside the duties of his office[12]or in the opinion of the President, is unfit to continue his/her office by reason of infirmity of mind or body.[13] The Chairperson shall not be removed from his/her office under this clause until he has been given a reasonable opportunity of being heard in the matter.[14]

The President shall remove a person from the office of Vice-chairperson or Member, if that person becomes an un-discharged insolvent[15]or gets convicted and sentenced to imprisonment for an offence which in the opinion of the President involves moral turpitude[16] or in the opinion of the President, is unfit to continue his/her office by reason of infirmity of mind or body[17] or refuses to act or becomes incapable of acting[18]or is without obtaining leave of absence from the Commission, absent from three consecutive meetings of the Commission[19] or in the opinion of the President, has so abused the position of Vice-Chairperson or Member as to render that persons continuance in office detrimental to the interest of the Scheduled Tribes.[20]

No person shall be removed from his/her office under this clause until he/she has been given reasonable opportunity of being heard in the matter.[21] The Commission shall have the power to regulate its own procedure.[22]

Headquarter of the Commission

The Headquarter of the Commission shall be located at New Delhi. The Commission shall function by holding ‘sittings’ and ‘meetings’ at any place within the country and also through its officers at the Headquarters and in the State Offices. The Members of the Commission including the Chairperson and the Vice-Chairperson shall function in

accordance with the procedure prescribed under these rules. The Commission has Six Regional Offices, located in Bhopal, Bhubaneswar, Jaipur, Raipur, Ranchi and Shillong.

B. Investigation and inquiry by the Commission

The functions, duties and powers of the Commission have been laid down in clauses (5) and (8) of the Article 338-A of the Constitution. It shall be the duty of the Commission to investigate and monitor all matters relating to the safeguards provided for the Scheduled Tribes under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards[23]; to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Tribes[24]; to participate and advise on the planning process of socio-economic development of the Scheduled Tribes and to evaluate the progress of their development under the Union and any State[25]; to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards[26]; to make in such reports recommendations as to the measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled Tribes[27]; and to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Tribes as the President may, subject to the provisions of any law made by Parliament, by rule specify.[28]

Methods of investigation and inquiry

The Commission may adopt any one or more of the following methods for investigating or inquiring into the matters falling within its authority - (a) by the Commission directly; (b) by an Investigating Team constituted at the Headquarters of the Commission; and (c) through its State Offices.

The Commission may hold sittings for investigation into matters relating to safeguards, protection, welfare and development of the Scheduled Tribes for inquiry into specific complaints for which the Commission decided to take up investigation or inquiry directly. Such sittings may be held either at the Headquarters of the Commission or at any other place within the country.

The sitting of the Commission would be held after giving due notice to the parties intended to be heard and also due publicity notice to the general public. Care will be taken to see that the members of the Scheduled Tribes who are affected in the mater under investigation or inquiry are given due information through notice or publicity.

When a decision for direct investigation is taken, an officer not below the rank of Research Officer/Section Officer along with necessary staff may be attached to the Member entrusted with such investigation or enquiry and they shall take all steps to arrange such sittings.

The Commission shall, while investigating any matter referred to in sub-clause (a) or inquiring into any complaint referred to in sub-clause (b) of clause (5), have all the powers of a civil court trying a suit and in particular in respect of the following matters, namely summoning and enforcing the attendance of any person from any part of India and examining him on oath[29]; requiring the discovery and production of any document[30]; receiving evidence on affidavits[31]; requisitioning any public record or copy thereof from any court or office[32]; any other matter which the President may, by rule, determine.[33]

The Commission for the purpose of taking evidence in the investigation or inquiry requires the presence of any person and when considered necessary may issue summons to him/her. The summons for enforcing attendance of any person from any part of India and examining him/her during the course of investigation and inquiry by the Commission shall provide at least 15 days' notice to the person directed to be present before the Commission from the date of receipt of the summons.

Where the property, service/employment of Scheduled Tribes and other related matters are under immediate threat and prompt attention of the Commission is required, the matter shall be taken cognizance by issue of telex/fax to the concerned authority for making it known to them that the Commission is seized of the issue. Urgent reply by telegram or fax shall be called from the concerned authority. In case no reply is received within ten working days, the authority concerned may be required to appear before the Commission at a shorter notice for enquiry.

The Commission may issue commissions for the examination of witnesses and documents to take evidence in any matter under investigation or inquiry and for this purpose appoint any person by an order in writing.[34] The Commission may make further rules for payment of fee and travelling and other allowances to persons appointed to take evidence on commission.

After holding the required sittings, the Member who conducted the investigation shall make a report which shall be sent to the Secretary or any other officer authorized to receive the report. After examination, action may be initiated on the report with the approval of the Chairperson. Investigation or inquiry by an Investigation Team constituted at the Headquarters of the Commission

The Commission may decide about the matter that is to be investigated or enquired into by an Investigating Team of officials of the Commission, provided that in case the matter is urgent, the decision for such investigation or inquiry may be taken by the Chairperson.
The Investigating Team shall hold the investigation or inquiry, as the case may be, promptly and for this purpose, may initiate necessary correspondence including issuance of notices for production of documents in Form I, appended to these rules.

The Investigating Team may visit the area concerned after observing due formalities for obtaining approval of tours and other administrative requirements and after giving information to the concerned local authorities regarding the matter, purpose, scope and procedure of the investigation or inquiry. The Investigating Team may enlist the help of the officers and staff of the concerned State Office but the responsibility of preparing and presenting the report shall rest with the head of the Investigating Team.

The Investigating Team shall submit the report of the investigation or inquiry, as the case may be, to the Secretary or a subordinate officer of the Commission as may be directed by general or specific orders within the stipulated time, if any. If the time limit stipulated is likely to be exceeded, the head of the Investigating Team shall obtain the orders of the Secretary through the Officer-in-charge of the matter. The report shall be examined and put up to the competent authority for a decision regarding the action to be taken on the report. The report shall be placed before the Chairperson of the Commission who will take appropriate action in the matter.

Investigation and inquiry through the State Offices

The Chairperson, the Vice-chairperson, the Members having jurisdiction over the subject or the Secretary of the Commission may decide about an investigation or inquiry that may be carried out through the State Offices of the Commission. The decision will be conveyed to the Officer-in-Charge of the concerned State Office who will be asked to get the matter investigated or inquired into within a stipulated time and send the report. The State Office shall conduct the investigation or inquiry through interrogation, on the spot visit, discussions and correspondence and examination of documents as may be necessary in the case and shall follow any special or general instructions issued in the matter by the Secretariat of the Commission from time to time.

If the investigation or inquiry cannot be completed within the stipulated time, the officer-in-charge of the State Office may send a communication to the Secretariat of the Commission before the expiry of the stipulated time and explain the circumstances and reasons for non-completion of the investigation or inquiry, as the case may be, within the stipulated time. The Secretary to the Commission or an officer acting under delegated functions may consider the request and communicate a revised date for the completion of the investigation or inquiry.

If during the course of investigation or inquiry, the Head of the State Office feels that it is necessary to invoke the powers of the Commission to require the production of any document or compelling the attendance of a person, he may make a special report with full facts to the Secretariat of the Commission. On receipt of such special report, the matter shall be placed before the Secretary or Member in-charge of the subject or State or Union Territory (UT) who may make an order that necessary legal process to compel attendance or to require production of any document may be issued. The summons and warrants issued for the purpose may be served on the person concerned either directly or through the

officer-in-charge of the State Office as may be directed by the Secretary/Member authorizing issue of such legal process.

After completion of the investigation or inquiry, as the case may be, the head of the State Office shall submit the report to the Secretary of the Commission suggesting the course of action that could be followed in the matter. The gist or findings of the report may be placed before the Secretary who may decide about further action in the matter.

Legal processes

All summons and warrants that are required to be issued in pursuance of the exercise of the powers of a civil court by the Commission shall be written in the prescribed form and shall bear the seal of the Commission. The legal process shall be issued from the Legal Cell of the Commission and shall bear its seal. The provisions of the Code of Civil Procedure applicable for the service of the legal processes shall be followed by the Commission.

C. Advisory role of the commission

Interaction of the Commission with the State Governments

The Commission shall interact with the State Governments through its Members, Secretariat and the State Offices. The Members in-charge of the State or UT would interact with the State Government or UT Administration through meetings, personal contacts, visits and correspondence. The information in this regard may be sent to the concerned Department or Organizations well in advance and the State Offices should also be informed about the same. For this purpose, detailed guidelines may be formulated by the Commission. The Secretariat of the Commission through its concerned Wings would provide necessary assistance and information to the Member for enabling him to discharge his functions effectively. The State Governments should provide facilities for transport, security, accommodation etc. to the Member as per his entitlement.

Interaction with the Planning Commission

The Commission shall interact with the Planning Commission at appropriate levels through representation in the various Committees, Working Groups or other such bodies set up by the Planning Commission. The Commission shall indicate this requirement through general or specific communication to the Planning Commission.

The Commission may request the Planning Commission to forward copies of all the documents concerning the process of planning and development and evaluation of all programmes and schemes touching upon the Scheduled Tribes.

The Commission may decide about the manner of interaction between the Chairperson or Members of the Commission and the Deputy Chairman or Members of the Planning Commission.

Interaction of the State Offices with the State Governments

The State Offices of the Commission shall work in a manner so as to provide a regular and effective link between the State Governments concerned and the Commission. For this purpose, the Commission may send communications to the State Governments suggesting that the officers-in-charge of the State Offices of the Commission may be taken on important Planning, Evaluation and Advisory bodies including Corporations concerned with the welfare, protection and development of the Scheduled Tribes. The officers-in-charge of the State Offices may be directed or authorized by the Commission to convey to any State authority the formal views, opinion or approach of the Commission on any specific or general mater or issue arising at any meeting or deliberation.

Research/Studies/Surveys/Evaluation

The Commission may undertake studies to evaluate the impact of the development schemes on the socio-economic development of the Scheduled Tribes taken up by the Union or State Governments. For this purpose, the Commission may constitute Study Teams either at the Headquarters or at the State Offices. The Study Teams may undertake investigations, surveys or studies either in collaboration with Central or State Government authorities or Universities or Research Bodies, as the case may be, or may do so independently.

The Commission may entrust surveys or evaluation studies to any professional body or person considered suitable and competent to undertake such work and, for this purpose, may make any reasonable payment to such body or person towards the cost of the study by way of fee or grant. The studies so undertaken or their gist may form part of the Annual or Special Report of the Commission to be presented to the President or may be published separately by the Commission. The Commission may forward a copy of such a study report to the Union or the State Government concerned, as the case may be, asking for their comments, if any. The comments or action taken reports by the Union/State Government may also form part of the Annual Report of the Commission.

D. Monitoring functions of the Commission

The Commission to determine subjects for monitoring

The Commission may determine from time to time the subjects or matters and areas that it would monitor relating to safeguards and other socio-economic development measures provided for the Scheduled Tribes under the Constitution or under any other law for the time being in force or under any order of the Government.

Prescribing returns and reports

The Commission may prescribe periodical returns or reports to be furnished by any authority responsible for or having control of the subject matter of which monitoring is being done by the Commission. The Commission may from time to time issue instructions to its State Offices to collect information and data on any particular subject or matter from the State Governments, Local bodies, Corporate Bodies or any other authorities which is

charged with the implementation of the safeguards provided for the Scheduled Tribes. The Commission may direct its State Offices to process the information of data in the State Offices with a view to arriving at conclusions with regard to the deficiencies or shortcomings discovered through such processing or analysis of the data and to bring these to the notice of the concerned authority for comments and rectification, where necessary. The Commission may have data relating to the subjects monitored, collected at the headquarters and may prescribe returns and reports for the purpose to be sent directly to its Headquarters by the Ministries or Departments of the Central government or a State Government or Public Sector Undertaking or any other body or authority which is charged with the responsibility of implementing safeguards relating to the Scheduled Tribes.

Follow-up action

In order to ensure that monitoring is done effectively, the Commission, after getting the information as prescribed in the above rules and after reaching conclusions, may as early as possible send out communications to the concerned authority describing the shortcomings that have been noticed in the implementation of the safeguards and suggesting corrective steps. Decisions on sending out such a communication may be taken at a level not lower than that of Joint Secretary or Secretary at Headquarters. Directors-in-Charge of State Offices may take decisions on routine matter whereas they will seek approval of the Secretary and the concerned Member on complex and important matters affecting the interest of Scheduled Tribes as a group.

The Commission may include in its Annual Report or any Special Report, findings and conclusions arrived at through the process of monitoring of the subjects relating to the safeguards and socio-economic development measures provided for the Scheduled Tribes under the Constitution or under any other law for the time being in force or under any order of the Union or State Government.

Non-formal actions by the Commission

The Commission can sue or be sued through its Secretary. The Commission may initiate correspondence in special cases in matters which are not strictly covered under the law if the matter is such that the welfare of an individual person belonging to Scheduled Tribes or that of a group of such persons is involved and it is necessary for the Commission in its inherent capacity as the protector of the interests of these classes of persons, to take action. The decision for correspondence on such matter shall be taken at the level of Director or above. All routine formal communications from the Commission shall be issued under the signatures of an Officer not below the rank of Research Officer or Section Officer.

Applicability of rules, etc., of the Central Government

All rules, regulations and orders issued by the Central Government and applicable in the Ministries/Departments will also apply in the Commission. The provisions relating to the delegation of financial powers in the Government of India shall apply to the corresponding officers in the Commission.

Decision on matters not specified in these rules

If a question arises regarding any such matter for which no provision exists in these rules, the decision of the Chairperson shall be sought. The Chairperson may, if he deems fit, direct that the matter may be considered at a meeting of the Commission.

Conclusion

The NCST is a constitutional body mandated to protect the rights of over 104 million tribal peoples of India. The Constitution has vested the NCST with enormous powers to deal with human rights violations of the tribal's. But due to lack of powers to enforce its recommendations and the weak rules of procedure which the NCST has developed to make it subservient to the State authorities have left the NCST largely ineffective. However, despite having enormous powers, the NCST has been hamstrung because of the lack of independence as given below:

First, the NCST's "Rules of Procedure" have made it subservient to the State authorities contrary to the Article 338-A of the Constitution. The NCST has to take prior permission from the concerned State government in order to investigate any case of human rights violations in that particular State. This has severely compromised the independence of the NCST more than anything else.

Second, the NCST has a flawed procedure of appointment of its members. The President (of India), who acts and exercises his/her constitutional powers on the advice of the Council of Ministers headed by the Prime Minister, appoints the members of the Commission on the basis of vaguely formulated criteria. Hence, in effect it is the Minister of Tribal Affairs who recommends the appointment of the members of the Commission in absence of any Recommendation Committee.

Third, despite having plurality in representation in the Commission the plurality has been narrowed down by the political appointments in the Commission.

Fourth, the NCST does not have financial autonomy. Its budget is decided by the Ministry of Tribal Affairs.

Fifth, the NCST is not equipped with adequate staff to carry out its functions effectively. The NCST is not easily accessible to the tribal populace. In a country of the size of India, there are only six Regional Offices with each Office having jurisdiction of at least six States (except the Regional Office at Raipur whose jurisdiction is only for Chhattisgarh). While the NCST Headquarters at New Delhi is far away from most parts of the country, the Regional Offices are hardly physically accessible to the poor tribal's who mostly live in remote and inaccessible villages. The NCST virtually remains unknown to the tribal's of the country.

References:

[1] Article 338-A (2) of the Constitution of India, 1950.
[2] Rule 3 (1) of The National Commission for Scheduled Castes and Scheduled Tribes Chairperson and Members (Conditions of Service and Tenure) Rules, 2004.
[3] Rule 3 (2) (a).
[4] Rule 3 (2) (b).
[5] Rule 3 (2) (c).
[6] Article 338-A (3) of the Constitution of India, 1950.
[7] Rule 4 (1) of NCSC and ST Chairperson and Members (Conditions of Service and Tenure) Rules, 2004.
[8] Rule 4 (2).
[9] Rule 8 (1).
[10] Rule 8 (2) (a).
[11] Rule 8 (2) (c) (i).
[12] Rule 8 (2) (c) (ii).
[13] Rule 8 (2) (c) (iii).
[14] Rule 8 (2) (c) Provided.
[15] Rule 8 (3) (a).
[16] Rule 8 (3) (b).
[17] Rule 8 (3) (c).
[18] Rule 8 (3) (d).
[19] Rule 8 (3) (e).
[20] Rule 8 (3) (f).
[21] Rule 8 (3) Proviso.
[22] Article 338-A (4) of the Constitution of India.
[23] Article 338-A (5) (a).
[24] Article 338-A (5) (b).
[25] Article 338-A (5) (c).
[26] Article 338-A (5) (d).
[27] Article 338-A (5) (e).
[28] Article 338-A (5) (f).
[29] Article 338-A (8) (a).
[30] Article 338-A (8) (b).
[31] Article 338-A (8) (c).
[32] Article 338-A (8) (d).
[33] Article 338-A (8) (f).
[34] Article 338-A (8) (e).

Problems of Poor under Trials

Dr. Ishrat Husain*

Introduction

The justice delivery system may be blind to all biases, but the impact of delay in criminal case trials has contrasting effect on the rich and poor. It is far easier for the high and mighty accused to prolong the trial proceedings. A poor accused suffers the delay but the rich and influential enjoy the delay in trial. Law has a different yardstick for the poor. It is a known fact that under trials lives in sub-human conditions even before they are convicted. It is needless to mention that though adequate facilities, under law and the Jail Manual, are required to be provided to those in custody, this is not followed. The lack of other facilities particularly with regard to food for the persons in detention, are the main reasons for mental torture. The nightmare starts the moment a person is taken into custody. The lockups are not properly maintained and cleaned. Sanitary conditions are far from satisfactory, the lock ups are overcrowded and maladministerd- all factors contributing to the general misery of inmates.

The poor, illiterate and weaker sections in our society in our country suffer day in and day out in their struggle for survival and look to those who have promised them equality- social, political and economic. A very large number of under–trial prisoners suffer prolonged imprisonment even in petty criminal matters merely for the reason that they are not in a position, even in bailable offences to furnish bail bonds and get released on bail.

In fact, our criminal justice system is good as an exhibit but ineffective as a tool. Under trials are languishing in jails and proclaimed offenders are freely moving out. Many prisoners are constrained to languish in prisons because the police do not finish investigation and file the charge-sheet in time. This is a very serious matter because such people remain in prisons without any slight knowledge of a police case against them. Many prisoners remain in prisons for long period because of the delay in trial.

Meaning

An under trial, or a pre-trial detainee denotes an un-convicted prisoner i.e. one who has been detained in prison during the period of investigation, inquiry or trial for the offence she/he is accused to have committed. He is an accused who is assumed to be innocent till proven guilty. He is in custody only to ensure that he appears at court as required or is available to answer questions during investigations. There is no other reason for him to be in prison. An extensive investigation across the country has exposed a dark sub-culture

**** Guest Faculty, Department of Law, AMU, Aligarh.***

thriving in jails across the country, not very different from the dark underworld of organized gangs and criminals. In the absence of proper legal aid, the poor and the vulnerable, especially women and youngsters, ignorantly become part of the dirty system.

Though, section 57 of Criminal Procedure Code and Article 22 of the Constitution of India provide protection to an arrested person or a person in police custody. No one can be kept in police custody more than 24 hours as these provisions provide. However, this time limit is extended by virtue of section167 of Cr. P.C. as it is called police remand. If charge sheet is not filed within 90 days in cases of imprisonment more than 10 years and 60 days in other cases. It does not mean that accused will be released on after passing of this time limit. Accused has to furnish bail. In most of the cases, under trials are unable to furnish bail for poverty, ignorance and lack of facilities. This is the main reasons for under trials to remain in jails for years.

The bail system causes discrimination against the poor since the poor would not be able to furnish bail on account of their poverty while the wealthier persons otherwise similarly situated would be able to secure their freedom because they can afford to furnish bail. As the UN Human Rights Committee (UNHRC) noted, pretrial detention can therefore negatively impact the presumption of innocence and should be used only as a last resort. States should only detain individuals pending trial where it is absolutely necessary. International and regional human rights instruments are explicit as to the limited circumstances under which pretrial detention is permissible.

Most of those in the Indian prisons are poor, indigent, illiterate or semi-literate. They do not know that they are entitled to free legal aid or that they can be released on personal bond. They therefore, continue to be in jail for long periods. Lack of adequate legal aid and a general lack of awareness about rights of arrestees are principal reasons for the continued detention of individuals accused of bailable offences, where bail is a matter of right and where an order of detention is supposed to be an aberration.

Present Position

There are altogether too many prisoners waiting trial in Indian prisons. Under trials constitute 64.7% of the total prison population in India. There are over 2.41 lakh under trial prisoners in India. As per the latest[2] statistics[2] available on prisons in India, there are 193627 under trial prisoners as against 63975 convicts constituting 71.2% of the total prison population in India. The range varies from allow of 12.1% in Tamil Nadu to a maximum of 98.7% in Dadra and Nagar Haveli.[1]

The following table highlights the period of detention for the year 2000:[2]

Period of detention	Number of under trials	Percentage of the total under trial population
Upto 3 months	78,316	40.4

Upto 6 months	43,799	22.6
Upto 1 year	34,419	17.8
Upto 2year	22,488	11.6
Upto 3 years	9,629	5.0
Upto 5 years	4152	2.1
Above 5 years	824	0.4

According to a note circulated by the law ministry in 2010, there are over three lakh under trial prisoners in jails across the country. About two lakh of them are imprisoned for several years primarily because of delays in the justice delivery system. In some cases, prisoners have behind bars for more than the maximum term of imprisonment for offences they had been charged with.

Problems: It is necessary to examine the realities inside the prisons in India, those may be summarized as follows:[3]

1. Violence

Group violence is endemic and riots are common. In a three day riot and stand off in the Chappra district prison in Bihar towards the end of March 2002. Six prisoners died in the shootout that occurred when commandos of the Bihar Military Police was called in to quell the riots. Meek and first time offenders are tortured and made to do all the menial tasks. Failure to comply sees them sleeping in font of smelly and overflowing toilets in the night.

2. Criminalizing Effect

Hardened criminals being around and in the absence of scientific classification methods to separate them from others, contamination of the first time, circumstantial and young offenders into full-fledged criminals occurs very frequently. It is often given quote that prisoners are universities of crime where people go in as under graduates and come out with Ph.D. in crime.

3. Abuse

Prisoners are institutions that lodge people of same sex. Being removed from their natural partners, forces the prisoners to look for alternatives ways to satisfy their sexual urge. This often found vent in homosexual abuses where the young and feeble are targeted. Resistance from the side of prisoners leads to aggravated violence on them. At times, Prisoners are subjected to massive homosexual gang rapes. Apart from causing severe physical injuries like the rupture of anus and spreading sexually transmitted diseases including HIV/AIDS, it also induces severe trauma in prisoners forcing some of them to commit suicide. If they do not, they carry a lot of anger and frustration in themselves which they take out on the next innocent prisoners who gets admitted.

4. Health Problems

Most of the prisoners face problems of overcrowding and shortage of adequate space to lodge prisoners in safe and healthy condition Most of the prisoners found in prisons come from socio-economically disadvantaged sections of society where disease, malnutrition and absence of medical services are prevalent. When such people are cramped in with each other in unhealthy conditions, infectious and communicable diseases spread easily. A sample study conducted by the National Commission of Human Right of India revealed that 76% of deaths in Indian prisons were due to the scourge of Tuberculosis.

5. Mentally Ill Prisoners

Mentally ill prisoners constitute another percentage of population, which largely ignored and forgotten by both the outside world and those inside. But given nature of the illness and prevailing social attitudes, they form the most helpless victims of human rights violations. The infamous case in India is that of Ajoy Ghos who spent 37 years in prison, till November1999. He was arrested or murdering his brother in 1962. Subsequently he was certified as insane and after his mother's death in 1968, nobody came to visit him. Everybody simply forgot him while he was in prison, the trial judge and all the witnesses died. His life was the ultimate vicious circle. He could not be acquitted unless tried. Since he was legally a lunatic, he could not be tried. In November 1999, some group brought him to the notice of the Supreme Court and it took the Chief justice of India to transfer him from the Presidency jail of Calcutta to the Missionaries of charity home. M Ghosh's life is the ultimate sacrifice to the Indian justice system.

6. Drug Abuse

Being in prison and cut off from the free world, sees and increased desperation to get the banned substance to satisfy their addiction to drugs. This also increases the danger of fresh prisoners being inducted into drug abuse since prison is an environment where there is a captive, bored largely depressed population eager for some release from the grim everyday reality.

7. Effect on Families of Prisoners

Those imprisoned are unable to look after their families. In the absence of the main bread winner, the family is many a time forced into destitution with children going astray. This combined with social stigmatization and ostracization that they face, leads to circumstances propelling children towards delinquency and exploitation by others. It is an inexorable circle. The problem becomes acute when they belong to the socio economically marginalized and exploited section of the society. The dominant class does not fail and loose time in taking advantages of this situation to exploit the remaining family members to the fullest possible extent. This can take the form of rape or forced prostitution of the prisoner's wife and/ or his daughters. It is easy to imagine what we are then leading to from here onwards.

The conditions of our jails are highly deplorable. There are walled houses of cruelty, torture and defiled dignity. The attitude of jail authorities towards crime and criminals is not only indifferent, but unpardonably dehumanizing. All this notwithstanding, the prison system cannot be dispensed with altogether. It has to be accepted as a necessary evil and, therefore, we have to reform it with a sense of urgency so that it could serve its four major purposes: retribution, incapacitation, deterrence and rehabilitation.

In the normal course, the food supplied in lockups is below par. Chappatis and vegetables, in some cases are infested by insects and stale vegetables are served. Though there is a procedure to check the meals for those in lockups, hardly any attention is paid to it. Even pure drinking water is not provided and this result in unavoidable diseases caused to the accused in custody. Those in direct charge of police or judicial lockups are supposed to provide special diets to sick persons, but seldom is any attention paid to this important aspect of human life. The accused are dumped in large numbers, which far exceed the capacity, into small dingy lockups. Further, there is just a small latrine in the lockups which is to be used by them, making a dirty and smelly.

Many a times, accused persons are kept in lockups without authorization. However the Supreme Court, in order to fetter the police, while pronouncing judgment on May 8, 1992 in the case of ***CBI vs. Anupam Kulkarni*** held that the police cannot keep a person charged with a specific offence in police custody for more than fifteen days from the date on which he is produced before a magistrate and remanded to police custody.

Solutions

The solutions with regard to the problems of poor under trials may be summed up as follows:

- Under trial prisoners should be lodged in separate institutions away from convicted prisoners. There should be proper and scientific classification even among under trial prisoners to ensure that contamination of first time and petty offenders into full fledged and hardened criminals does not take place.
- Under no circumstances should they be put under the charge of convicted prisoners.
- Institutions meant for lodging under trials should be as close to the courts as possible
- Provisions of section167 of the Cr. P.C. with regard to the time limit for police investigation in case of accused under trial prisoners should be strictly followed both by the police and the courts.
- The possibility of producing prisoners at various stages of investigation of investigation and trial, in shifts should be explored.
- Video conferencing between jails and courts should be encouraged and tried in all states beginning with the big central jails and then expanding to district and sub jails.
- A district level Review Committee should be constituted to review the cases of uundertrial prisoners. This committee should visit all Central and District prisons in the district at least once a month and meet every under trial prisoner present on the day. It

should hold a meeting to review the cases of all under trial prisoners in the prisons under its jurisdiction and see that no such prisoner is unnecessarily detained in the prison.

- The District Magistrate should constitute a committee consisting of representatives from the local police, judiciary, prosecution, district administration and the prison department at a fairly high level, to visit the sub-jails under their jurisdiction at least once every month and review delay in cases of prisoners if any and adopt suitable measures.
- Police functions should be separated into investigation and law and order duties and sufficient strength be provided to complete investigations on time and avoid inordinate delays.
- The criminal courts should exercise their available powers under sections 309, 311 and 258 of the Cr. PC to effectuate the right to speedy trial.
- With under trials prisoners, adjournments should not be granted unless absolutely necessary.
- There should be an immediate increase in the number of judges and magistrates in some reasonable proportion to the general population.
- Amount of bail should not be unreasonably high and arbitrary.
- Recruitment of trained and post committed law officers to jails, in numbers proportionate to the prison population.
- The grant of bail is one important remedy available to reduce pre-trial detention. Indian courts have reiterated that the grant of bail should be the rule rather than the exception. Because they are considered to be less likely to abscond or interfere with the investigation, bail provisions in non-bailable offences are more liberal if the accused is under sixteen, a woman, sick or infirm. Despite sounding fair, the bail provisions and their implementation are highly discriminatory. But the prisoners are unable to serve surety.
- Another suggestion is that it should be made mandatory for the jail authorities to educate them about their rights and provide them legal aid. The plight of the wrongfully confined prisoners is compounded when jail authorities refuse to release information about them in public domain. One very relevant solution is Section 436A of the Indian Criminal Procedure Code states that the maximum period for which an under trial prisoner can be detained without being released is not more than 50% of the maximum imprisonment specified for the charge he/she is booked for, except if the offence attracts death as the maximum punishment. According to the law, such prisoners can be released on personal bond if they cannot furnish bail. This provision is hardly used by authorities. Public-spirited citizens and lawyers could also take up these matters. The prison authorities should display the updated information every month on their website and also display hard copies of the information in every prison in a place where prisoners have access.

The very basis of the bail system is tilted against the poor Criminal Procedure Code is property oriented. The accused has to furnish a surety and a bail bond requires him to pay a particular sum of money in case he fails to appear for the trial. Justice P. N. Bhagbati has been out-rightly critical about this system of bail." The poor find it difficult to furnish bail even without sureties because very often the amount of bail fixed by the court is so unrealistically excessive that in a majority of cases the poor are unable to satisfy the police or the magistrate."

Conclusion

The conditions of our jails are highly deplorable. These are walled hoses of cruelty, torture and defiled dignity. The attitude of the jail authorities towards crime and criminals is not only indifferent, but also dehumanizing. All this notwithstanding, the prison system can not be dispensed with altogether. It has to be accepted as a necessary evil and, therefore, we have to reform it with a sense of urgency so that it could serve its four major purposes: retribution, incapacitation, deterrence and rehabilitation. Until it is done, the present system will continue, meaning that justice will be on trial and the agencies involved in it would lay themselves open to the charge of contempt of justice.

One of the fundamental elements of human rights law which importance grew over time is the concept of "Fair Trial". Taking this into account, the question rises how far the application of the fair trial rights stretches into the pre trial stage of investigation. Answering this question is far from easy and it is pointed out correctly, it is by no means obvious what the fair trial concept really encompasses and what the singular rights within this concept really stand for.

The overuse of detention is often a symptom of a dysfunctional criminal justice system that may lack protection for the rights of criminal defendants and the institutional capacity to impose, implement, and monitor non-custodial measures and sanctions. It is also often a cause of human rights violations and societal problems associated with an overtaxed detention system.

In India, apart from the Prisoners Act, 1984, there is a Model Prison Manual in place and the various judicial pronouncements have made it clear that prisoners are entitled to human rights, the most important of which is presumption of innocence till he is proven guilty.

As Justice P.N Bhagwati, "It is high time that the public conscience is awakened and the government as well as the judiciary begins to realise that in the dark cells of our prisons there are a large number of men and women who are waiting patiently, impatiently perhaps, but in vain, for justice – a commodity which is tragically beyond their reach".

It is crying shame on the judicial system which permits incarceration of men and women for such long periods of time without trial. We are shouting from rooftops about the

protection and enforcement of human rights. But are we not denying human rights to these nameless persons who are languishing in jails for years for offences which perhaps they might ultimately be found not to have committed?

References:

[1] Types of inmates in Prison Statistics 2000, National Crimes Records Bureau, Ministry of Home Affairs, Govt. of India at page 21.

[2] Period of Detention of Under trials in Prison Statistics 2000 at page28.

[3] Access to Justice for Under trial Prisoners: Problems and Solutions by R. Sreekumar.

Discourse On Gender Discrimination and Inequality in India with Special Reference to Sexual Minorities

Mukesh Bharti*
Dr. Preeti Misra**

Abstract

Crime and Criminals are treated as social evils. These are handled by criminal justice system of a particular country. Every guilty person or group is punished, for the wrong committed against any individual or society, through a criminal justice system, according to procedure established by law. The power of any institution exists in its people and their functioning involved. It is an obligation on criminal justice system to protect innocent persons from any hardship and promote their human rights for securing a quality, value, fair and precious justice. Under gender discrimination and inequality discourse, we generally know and talk about male and female categories but a huge group of sexual minorities (Lesbian, Gay, Bisexual, Transgender, Hijra, etc.) is facing violations of their human rights not only in India but also world under the same discourse. The situation of such discrimination and inequality exists in social, economic, political and legal sphere too. They are searching accessibility into the mainstream of society as well as in justice. After the decision of Delhi High Court in Naz Foundation case, the role of Indian Criminal Justice System has become more significant in present scenario. The paper highlights on such gender discourse keeping in view the incidences of discrimination and inequality against sexual minorities in India. This paper also attempts to provide a larger theoretical perspective of gender discourse.

Key Words: Gender; Indian Criminal Justice System; Human Rights; Sexual Minorities; etc.

Introduction

India is known for multi-cultural, multi-religious, multi-linguistic and other kinds of diversified society. When we talk about gender, gender identity, or any other things related to gender, the knowledge of everything we see, perceives, thought can be included in the study of gender because gender is a social construct. Generally, the study of gender take rest on the study of male and female binary system but there are lots of issues involved with the study of gender out of that the study of sexual minorities (hereinafter LGBT) is attempted. The understanding of LGBT contains the study of not only gender but also sex.

Research Scholar, Department of Human Rights, School for Legal Studies, Babasaheb Bhimrao Ambedkar (A Central) University, Lucknow.
****** Associate Professor, Department of Human Rights, School for Legal Studies, Babasaheb Bhimrao Ambedkar (A Central) University, Lucknow.***

Gender Discrimination and Inequality

Gender discrimination and Inequality refers the incidences and consequences of differentiating between male and female recipients of society because of certain presumptions, thoughts, behaviours, and identity and most popular the 'social norms'. This is a process by which a person either feels or performs a comparison with other inmates of society. For understanding this, the understanding of sex, gender in a wider aspect is needed.

Sex

Generally, we do not talk and discuss about sex mostly in public because of many reasons like immoral; eroticism; absenteeism of sex knowledge from curriculums and prohibited norms of society, that result as an inadequate and improper knowledge of sex among persons and concludes with behavioural problems. 'It is well recognized that sexual health is one of the important component of health in general. It is both the cause and effect of varied behavioural and physical disorders. In spite of this, sexuality research has received only a cursory or negligible interest by Indian researchers. Physicians either show no interest or ignore patients' psychosexual concerns (Avasthi& Nehra, 2000). We lack to great extent the reliable measures and the estimates of sexual disorders (Kulhara&Avasthi, 1995), specialized clinics (Rao. TSS, 2000) special groups,(Rao. TSS,1989), training facilities (Singh et. al, 1987) and concerned practitioners (Avasthi et. al, 1994).'[1]

'There are widely prevalent myths, misconceptions and prejudices concerning sex in our culture (Mishra, 1963) and the so-called 'sex specialists' and 'quacks' have added to the self-perpetuating, iatrogenic disorders.'[2] In her book 'sexuality in India: Teenager and Teacher', 'Kavita Joshi', emphasises various sex and sexuality values and perceptions relating to variables, need for sex education, gender equality, homosexuality, deviant behaviour, etc. for adolescent through inculcating sex and sexuality in different curriculums. 'Dickinson believes that sex is first of all a physical fact.'[3]'Sex denotes the physical and mental traits that distinguish between males and females; and also the physiology and psychological processes related to procreation and sensual pleasure (Goldenson, 1984).'[4]'Khujraho temples or Ajanta caves were carved to educate about sex, sex is a matter of one's personal conduct'[5]When says sex, Freud, means 'sex-genitalia and their direct expression'[6]and 'at the same time he comes to the tacit understanding that sex really is nasty, an ignoble slavery to nature.'[7]

When Robyn Ryle asks to her students of sociology about the difference between sex and gender they 'usually agree that sex describes the biological differences between women and men'[8]while using biosocial approach Robyn Ryle discusses that 'sex describes the biological differences between people we call males and people we call females.'[9]Biosocial approach is being applied by the bio-socialists and they particularly focus on the sexual dimorphism which means 'the claim that sex marks a distinction between two physically and genetically discrete categories of people. Sexual dimorphism is the belief that there is

something meaningful out there called sex and that we can use certain characteristics to objectively sort people into two categorises called male and female.'[10]

In his book titled "Human Sexuality in a world of diversity" Rathus, pointed out that, 'the word (sex) derives from Latin roots meaning "to cut or divide," signifying the division of organisms into male and female genders. One use of the term sex, then, refers to our gender, or state of being male or female. The word sex (or sexual) is also used to refer to anatomic structures, called sex (or sexual) organs, that play a role in reproduction or sexual pleasure. We may also speak of sex when referring to physical activities involving our sex organs for purposes of reproduction or pleasure: masturbation, hugging, kissing, coitus, and so on. Sex also relates to erotic feelings, experiences, or desires, such as sexual fantasies and thoughts, sexual urges, or feelings of sexual attraction to another person.'[11]'Sex indicates the difference in Morphology and Anatomy Morphology is which separates from male from female.'[12]Nagpal (2001), 'further opined that sex is gratification and lust is being confused with love.'[13]

Sorenson views 'sex as a biological fact, meaning that it is non cultural, static and scientifically measurable and unproblematic.'[14]According to Michel Faucault, 'the notion of "sex" made it possible to group together, in an artificial unity, anatomical elements, biological functions, conducts, sensations, and pleasures, and it enabled one to make use of this fictitious unity as causal principle, an omnipresent meaning, a secret to be discovered everywhere: sex was thus able to function as a unique signifier and as a universal signified.'[15] Discussing about the understanding of sex, Robyn Ryle point outs that 'sex, then, is a causal factor dictating how gender gets expressed.'[16] 'From a strong constructionist perspective, using sex infers a belief in two kinds of people, male and female. From a biosocial perspective, sex indicates the existence of two different kinds of people, male and female.'[17] Further, 'In English, sex can mean both the biological categories of males and females as well as engaging in some kind of sexual act.'[18] 'LeVay and Baldwin (2009) note that sex is about identity as well as relationships.'[19]

Many authors and writers have contributed in enlargement of knowledge of sex through various perspectives such as biology, anthropology, sociology, psychology, history, medical, science, etc. but we are lacking one perspective which has also contributed in the knowledge of sex. This perspective is known as spiritual perspective and the name of 'Osho' is very famous in this regard. In an article related to Osho 'Sex is a mysterious phenomenon, which has puzzled even great sages.'[20] 'Sex for the Athenians was understood as an action performed always by a social superior on a social inferior. Sex was a deeply asymmetrical act that divided the world into penetrator and penetrated, and these categories were in no way interchangeable.'[21] 'Those deemed socially superior (male citizens) were the penetrators, and those seen as socially inferior (women, children, foreigners, and slaves) were the penetrated.'[22]

The above mention discussion provides us knowledge about sex that reflects sex as biological phenomenon.

Gender

It is that part of study in social science research which has a very long list of work. 'Although much has been written in academic and policy circles on gender, on conflict, and on the impact of conflict on women,'[23]but there has been made an effort to discuss the currently debated issue related to sex, gender and sexuality i.e. homosexuality or same-sex-relationship particularly under Indian criminal justice system. Gender may also be a subject matter of various social scientists, anthropologists, psychologists; human and legal rights activists especially focused on women related issues. Bem& Wharton says, 'that most people in western cultures grow up learning that there are two and only two sexes, male and female, and two and only two genders, feminine and masculine. We are taught that a real woman is feminine, a real man is masculine, and that any deviation or variation is strange or unnatural.'[24]

We have a long list of work on gender within different context as social, economic, political, cultural, and legal & human rights. 'Numerous theories explain how and why gender differentiation and inequality exist in most societies. We cannot describe them all.'[25]Some may be referred here and before going into details of gender studies, we need to 'develop a capacity to see what is hidden by the cultural blinders that we all wear at least some of the time.'[26]Discussing about gender, this term 'defined as the meanings, practices, and relations of femininity and masculinity that people create as they go about their daily lives in different social settings.'[27]Kimmel and Tavris, 'described gender as two "sex" roles- male/masculine and female/feminine by forwarding innate personality characteristics and biological sex characteristic such as hormones and reproductive functions.'[28]

Women are biological inferior to men was debunked by Tavris as women has been regularly participating and producing high level of achievement in comparison of men in different fields of sports. Researchers have tried to find out the 'gender inequality within the economy, family, religion, and other social institutions'[29]of life. Schwalbe, theorises gender is "human-made"[30]and argues that 'gender is a human invention is called social construction.'[31]The situation becomes more complicated when gender is defined within different cultural context as Helliwell, defines 'about the similarity of men and women while Herdt defines gender as flowing and changing across the life span.'[32]In understanding of gender, 'R.W. Connell argued in terms of *hegemonic masculinity and emphasized femininity* that reflects the dominance of men or emphasized femininity is always subordinated to masculinity.'[33]

Now, taking the different categories of individual and institutional level, social scientists Howard &Alamilla, says that at Individual level 'gendered expectations, including stereotypes, are incorporated into how we define ourselves, and shape how we act and react as well as how other perceive us. While, ultimately, gendered identities are the result of

larger societal and cultural forces, they are deeply felt, and individuals act upon them.'[34]According to West and Zimmerman, 'gender is "done" in interaction with others in specific situations. They argue that the very process of interaction involves the presentation of a gendered self, the responses of the persons we are interacting with, and our reactions to their anticipated or actual responses. As such gender is an on-going activity that is carried out in interaction with other people, and people vary their gender presentations as they move from situation to situation.'[35]Pleck (1981) defines 'sex role (gender) as, "the set of behaviours and characteristics widely viewed as (1) typical of women or men (sex role stereotypes) and (2) desirable for women or men (sex role norms)".'[36]

Further, some theorists use social constructionism to explain gender at the institutional level. Acker argues, 'that institutions are gendered because "gender is present in the processes, practices, images and ideologies, and distributions of power in the various sectors of social life".'[37]Like Acker, Judith Lorber also combines a social constructionist perspective with the concept of social institutions. She argues that gender be viewed "as a society-wide institution that is built into all major organisations of society:" By viewing gender as an institution, Lorber, sees it as a basis for inequality in society because it is through gender that resources, power, and privilege are distributed. Gender, according to Lorber, is "a process of creating distinguishable social statuses for the assignment of rights and responsibilities."[38]Further, Lorber argued that 'gender is an institution that is embedded in all the social processes of everyday life and social organisations.'[39] Postmodernist theorists ague that 'gender is a product of the discourses within particular social contexts that define and explain gender.'[40]Sorenson views 'gender as a cultural attribute, a means by which people are taught who they are, how to behave, and what their roll will be.'[41] Barbara J. Risman theorises gender 'as a social structure'[42]and examined the construction of gender within individual, intersectional, and institutional dimensions of social life. 'The expression 'gender' denotes 'the social meaning of sex categorization.'[43]

American sociologist, Betsy Lucal, by giving her own biography and experiences in daily life, consequently provided the two categories i.e. 'issue of identity and issue of interaction'[44]for understanding of gender as social construction. The most common experience "Sir" was emphasised by her. She categorically discussed gender as "perceived gender" and mentioned that gender is pervasive in our society. I cannot choose not to participate in it. Even if I try not to do gender, other people will do it for me. After analysing the incidences she realised that 'gender is a substantial part of her personal identity'. Sharon Preves, a sociologist, has done 'ground-breaking research on what it is like to live in contemporary America with an intersexed body that doesn't confirm to "standard" medical definitions of male and female.'[45]In her study she exclusively targeted the intersex people referred as 'deemed sexually ambiguous'. Through her study, she tried to find out the root causes for gender variation with the help of medical literature. 'Gender is an organizing principle of social life that affects different levels of social reality, not only individual people.'[46]

Another sociologists, anthropologists, researchers and scholars have also added many more knowledge in the area of gender research covering huge range of boundary or limit. The anthropologist, Serena Nanda, discussed in her book multiple sex/gender system around the world about the multiple genders. She emphasised on the variation of gender by taking the example of hijra and other sexual minorities. She categorically argued about gender variation on multiple levels like characteristics, transvestism, occupation, sexuality and power. She concluded her argument with that 'a person who contains both masculine and feminine qualities or one who is transformed from the sex/gender assigned at birth into a different gender in later life manifests some of the many kinds of transformations and ambiguities that are possible, not only for humans, but for animals and objects in the natural environment.'[47]

'Gender refers to the socially constructed roles ascribed to women and men, as opposed to biological and physical characteristics. Gender roles vary according to socioeconomic, political, and cultural contexts, and are affected by other factors, including age, class, and ethnicity. Gender roles are learned and negotiated, or contested. They are therefore changeable.'[48]Judith Butler in her book Gender Trouble (Butler, 1990) seeks to demonstrate that 'Gender is, thus, a construction that regularly conceals its genesis; the tacit collective agreement to perform, produce, and sustain discrete and polar genders as cultural fictions is obscured by the credibility of those productions-and the punishments that attend not agreeing to believe in them; the construction 'compels' our belief in its necessity and naturalness.'[49]

In defining gender, we have different feminists and sociologists who provided their theories. These theories are known as feminist and sociological theories of gender. 'Using the sociological imagination to investigate gender means performing the detailed archaeology of our own biography and learning to identify the larger structural forces at work in our lives surrounding issues of gender.'[50]A network approach of gender provides 'gender is really a product of the networks of relationships we find ourselves embedded in, going all the way back to the very first networks we belonged to as children.'[51] Under feminist theory, 'Gender is considered separately from statuses such as race, ethnicity, age, class, nationality, or sexuality.'[52]

On the basis of these statements, it comes out that gender has a very long list of work and many persons have defined it in their own ways and in defining of gender, they have adopted various approaches and context within the institutions of society. So, it is also very hard to understand and put a specific definition of gender as it keeps changing with the changing of time, context and circumstances. It is rightly said by Lorber and Tavris in understanding of gender that, 'Lorber and Tavris, research shows that the behaviour of real women and men depends on time and place, and context and situation, not on fixed gender differences.'[53]

After this detailed discussion about gender it may presume that an individual is identified with his or her gender identity irrespective of sex at birth and in this social process of gender identity formation everyone not only 'do gender' but also has 'being gender'. Whenever, we think about 'do gender' it relates, how concerned individual feel, think, behave, react and experience for others but in case of 'being gender' it produces the feeling, thinking, behaving, reacting and experiencing of others for individual concerned.

Sexual Minorities (LGBT)

'We live in a world that is deeply structured by sex and gender. The categorisation of people as 'male' or 'female' permeates our society on every level, including our language, relationships, social institutions, and academic debates. On a social level, biological determinism, or the belief that we act in certain ways because of our physical make-up, is rife. This is the case despite the changes that have occurred over the past century in the way that gender and sexuality are constructed, and high levels of cross-cultural gender and sexual variance.'[54] For a common understanding to society, the status of LGBT is derived from various social, cultural and religious norms followed by law of state i.e. sec. 377 of Indian Penal Code (hereinafter IPC) which is very much centric for my work. The sec. 377 of IPC criminalises the sexual act between same-sex and may be read as:

'Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment which may extend to ten years, and shall also be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.'[55] According to G. R. Dunstan, accepted a sketch of human norm: 'patterns and standards of human relationship, validated widely in ordinary experience, attainable and enjoyed by men and women in varying degrees, and approbated by the conventions, and in some respects by the laws, of societies with a developed awareness of human liberty.'[56] He also discussed that 'there can be no one universal pattern of human sexual behaviour. There must be variety and acceptance of variety.'[57] Moreover, taking a deeper sense of understanding about the 'Variant forms of human sexual behaviour'[58]Rechard Green believed that 'there is probably no limit to the number of 'variant' forms of human sexual lifestyles.'[59]

Forwarding the illustration of Alfred Kinsey, Richard Green pointed out that 'People with an exclusive or major preference for a same-sex sexual partner make up a significant part of the population.'[60] Responding against the developmental mechanism of homosexual behaviour, Richard Green suggested 'prenatal endocrine programming of the central nervous system, various genetic factors, features in the child's family life, such as resolution or non-resolution of the Oedipal conflict ('family romance'), or the impact of early socialization on 'social learning' as the responsible factors.'[61]Although, he was not sure about the 'genetic loading'[62] behind a homosexual orientation.

'LGBT are defined with reference to two distinct and complex characteristics: sexual orientation and gender identity.'[63]Indian society is diverse and has conservative nature as

'many Indians view transsexualism as a purely Western phenomenon, analogous to homosexuality and lesbianism, created by an overindulgent and over promiscuous society. They gloss over the evils of sexual repression in their own society, and ignore the evidence that homosexuality and lesbianism are as old as man himself, having been written about and discussed in ancient treatises such as the *Kamsutra*.'[64]Talking about the categories such as homosexuality David Halperin, argues that, 'homosexuality are indispensable to the experience of 'being' homosexual and further wants to make clear that such categories do not exist 'outside of history and culture', nor are they some form of 'false consciousness.'[65]A Public Union of Civil Liberties (PUCL)-K fact-finding report about Bangalore says that sexual minorities refer 'people discriminated against due to their sexual identity/ orientation or gender identity. This includes gays, lesbians, bisexuals, hijras, kotis, transgender, etc.'[66]

Marks and Spencer discussed about bullying that 'unwanted behaviour whether physical or verbal which is offensive, humiliating and viewed as unacceptable to the recipient.'[67] 'The Germans and the French call it "the slow poison".'[68] Several recent studies of bullying found that bullying affects the person in many ways out of these 'anxiety, depression, exhaustion, insecurity and self-doubt, shame, embarrassment and guilt, obsessive thinking and nightmares, poor concentration, and sleeplessness'[69] are most prevalent, although the outcomes of bullying are numerous. Now, in my own view, bullying with LGBT persons seems the first interactive activity offered by other persons. LGBT persons are highly vulnerable as far as the bullying is concerned.

Submitted by Georgia Lawrence, on 'The Science of Homosexuality' on Monday, 13-11-2006, 'Homosexuality is an issue that has sparked tumultuous debate in the United States, and has been brought to the forefront in the last fifty to sixty years. While the legal and social implications have captured the attention of the media, the lingering question of biology remains at the core of the debate. Is it possible that one is born with the characteristic of being homosexual, or is it solely a learned behaviour embedded in cultural norms?'[70] Considering on the study of 'Health and Medicine Week', in 2004, Scientists at Oregon Health and Science University School of Medicine, Simon LeVay and Thomas A. Schoenfeld,Diamant, Louis, Kristof, Nicholas D, Georgia Lawrence concludes with a relationship between biology and sexual behaviour.

Although, the definition of LGBT is not provided in social and legal related studies but there are certain organisations, working groups and authorities who have tried to put definition of terms used under the category of LGBT in express and implied forms. The definitions are discussed out of binary system we know and may be referred here as:

Lesbian

'The word lesbian comes from the Greek Island of Lesbos, where the poet Sappho lived in 600 B.C. Sappho was an intellectual and poet who wrote many love poems to other women'(Reference: Kathy Belge, http://lesbianlife.about.com/bio/Kathy-belge-9380.htm).

'Female, who are erotically attracted to, and desire to form romantic relationship with, other females.'[71]'A woman who is attracted to women emotionally/ sexually/ romantically.'[72] Sometimes, lesbians are also called 'homosexual women'. 'A woman who desires other women, the characteristic of people who are female desiring other females.'[73] Deepa V. N. points out her idea about lesbian that 'a lesbian is someone who will have sex with anybody.'[74]

Gay

'Male who are erotically attracted to and desire to form romantic relationship with other male.'[75]'A man who is attracted to another men emotionally/sexually/physically.'[76]'Males who desire only other males, the characteristic of same-sex male attraction.'[77] 'A word used to describe a man who is attracted to another menemotionally/sexually/physically.'[78]

Bisexual

'Sigmund Freud admitted the bisexual nature of all human beings, in his system the 'normal' mode of sexual development was heterosexual; explanations were required only when sexual object choices or aims other than reproductive activity with the 'opposite' sex occurred.'[79]Freud has strongly insisted 'on "an original bi-sexuality in every individual" assumes the status of an ethical judgement. His idea of bisexuality presumes an original unity of male and female characteristics and sexual inclination.'[80]'Bisexual refers, who has erotic attraction to, and interest in developing romantic relationship with, males and females both.'[81]'Bisexual is sexually responsive to either gender i.e. male or female.'[82]'A person who is attracted romantically/emotionally/sexually to both men and women.'[83]'The term 'bisexuality', whilst allowing for polysexual attraction (desire for people of more than one sex).'[84]'People who are fluid about their desires might identify as bisexual.'[85] 'Alternative types of sexual orientation include those documented by Queen (1997): 'Omni sexual', (attracted to multiple genders), and 'pansexual', a term coined by Firestone (1970) to mean diverse, unbounded desire.'[86]'Capable of desiring people of more than one gender, or a person who identifies as potentially desiring people of more than one gender. Bisexual has also been given other meanings, such as some who has two gender identities.'[87]

Transgender

'Someone who is anatomically born in a certain sex, but is more comfortable with the gender /sexual identity of a different gender, and chooses to go in for a sex reassignment surgery or hormonal treatment.'[88]'Transgender is an umbrella term that can be used to refer to anyone for whom the sex she or he was assigned at birth is an incomplete or incorrect description of her or himself. Individuals may use an array of terms to describe their gender identity including transgender woman, transgenderman, female-to-male (FTM), male-to-female (MTF), Trans, two-spirit, gender nonconforming (GNC), or persons of transgender experience. Some trans- gender people may identify with the term transsexual and may utilize various interventions to medically transition into the gender they most identify with.'[89] 'An umbrella term which includes cross-dressers, transsexuals,

androgynies, drag artists, third and other gender people, and other people with gender identities that are more complex than simply 'male or 'female'.'[90]

Conclusion

Finally, the discussion on gender discourse in general produces the material of male and female study popularly known as binary structure under social construction. Because of having the broader perspective of understanding sex, gender and sexual minorities, we can say that the existing binary social construction for the study of gender is not sufficient and the study of gender itself seems incomplete under such binary construction. Hence, the study of this highly discriminated and isolated community needs to include under the study of sex, gender or person as whole. In legal aspect, the study of LGBT persons is highly debated after some judgements of Indian judiciary. Hence, the study of gender discourse and inequality with reference to LGBT persons is breaking this binary system i.e. male and female study in present circumstance.

References:

[1]Dr. T. S. Sathyanarayana Rao, "Some Thoughts on Sexualities and Research in India", 46(1) *IJP* 3 (2004).
[2]Ibid.
[3]R. L. Dickinson, *Sexual Adjustment in Marriages-A Pshcho-Medical Approach ix* (Reprint Publication, Dehradun (India) 2004).
[4]Kavita Joshi, Sexuality in India: Teenager and Teacher (Kalpaz Publications, Delhi, 2004) at p.15.
[5] Ibid, at p. 79.
[6] Philip Rieff, Freud: The Mind of the Moralist (University Paperbacks, Methuen: London, 1965) at p. 152.
[7]Ibid, at p.154.
[8] Robyn Ryle, Questioning Gender: A Sociological Exploration (SAGE Publication, United States of America, 2012) at p.6.
[9]Ibid.
[10] Ibid.
[11] Spencer A Rathus, Jeffrey S. Nevid, et. al. (eds.), Human Sexuality in a world of diversity (Allyn and Bacon, United State of America, 4thedn; 2000) at pp.4-5.
[12]Kavita Joshi, Sexuality in India: Teenager and Teacher (Kalpaz Publications, Delhi, 2004) at p. 44.
[13] Ibid, at p. 59.
[14] Joan Z. Spade and Catherine G. Valentine (eds.), The Kaleidoscope of Gender: Prisms, Patterns, and Possibilities (Sage Publications, New Delhi, 2ndedn; 2008) at p. 5.
[15]Sara Delamont and Paul Atkinson (eds.), Gender and Research (Sage Publications, New Delhi, Vol. 4; 2008) at p. 107.
[16] Robyn Ryle, Questioning Gender: A Sociological Exploration (SAGE Publication, United States of America, 2012) at p. 9.
[17] Ibid, at pp. 9-10.
[18] Ibid, at p. 10.
[19]GuryinderKalra, Susham Gupta, et. al; "Sexual variation in India: A view from the west", Indian J Psychiatry, Vol. 52, No. (Suppl 1) (January, 2010) at p. S264–S268.
[20] Anil Kumar Mysore Nagaraj, "Osho: Insights on sex", Indian J Psychiatry, Vol. 55, No. Indian Mental Concepts I – Supplement (January 2013) at p. S268.
[21]RobynRyle, Questioning Gender: A Sociological Exploration (SAGE Publication, United States of America, 2012) at p. 186.
[22] Ibid.

[23]TsjeardBouta, Georg Frerks, et. al. (eds.), Gender, Conflict, and Development (The World Bank, Washington, D.C., 2005) at p. xi.
[24]Joan Z. Spade and Catherine G. Valentine (eds.), The Kaleidoscope of Gender: Prisms, Patterns, and Possibilities (Sage Publications, New Delhi, 2nd edn; 2008) at p. 3.
[25]Ibid, at p. xvii.
[26]Ibid, at p. xiv.
[27]Ibid, at p. xiii.
[28]Ibid, at p. xv.
[29]Ibid, at p. xvi.
[30] Ibid.
[31] Ibid.
[32]Ibid.
[33]Joan Z. Spade and Catherine G. Valentine (eds.), The Kaleidoscope of Gender: Prisms, Patterns, and Possibilities (Sage Publications, New Delhi, 2nd edn; 2008) at p. xvi.
[34]Ibid, at p. xviii.
[35] Ibid.
[36]Sara Delamont and Paul Atkinson (eds.), Gender and Research (Sage Publications, New Delhi, Vol. 4; 2008) at p. 37.
[37] Joan Z. Spade and Catherine G. Valentine (eds.), The Kaleidoscope of Gender: Prisms, Patterns, and Possibilities (Sage Publications, New Delhi, 2nd edn; 2008) at p. xviii.
[38]Ibid, at p. xix.
[39]Ibid, at p.10.
[40]Ibid, at p. xx.
[41] Ibid, at p. 5.
[42] Ibid, at p. 9.
[43]RajeshTalwar, The Third Sex and Human Rights (Gyan Publishing House, New Delhi, 1999) at p. 24.
[44] Joan Z. Spade and Catherine G. Valentine (eds.), The Kaleidoscope of Gender: Prisms, Patterns, and Possibilities (Sage Publications, New Delhi, 2nd edn; 2008) at p. 24.
[45] Ibid, at p. 33.
[46]TsjeardBouta, Georg Frerks, et. al. (eds.), Gender, Conflict, and Development (The World Bank, Washington, D.C., 2005) at p. 3.
[47] Joan Z. Spade and Catherine G. Valentine (eds.), The Kaleidoscope of Gender: Prisms, Patterns, and Possibilities (Sage Publications, New Delhi, 2nd edn; 2008) at p. 52.
[48]TsjeardBouta, Georg Frerks, et. al. (eds.), Gender, Conflict, and Development (The World Bank, Washington, D.C., 2005) at p. 3.
[49] Sara Delamont and Paul Atkinson (eds.), Gender and Research (Sage Publications, New Delhi, Vol. 4; 2008) at p. 200.
[50] Robyn Ryle, Questioning Gender: A Sociological Exploration (SAGE Publication, United States of America, 2012) at p. 32.
[51] Ibid, at p. 51.
[52] Ibid, at p. 52.
[53] Joan Z. Spade and Catherine G. Valentine (eds.), The Kaleidoscope of Gender: Prisms, Patterns, and Possibilities (Sage Publications, New Delhi, 2nd edn; 2008) at p. 5.
[54] Surya Monro, Gender Politics (Pluto Press, London, 2005) at p. 10.
[55]Arvind Narrain and GautamBhan (eds.), Because I Have a Voice (Yoda Press, New Delhi, 2012) at p. 7.
[56] C.R. Austin and R.V. Short, Reproduction in Mammals: Human Sexuality 170 (Cambridge University Press, New York, 1980).
[57]Ibid, p-171.
[58]Ibid, p-68.
[59] C.R. Austin and R.V. Short, Reproduction in Mammals: Human Sexuality 68 (Cambridge University Press, New York, 1980).

[60] Ibid.
[61]Ibid, p-70.
[62]Ibid, p-71.
[63]Ann P. Haas, PhD, Mickey Eliason, PhD, et. al., "Suicide and Suicide Risk in Lesbian, Gay, Bisexual, and Transgender Populations: Review and Recommendations", Journal of Homosexuality, Vol. 58, (2011) at p. 13.
[64] Rajesh Talwar, The Third Sex And Human Rights (Gyan Publishing House, New Delhi, 1999) at p. 12.
[65] Robert A. Nye (ed.), Sexuality (Oxford University Press, New York, 2009) at p. 7.
[66]A PUCL-K, 2001 fact-finding report about Banglore, Human Rights Violations against Sexuality Minorities in India, at p. 6.
[67] Ibid, at pp. 2-3.
[68] Ibid, at p. 2.
[69] Ibid, at p. 8.
[70]http://serendip.brynmawr.edu/exchange/node/33.
[71] Spencer A Rathus, Jeffrey S. Nevid, et. al. (eds.), Human Sexuality in a world of diversity (Allyn and Bacon, United State of America, 4thedn; 2000) at p. 267.
[72]A PUCL-K, 2001 fact-finding report about Bangalore, Human Rights Violations against Sexuality Minorities in India, at p. 6.
[73] Surya Monro, Gender Politics (Pluto Press, London, 2005) at p. 194.
[74]Arvind Narrain and GautamBhan (eds.), Because I Have a Voice (Yoda Press, New Delhi, 2012) at p. 21.
[75] Spencer A Rathus, Jeffrey S. Nevid, et. al. (eds.), Human Sexuality in a world of diversity (Allyn and Bacon, United State of America, 4thedn; 2000) at p. 267.
[76]A PUCL-K, 2001 fact-finding report about Bangalore, Human Rights Violations against Sexuality Minorities in India, at p. 6.
[77] Surya Monro, Gender Politics (Pluto Press, London, 2005) at p. 194.
[78] Arvind Narrain, *Queer: Law and Despised Sexualities in India*, Glossary
[79] Robert A. Nye (ed.), Sexuality (Oxford University Press, New York, 2009) at p. 10.
[80] Philip Rieff, Freud: The Mind of the Moralist (University Paperbacks, Methuen: London, 1965) at p. 185.
[81] Spencer A Rathus, Jeffrey S. Nevid, et. al. (eds.), Human Sexuality in a world of diversity (Allyn and Bacon, United State of America, 4thedn; 2000) at p. 267.
[82] Ibid, at p. 13.
[83]A PUCL-K, 2001 fact-finding report about Bangalore, Human Rights Violations against Sexuality Minorities in India, at p. 6.
[84] Surya Monro, Gender Politics (Pluto Press, London, 2005) at p. 14.
[85] Ibid, at p. 16.
[86] Ibid, at p. 15.
[87] Surya Monro, Gender Politics (Pluto Press, London, 2005) at p. 194.
[88]Ibid.
[89] Kevin L. Nadal, AvySkolnik, et. al., "Interpersonal and Systemic Micro aggression stoward Transgender People: Implications for Counselling", Journal of LGBT Issues in Counselling, Vol. 6, No. 1, (2012) at pp. 55-56.
[90] Surya Monro, Gender Politics (Pluto Press, London, 2005) at p. 195.

Right to Education: Miles to Go On

Gaurav Gupta*
Shashya Mishra**

Introduction

Children are invaluable human resources. A child can become useful member of society only when he gains quality education .Education plays a huge role in transforming society. It operates as a multiplier by enhancing the entitlement of all individual rights and freedoms. It is only through education a child can know about its other human rights .Education is a key to protect other human rights. Education leads to liberation from ignorance.

History

India has a glorious tradition of education at all levels.[1] Systematic system of education in India begins with vedic period.[2] During vedic period education was imported by sages. Under the Buddisht period education was available to all without any discrimination .Almost two centuries ago the state has been making endeavor to provide free and compulsory education since 1813.[3] Clause 43 of Charter Act made education a state responsibility. Later on Hunter Commission (1882) and Patel Bill (1917) proposed to make education free. King of Baroda Shivaji Rao declared in 1906 that there would be compulsory primary education. In 1944 Government presented a plan to provide 100% literacy within 40 years i.e., by 1984. .

Right to Education Globally

Universal Declaration on Human Rights (1948)

Article 26 provides that everyone has the right to education .Education shall be free at least at elementary and fundamental stages .Elementary education shall be compulsory.

International Covenant on Civil & Political Rights (1966)

Article 18(4) the state parties to the present covenant undertake to have respect for the liberty of parents and when applicable legal guardians to ensure the religious and moral education of their children.

International Covenant on Economic, Social, Cultural Rights (1966)

**** Assistant Professor, Jagran School of Law, Dehradun.***
***** Guest Faculty, Amity International University, Lucknow.***

Article 13 of covenant states that the state parties to the present covenant recognize the right of everyone to education. Primary education shall be compulsory and available to all. Secondary education shall be made generally available and accessible to all.

Convention on Rights of Child (1989)

Article 28 – the child has the right to education and the state has a duty to ensure that primary education should be made free and compulsory. Take measures to encourage regular attendance of schools and the reduction in dropout rates. Corporeal punishment is deemed here to be a clear violation of child's right.

Education for All (EFA) 1990 & 2000

First world conference on education for all held at Jomtinen, Thailand. In April 2000 there was a follow up conference in Darkar, Senegal, ensuring that by 2015 all children, particularly children in difficult circumstances have access to free and compulsory education of good quality. Build on existing mechanisms to accelerate progress towards education for all.

The Millennium Development Goals (2000)

This was held in September 2000 is the largest gathering of world leaders. Kofi Annan Secretary General of U.N. urged the G-8 leaders to give priority to the issues of development. Goal 2 is about education and only about primary education. It says to achieve universal primary education. It ensures that by 2015 children everywhere boys and girls will be able to complete a full course of primary schooling.

Right to Education – Indian Prospective

Right to Education & Constitution of India

Our constitution makers were aware about the problem of illiteracy in our country therefore they kept the provisions related to education under directive principles of state policy (Article 41, 45, 46). Which are non- enforceable? Initially article 45 states to make provision within 10 years to provide free and compulsory education for all children until they complete the age of 14 years .Our constitution makers kept the provisions related to education in directive principles of state policy because at that time our country had limited resources .

Education Commission

To keep pace with the socio – economic development and recognizing the need of the people and society, several commissions for education were made –

Kothari Commission (1964 – 1966)

The national objectives of the education were defined clearly for the first time. The commission emphasized the need for the common school system .The commission recommended that publicly funded schools open to all children without any discrimination and there will be no tuition fee. Education must be imparted in mother tongue.

Education Policies

On the basis of Kothari commission report National Policy on Education (1968) issued which aimed to improve quality of education. It also stressed to improve quality of books. National Policy on Education 1986 discussed various issues including the role of education the underlying principle is to ensure that all students upto a given level have education of comparable quality. The constitutional amendment of 1976 made education a joint responsibility of central and state government by placing education in concurrent list. The policy stated the union government would accept a larger responsibility to reinforce the national character of education.[4] The policy of 1986 was updated on 1992 laid special emphasis on removal of disparities[5].

National Programmes on Education[6]

The period following the adoption of NPE 1986 introduced a number of centrally sponsored schemes to meet the requirements of the elementary education .Various schemes were initiated to provide strength to our education system –

- District Primary Education Programme
- Operation Blackboard
- Mid – day Meal Scheme
- Sarva Siksha Abhiyan
- Siksha Karmi Project

Sarva Siksha Abhiyan[7]

Launched in 2001- 02 for universalization of primary education in a time barred manner. It is the flagship programme of government mandated by 86th amendment of constitution.

Aims

- By 2015 all children in India shall receive 8 years of basic education
- Thrust on enrolment, equity and quality in education
- To open primary schools in area of 1 km
- Free text books to children
- A teacher for every 40 pupils
- Toilets and drinking water facility

SSA makes schools more accountable to parents and gives Village Education Committee more control.

Sarva Siksha Abhiyan Problems[8]

- Despite 52% increase in SSA budget between 2010-11 & 2012-13 for infrastructural up gradation there is not much improvement
- Lack of classrooms
- No proper play grounds, drinking water
- Shortage of books
- Due to these loop holes enrolment in private schools is increasing.
- Parents are choosing to pay higher fees to private schools.

- In the budget of 2012-13 SSA gets a heavy amount of Rs 27,258 crore.[9]

Recognition of Right to Education by Judiciary

First time the question of free and compulsory education was asked in the case of *Mohini Jain vs. State of Karnataka*. The two bench judge of SC held that the right to education at all levels is a fundamental right of citizen under article 21 and charging of capitation fees for admission is illegal and amounted to denial of citizens right to education is also volatile of article 14 being arbitrary. The fundamental right to speech and expression cannot be fully employed unless a citizen is educated and conscious of his individualistic dignity. The education in India has never been commodity for sale.

Right to Education Is Fundamental Right but Upto Age of 14 Years

In case of *Unni Krishnan vs. State of A.P.*[10] the five judges' bench by 3-2 majority partly agreed with the Mohini's case decision and held that right to education is the fundamental right under article 21 of the constitution directly flows from right to life. The court partly over ruled the decision of Mohini Jain. The obligation created by article 41, 45, 46 can be discharged by the state either establishing their own institutions or by aiding recognizing or granting affiliation to private institutions. Without education the objectives set forth in our constitution cannot be achieved.

Right to Free Education Is a Fundamental Right from 6-14 Yrs. of Age

After 52 years of enforcement of constitution our constitution was amended 86th time in the year 2002. This amendment gives way to two new articles article 21- A and article 51-A (k) and substitutes **Article 45.**

Right to education – The state shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as state by law determine. (Article 21-A)

Early childhood care and education to children below the age of six years – The state shall Endeavour to provide early childhood care and education for all children until they complete the age of six years. (Article 45)

Fundamental duties of the parent and guardian – It shall be the duty of every citizen of India who is the parent guardian to provide opportunities for education to his child or as the case may be ward between the age of six and fourteen years. Article 51-A (k). After signed by the President our constitution was amended for the 86th time and the act on Right to Education came into force with affect from 1st April 2010.

Necessity of Compulsory Education

In *Bandhua Mukti Morcha vs. Union of India*[11] the SC explained why education should be compulsory. An educated citizen can meaningfully exercises his political rights and can discharge his social responsibility, therefore, education is compulsory. Compulsory

education to child from poor and weaker section is one of the principal means and primary duty of the state for stability of the democracy, social integration and to eliminate social tensions.

According to news, published in, The Hindu on 2nd February, 2006[12] Supreme Court held in a PIL case seek enforcement of the right to education of every child in the age group 6-14 by abolishing child labour in all forms. Supreme Court held that "they have to be in school, it is the duty of the state to provide them schools."

In the case of *Ashok Kr. Thakur vs. Union of India*[13] issued following directions:

- The word compulsion is not to be related to the student or the parents. It is the obligation of state to provide for free education.
- SC held nothing is more important than to ensure total compliance of art. 21A.
- Fines do not go far enough in implementing article 21-A.

The Right of Children to free and Compulsory Education Act, 2009

The central and the state governments have tried to bring legislative framework for right to free and compulsory education while the model bill circulated by the central government was not accepted by the states due to inadequate financial support from central. The central bill redrafted after deliberation at various stages, and a new bill (The Right of Children to Free and Compulsory Education Bill, 2008) was introduced in Rajya Sabha in December 2008.[14]

The proposed legislation is anchored in the belief that the values of equality, social justice and democracy and a creation of just and humane society can be achieved only through provision of inclusive education elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker section is therefore not merely the responsibility of schools run or supported by the appropriate authority/government but also of schools which are not dependent on government funds.[15]

The act had elaborated preamble aspiring for fulfilling the constitutional objectives of attaining socio-economic justice and humane and equitable society, giving respect to cultural diversity and equitable quality of education and development of the disadvantaged section of the society. It had contemplated creative role of co-operative federalism, responsibility upon central and state governments both. Centre and state governments has duties towards non-enrolled children to provide accommodation in neighborhood schools. Furthermore, it is the duty of unaided and specified (Navodaya and Kendriya Vidyalaya etc.) schools to offer 25% of seats to the weaker sections.

Object and Reasons Behind the Enactment of the Act

- To strengthen the social fabric of democracy through provisions of equal opportunity to all.

- To achieve the object, which is given in DPSP?
- To Provide Free And Compulsory Education Particularly Children Fron Disadvantaged Groups And Weaker Sections.
- To Improve Quality Of Education.

Key Features of the Act

- Children between age of 6-14 years have the right to free and compulsory education in a neighborhood school (Sec 3).
- Children with disabilities also have right to free education. (Sec 3).
- Elementary education shall be free until completion even if the child is older than 14 years. (Sec 4).
- No child shall be held back ,expelled (Sec 16) or required to pass a board exam.(Sec 30).
- No physical punishment or mental harassment. (Sec17).
- All schools should comply with pupil – teacher ratio. (Sec 25).
- If private schools fails to comply with infrastructural norms shall lose their recognition and need to shut down (Sec 18)
- Schools already established shall have 3 years to fulfill the norms. (Sec19).
- The penalty includes fines of up to Rs 1 lakh. (Sec 18).
- Curriculum must be child centered Trauma free learning in mother tongue[16] (Sec 29).
- Teachers are prohibited to give private tuitions (Sec 28) and undertaking non teaching work. (Sec 27).
- School management committee shall monitor the school and utilization of government grants. (Sec 21).
- The central government shall constitute a National Advisory Council of 15 members to give expert advice to the central government on implementation of provision of the act. (Sec 33).
- Kendriya Vidalayas, Navodaya Vidalays, Sainik schools and unaided schools shall admit at least 25% of the students from weaker section (Sec 12).

The constitutional validity of reservations could be challenged.

Constitutional Validity of Sec 12

Society for Unaided Private Schools of Rajasthan vs. UOI & others[17] Parties claimed that 25% reservation for weak children in government & private aided schools is unconstitutional. On 12th April 2012 decision was given by bench of 3 judges by a majority of 2:1. C.J. Kapadia & J. Swatantra Kumar held – such reservation is not unconstitutional but not applicable on boarding and unaided private minority schools. J. Radhakrishnan did not agreed with the other two judges.

CJ. Kapadia held that RTE act is child centered. Its objectives are -

- Strengthen social fabric by providing equal opportunities to all children.
- To remove all barriers impeding right of primary education
- Word free in title means removal of financial barriers by state.

- The use of the word compulsory means that it is the duty of the state and parents to provide education to the children.

Criticism

- The act has been criticized for being hastily drafted not consulting many groups active in education. There was a kind of international pressure as well and on various times judiciary pressurized the government to make a separate legislation on education
- Quality of education remains a big question while it remains the largest provider of education in our country it suffers from scarcity of teachers and infrastructural gaps.
- Appointment of teachers is based on political will and there are frequent cases of absenteeism and governance.
- Poor quality of food is given in government schools due to which the parents send their child to private schools and many private schools do not provide free lunch.
- Difference in salaries of teachers in government schools and private schools. In private schools salary of teachers is comparatively less than government schools
- Forcing unaided school to admit 25% students has been criticized because somewhere the government is shifting its responsibility on schools.
- No penalties if the authorities fail to provide education.
- The act provides for the right to schooling and physical infrastructure but does not guarantee that children learn. It exempts Government schools from any consequences if they do not meet the specified norms.
- Both the state government and local authority have the duty to provide free and compulsory elementary education. Sharing of this duty may lead to neither government being held accountable
- The act do not exempt minority schools .There is a possibility that this will conflict with article 30 of the constitution which provides a right to minorities to set up and administer educational institutions.

Present status of RTE after 3 years of its enforcement

According to report of NEUPA, 2012 (presented by MADAN JAIDA) published in, HINDUSTAN on 31st March, 2013 which provides the current status as follows:

- 13.62 lakhs primary schools.
- 41 lakhs teachers are appointed.
- 8 lakhs teachers are untrained.
- 11 % teachers are on contract.
- 23 lakhs post of teachers are vacant.
- 22 lakhs children left government schools and migrated to private.
- 30% -40% children of U.P., Maharastra, Rajasthan are in private schools,
- According to a report of UNICEF 43 % schools are without toilets and 93% without water facility.
- 61% students of class V can’t read books.
- 30% students of class III are unable to do simple calculation.

- Central government has given norms for qualification but states are not getting candidates, Due to which central government permitted to appoint untrained teachers.
- None of the state is able to achieve the target of RTE.
- Even governments do not know which area requires schools.
- Central government gave permission to open 1.61 lakh schools but till now there are only 12,530 schools.
- No similar frame work only 14 states have similar frame work. Rest of the states have own set of rules.
- Private schools are not complying with the provision of 25% reservation**.**

According to survey report of ASAR[18], 2013 shows that the students are not interested to get admission in government schools. The report is tabulated is here:

Children of age group 6-14, who do not go to school (in %):

	2009	**2010**	**2011**	**2012**
U.P.	4.9	5.2	6.1	6.4
INDIA	4.0	3.4	3.3	3.5

According to the report in 2009, 4.0 %children did not went to school and the %age decreases to 3.5% in 2012 after the RTE act. On the other hand if we look on the status of U.P. we find that there is increment in the percentage 4.9% to 6.4% (of the children who are not going to school).

Girls of age group 6-14 - do not go to school (in %) :

	2009	**2010**	**2011**	**2012**
RAJASTHAN	12.2	12.1	8.9	11.2
BIHAR	6.0	4.6	4.5	5.2
JHARKHAND	8.5	4.9	6.4	6.3
U.P.	9.5	9.7	9.7	11.5
INDIA	6.8	5.7	5.2	6.0

Data shows that the status of girl's education is getting more severe.

Empirical research

An empirical research conducted by us to know the ground realities of the act after 3 years of its commencement. This survey is conducted in five government primary schools and 5 private primary schools of Lucknow city on the ground of following questionnaire:

1. Whether institutions know about the RTE Act, 2009 and its provisions?
2. Is there any kind of increase in enrollment or drop-out?
3. Whether any compulsion by schools to submit T.C. and birth certificate?
4. How many students of poor section are getting free education?
5. Ratio between teachers and children?
6. How many teachers have appropriate professional degree?

7. Are the schools provide mid-day-meal, free books and uniform?
8. Adequate facility of drinking water and toilet is in school or not?

Findings

40% private institution refused to cooperate. Rest knows about the RTE Act, 2009 and its provisions. The number of enrollment increased in private schools but the students are not belonging to poor class. On the other hand in government primary schools, the rate of enrollment is either constant or decreasing.

School administration of private schools do not give admission without T.C. and proper proof of birth certificate, but the government schools adopt a lenient way and take admission without any compulsion to submit T.C. and birth certificate. There is a vast and magical difference in teacher's student ratio whether they are private or government primary schools. When we look at private schools the ratio of teacher-student is 1:57 approx. and when we compare this ratio with government primary school the ratio was 1:23 approx. the prime reason which is responsible for such findings is poor quality of education provided by government schools. Thus, the government schools are losing faith among parents. In most of the private schools teachers do not possess adequate professional degree. Only 45% teachers have sufficient qualification. On the other hand 70%-75% of teachers employed in government primary schools have degree according to the norms set by the education board.

Government schools provide mid-day-meal, but students inform us about the poor quality of food. So this mid-day-meal instead of giving adequate nutrition results in lack of nutrition. Private schools do not provide such facility. Books which are the integral part of our education play a vital role in imparting quality education. Government schools provide books and uniforms only to the 50% of the student because the state government does not provide sufficient books and quality uniforms. The proper and hygienic drinking water is not available in 80% of government schools. The condition of private schools in this regard is better but not good. No proper and clean toilet facility in 80% of government primary schools and 33% of private primary schools.

Conclusion

In a present democratic setup of our country this is through education of each and every child, nation can progress. Education is the key to unlock all locks. Education leads the child towards success. The act which was enforced on 1st April, 2010 made government and parents responsible to provide free and compulsory elementary education and to create opportunities for a child between ages 6-14 years. So that they can get basic knowledge. Right to education is empowerment right. It's a right through which children belonging to marginalized and poor sections can be brought in main stream. Education is necessary for maintaining physical and mental growth of a child. Although RTE is now a fundamental right but still millions of children in our country can't access to school.

On 1st April 2013, the act of free and compulsory education completed its three years but then also numerous children till now can't see the face of school. Because somewhere their families are still unaware about the law & ignorant about the importance of education and some parents want only earning hands so that they can attain their livelihood. Furthermore the government policies like *Mid-Day-Meal* and *Sarva-Siksha-Abhiyan* are not attracting large number of children to schools; along with this on the other hand there is the question of lack of resources from the government side. The dark side carries major problem of corruption in addition.

The schemes of government could not reach to the needy or poor due to corruption or miss governance. Lack of teachers and absence of necessary qualification to understand the physcology of child .can only give poor education to child instead of quality education. The concept of universal education still facing a set back and discrimination is still prevalent.. Government fixed the time of three years to provide elementary education which is still not fulfilling and we have to move miles on to achieve this target .So there is a need to provide quality education which can only be given when our educational system is free of corruption and maladministration and government must assure it with total honesty.

Our country is emerging as new power for the world. We are improving in technology. If a new gazette comes in market we want to know about that and want to purchase it as soon as possible. But how many of us bother to provide new books to a poor child SO WHAT WE ARE DOING FOR OUR YOUNG ONES ASK YOURSELF……..

References:

[1] Meeta, Agarwal, *Right to Education an Indian Prospective*, Regal Publication, (2012), New Delhi, p. 20.
[2] Ibid p. 20.
[3] Ibid p. 36.
[4] Meeta, Agarwal, *Right to Education an Indian Prospective*, Regal Publication, New Delhi, (2012) p. 129.
[5] Ibid p.130.
[6] Ibid p.146.
[7] Available on http//www.sarva.siksha abhiyan.com accessed on 23/2/2013 at 1:35 pm.
[8] Available on www.indianexpresscom/story-print/1092897 accessed on 4/4/2013 at 6:35 pm.
[9] Available on Ibn live.in.com/news/business/budget2013 education –sector-gets-17-pc-jump-hrd-to-ask-for-more/375700-7.html accessed on 4/4/2013 at 6: 15 pm.
[10] (1993) 1SCC 645.
[11] (1997) 10 SCC 549.
[12] Malik and Rawal, *Law and social transformation in India*, third edition, reprint 2012, p. 309.
[13] (2008) 6 SCC 1.
[14] Bhat, P. Ishwar, Law and Social Transformation (2009) p. 654.
[15] Bhat, P. Ishwar, Law and Social Transformation (2009) p. 654.

[16] Recommended by Kothari Commission as well as by N.P.E. that education must be given in mother tongue and education must be child centered.
[17] (2012) 6 SCC 1.
[18] Report published in Hindustan on Sunday, 31st March, 2013.

Peoples Right to Know: A Pre-requisite for Genuine Democracy

Rajeev Kumar Singh*

Abstract

The Constitution of India provides democratic form of government for Indian citizens. Democracy is a method of government by the people. In such system the supreme power is vested in the people and is exercised by them generally through their elected representatives under partial electoral system. Accountability and transparency are the two eyes of democracy. People are the master and they have right to watch the performance and business of the government. They have right to know that how they are being governed. Veil of secrecy restricts the vision of the citizens to see the working of government. In the present scenario knowledge has become the most valuable resource. Corruption and abuse of power are the inevitable fall outs of an unaccountable system of governance. The right to information when vested in people can act as a deterrent against corruption and abuse of power. The right to information is a means to ensure open government and to empower the people. The Right to Information Act, 2005 has categorically disclosed information's related to public authorities to provide for setting out the practical regime of right to information for citizens in order to promote transparency and accountability in the working of every public authority.

Introduction

Freedom of speech and expression could be considered one of the most fundamental of all freedoms. While it is of dubious value to rate one freedom over another, freedom of expression is a basic foundation of democracy. It is a core freedom without which democracy could not exist. The term encompasses not only freedom of speech and media but also freedom of thought, culture and intellectual inquiring. Freedom of expression guarantees everyone's right to speak and write openly without state interference, including the right to criticize injustices, illegal activities and incompetence's. It guarantees the right to know and right to inform the public and to offer opinions of any kind, to advocate change, to give the minority the opportunity to be heard and became the majority and to challenge the rise of state tyranny by force of words.

Until the 20th century, formal censorship not right to know was the common practice of most states. Autocrats frequently imprisoned critics, shutdown the process, forced author's into exile, or censored written and artistic works. The struggle against licensing requirements in Great Britain in the 17th century, the American Bill of Rights, and the

**** Research Scholar, Department of Human Rights, School for Legal Studies, Babasaheb Bhimrao Ambedkar (A Central) University, Lucknow.***

French Declaration of the Rights of Man expanded standards of freedom in a way that inspired new realms of independent expression and thought not especially in Europe in the 19th and early 20th centuries but also in other parts of the word.

In such regimes the State not only exerted full control over freedom of speech and expression and right to know, it also used the media to direct citizen's thoughts and opinions through propaganda, indoctrination, denunciation, and social conformity. After the defeat of Nazi Germany, freedom of speech and expression joined realm of core freedoms that are now protected as universal standards. United Nations accepted right to information right from its beginning in 1948.

Enactment of Right to Information Act, 2005, has ushered a new era leading us towards the development of the participatory democracy. It has led to a series of debates. Enactment of Right to Information Act, 2005[1], has ushered a new era leading us towards the development of the participatory democracy. It has led to a series of debates among the intellectuals and has also stirred common masses. Right to Information[2] implicitly forms part of fundamental rights guaranteed by the Constitution of India. Article 19 (1) (a) dealing with freedom of speech and expression is deemed to contain the basis of right to information. Democracy in real terms requires public to act as a sovereign force. Abraham Lincoln in his famous Gettysburg Address said that "*democracy is government of the people, for the people and by the people"*. In this regard Dr. Ambedkar told in Lok Sabha during Constitutional Assembly Debate that the people have fed up with of the people and for the people and they really want government by the people. This postulation can be materialized only by an informed citizenry.

The conceptual roots of democracy lie in Articles 23 and 25 of the Universal Declaration of Human Rights, 1948 and in Part III and Part IV of the Constitution of India. These provisions generally guarantee some rights like right to life, liberty, dignity and decent conditions of life and development. In this regard, right to information is part of the constitutional framework enshrined as freedom of speech and expression. Explicit exercise of this right was not possible due to its derivative and implicit existence within the Constitution. This facilitated the need of a specific legislation enabling the citizens to enjoy the right available to them. The same message echoed in the juristic exposition by Justice Mathew in *Kesavananda Bharati v. State of Kerala*[3] stated in these prominent words like:
"Fundamental rights themselves have no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience."

Access to information held by a public authority was not possible until 2005. Lack of information precluded a person to realize his socio - economic aspirations, because he had no basis to participate in the debate or question the decision making process even if it was harming him. Official Secret Act, 1923 acted as a remnant of colonial rule shrouding everything in secrecy. The common did not have any legal right to know about the public policies and expenditures. It was quite ironical that people who voted the persons

responsible for policy formation to power and contributed towards the financing of huge costs of public activities were denied access to the relevant information.

This culture of secrecy resulted in prolific growth of corruption. In face of non-accountability of the public authorities and lack of openness in the functioning of government, abuse of power and unscrupulous diversion of the public money was the order of the day. Under such conditions, public and various NGOs demanded greater access to the information held by public authorities. The government acceded to their demand by enacting RTI Act 2005.

Genesis of Right to Information

Global Perspective

RTI which is the cynosure of this discourse is not something new. In fact there is a long history at international level towards the attainment of this right and mobilization of the masses for achieving it. With development of human ideals and establishment of democratic governments in most of the civilized countries, this topic came to the fore. Many international organizations and regional groups recognized this right to be part of their systems.

Position in Sweden

Swedish Freedom of Information Law (a literal translation of the native term indicates the Freedom of Printing Act) passed in the year 1766 is considered to be the oldest and earliest legislative recognition of RTI[4]. This law was passed by Sweden. A large number of countries have followed the same line and have enacted access laws after it. For example, Finland in 1950, Denmark in 1950, Norway in 1970, and United States of America in 1966 enacted such laws in order to facilitate information access. Before discussing the various international instruments, let us first analyze the status of RTI in the two most developed democracies of the world U.S.A and England.

Position in United Kingdom

India was the colony of Britain and many laws are the creation of that very time, so it is very obvious to see the position in England. Democracy has been the basic tenet of England since ages but 'secrecy' is emphasized rather than openness. This is due to the innate tendency of legislature and executive to enshroud policies instead of making it transparent. England has enacted Freedom of Information Act, 2005[5]. But basically, the present law is contained in the Official Secrets Acts of 1911, 1920, 1939[6]. Judiciary in England has approved of openness in Government. The same is reflected in the decision of House of Lords where it established its jurisdiction to order the disclosure of any document[7]. In this case the court refused the crown privilege. Deciding this case Justice Lord Reid, said that *"The document must be produced in the court for deciding the case and held that it is not crown privilege but it is public interest privilege"*. However, it was also emphasized that balance between conflicting interests of secrecy and publicity should be maintained. The court held that the entire class of the document cannot be pleaded as

privileged document and first time classified the document in two parts as class document as a privileged document and content document as non privileged one.

Keeping in view the desirability of "openness" of government affairs in a democratic society, the Franks committee recommended a repeal of section 2 of the 1911 Act, and its replacement by the Official Information Act .The United Kingdom has enacted Freedom to Information Act 2000. Most of the countries of the Western Europe have now such legislations. Importance of freedom of expression in English law can be ascertained by the observation of Lord Steyn in a case[8] which goes as following:

"Freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve; people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country...."

Position in United States of America

India and America is very common in one thing that India has the largest democracy in the world and America has the oldest one. America and democracy are generally synonymous. America apparently proclaims it to the torchbearer of the plethora of democratic rights that ought to be the part of a true democratic framework. The same applies on the dispensation of information too. Antipathy towards the inherent secrecy is therefore not a surprising attribute exhibited by the Americans. Schwartz observes, "Americans firmly believe in the healthy effects of publicity and have a strong antipathy to the inherent secretiveness of government agencies."[9] The Freedom of Information Act, 1966 and The Administrative Procedure Act, 1946 are two main statutes which confer RTI.

The Constitution of America does not deal specifically with RTI. However, such right is considered to be corollary of the First Amendment freedoms[10]. A provision of a statute was held to be a restriction on the unfettered exercise of First Amendment Rights[11] and hence was declared invalid by the Supreme Court. Similarly in *Stanley v. Georgian*[12] it was observed that freedom of speech necessarily protects the right to receive information. The American government passed Freedom of Information Act, 1966 which gives every citizen a legally enforceable right to excess to government files and document which the administrations may be tempted to keep confidential. If any person is denied this right, he can seek injunctive relief from the court. The Act ensures access to government information in three broad ways:

(a) Publication in the Federal register;
(b) Making available for inspection and copying certain certified information and
(c) Making available reasonably described records on request.

RTI in various International legal instruments

Various international instruments such as treaties, charters etc have recognized RTI as right that ought to be available to the people. All the citizens have a right to decide, either personally or by their representatives, as to necessity of the public contribution, to grant this freely, to know to what use it is put; and to fix the proportion, the mode of assessment and of collection and the duration of taxes[13].

United Nations

United Nations accepted RTI right from its beginning in 1946. The General Assembly resolved that: "freedom of information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated."[14]

Universal declaration of Human Rights, 1948

Right to information is a human right under Article 19 of Universal Declaration of Human Rights. Article 19 of the Universal declaration of Human Rights of 1948 states that, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of
frontiers."

The International Covenant on Civil and Political Rights, 1968

Article 19 of the Covenant states as following:
(1) Everyone shall have the right to hold opinions without interference;
(2) Everyone shall have the right to freedom of expression, this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

The Commonwealth

The Commonwealth association of 54 countries affirmed the existence of RTI by emphasizing the participation of people in the government processes. The law ministers of the Commonwealth at their meeting held in Barbados in year 1980 stated that 'public participation in the democratic and government process would be most meaningful when citizens had adequate access to official information'.

Organization of American States

American Convention on Human Rights was adopted by the Organization of American States (OAS) in 1969. This international treaty is legally binding in nature. Article 13 of the convention reads as follows;-
(l)Everyone has the right to freedom of thought and expression. This right shall include freedom to work, receive and impart information and ideas, of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

Clause 2 states that exercise of such right may sometimes be subject to liabilities or restrictions if it compromises the national security or contravenes the right available to others.

European Convention on Human Rights

Clause 1 of Article 10 of the Convention states that, 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions, and to receive and impart information and ideas without interference by public authority and irrespective of frontiers. However, clause 2 provides that such right is subjected to such formalities, conditions, restrictions or such penalties as are prescribed by law, and are necessary in a democratic society, and if it harms the national interest or territorial integrity.

However European Court of Human Rights interpreted Article 10 strictly[15]. That is to say it was held that freedom to information prohibited the Government from restricting a person from receiving information. But, at the same time it does not provide any positive right to a person for obtaining the information. This interpretation was based on the difference between 'freedom' and 'right'.

Most of the above discussed international instruments do not deal with RTI directly. Their role however is not diminished at all by this fact. Like a first step they showed the world community a direction to be explored in order to materialize the democratic value of RTI, thereby making the systems transparent and world more amicable for the people.

Constitutional provisions regarding RTI in various countries

Constitutional recognition stands paramount specially when relating to the fundamental human rights such as RTI. In this regard various countries have given place to RTI in their respective constitutions. Some of them are as following:

- Article 20 of the 1987 Constitution of Austria;
- Article 32 of the Constitution of Belgium as amended in 1993.
- Article 41 of the Constitution of Bulgaria;
- Article 23 of the Constitution of Albania;
- Article 38 of the Constitution of Croatia;
- Article 44 of the Constitution of Estonia;
- Article 10 (3) of the Constitution of Greece;
- S. 32 (1) of the Constitution of Republic of South Africa pursuant to the Constitution Act 106 of 1996.

Legal provisions in various countries relating to RTI

Apart from the constitutional recognition, specific statutes are sometimes necessary to be formulated in order to effectuate proper exercise of rights. This is so because mere recognition sometimes is not sufficient to provide results. Statutes here come to the rescue by providing optimal output through an elaborate mechanism, As stated earlier that

Sweden enacted the first legislation in this regard. The Freedom of Information Act is now part of the Constitution of Sweden. Therefore, let us now see some of the important statutes providing RTI to the people. They are as following:

- 1888 Code of Political and Municipal Organization of Columbia enabled the individuals to request documents held by the government;
- The Freedom of Information Act, 1966 of U.S.A.;
- The Freedom of Information Act, 1982 of Australia;
- The Access to Information Act, 1983 of Canada;
- The Official Information Act, 1982 of New Zealand;
- The Freedom of Information Act, 2005 of England; and Legislations passed by many Asian countries such as The Philippine, Hong Kong, Thailand, South Korea, Japan etc.

Constitutional roots of Right to Information in India

Rights are the interests which are recognized and protected by law. The sanctity of right enhances if it is adopted by the Constitution of a country. In Indian context, where the common people were subject of negligence for centuries, constitutional principles are the only messiahs that can ensure freedom of all sorts. Information has a pivotal role in strengthening public by making them knowledgeable.

Accessing information, however in a developing country like India is a cumbersome task to be accomplished by majority of less educated and illiterate citizenry oblivious of its rights. Red tapism and bureaucratic supremacy is highly hesitant in empowering people. Moreover the colonial legacy which was copious with policy of secrecy still haunts the system. Here the Constitution of Indi comes to the rescue of the 'little man' by bestowing upon him certain fundamental rights within Part III. These rights cannot be violated except the procedures laid down by the law, which are in consonance with spirit of Constitution, Similarly, RTI is a right imbibed within Article 19 (1) (a)[16] of the constitution.

The Constitution of India although incorporates provisions of various leading democracies, is primarily founded on bedrock of Government of India Act, 1935. The system of governance therefore is not free from many vestiges of past which constituted a stumbling block in the free flow of information to the people. Section 123 and 124 of Indian Evidence Act, 1872 and the Official Secrets Act, 1923 and in present time section 52 of the Competition Act, 2002 which says that information relating to any enterprise, being an information which has been obtained by or on behalf of the commission without the previous permission in writing shall not be disclosed, are examples of such techniques.

Legislations that License Secrecy

There is some legislation which license secrecy in India but after the enactment of Right to Information Act some of having overriding effect. These legislations are as following:

- The Official Secrets Act,1923
- Rule 11 of the Central Civil Services (conduct) Rules, 1964

- Section 123 and 124 of the Indian Evidence Act, 1872
- Council of Ministers advice to maintain secrecy
- Privilege to withhold Documents from Courts
- Oaths under the Constitution
- Atomic Energy Act, 1962
- Commission of Inquiry Act, 1952

The right to information has not been expressly provided in the constitution. It is derived from the Article 19 (1) (a). That is to say, it is implicitly imbibed within the constitutional framework. However, judiciary in several landmark cases has expressly held RTI as natural concomitant of Article 19 (1) (a). Let us now see some important cases which raised RTI to the status of a constitutional right because of the juristic interpretation of the learned judges Judicial activism has carved the sculpture out of Article 19 (1) (a) - which is the bedrock of democracy. Upon a thorough analysis it can be safely stated that direction towards the realization of RTI within the constitutional ambit incepted right from the verdict in *Hamdard Dawakhana v. Union of Indian*[17]. Supreme Court for the first time declared RTI to be part of Article 19 (1) (a) in *Bennett Coleman v. Union of India*[18], where it held Newsprint Control Order of 1972-1973 issued under the Essential Commodities Act, 1955 to be ultra virus Article 19 (1) (a) of the constitution. Ray, CJ in the majority judgment opined that, "It is indisputable that by freedom of the press is meant the right of all citizens to speak, publish and express their views. The freedom of press embodies the right of the people to read." Here what is refereed as 'right of the people to read' refers to the right of the readers to get the information.

The strongest exposition in this regard came from Justice K. K. Mathew in *State of U. P. v. Raj Narain*[19] who emphasized that in *"government of responsibility like ours where all the agents of the public must be responsible for their conduct, there can be but a few secrets. The people of this country have a right to know every public act, everything that is done in a public way by the public functionaries."* The facts of this case were that Raj Narain who challenged the validity of Mrs. Gandhi's election required disclosure Blue Books which contained the tour program and security measures taken for the Prime Minister. Though the disclosure was not allowed, Mathew, J. held that the people of country were entitled to know the particulars of every public transaction in all its hearing.
The major breakthrough was attained in *S. P. Gupta v. Union of India*[20] when the apex court imparted constitutional status to RTI. The point of contention in this case was again with regards to the claim for privilege laid by the government of India in respect disclosure of certain documents including correspondence between Chief justice of India and the Chief Justice of Delhi High Court in connection with the confirmation of Justice Kumar who was an additional Judge of the Delhi High Court. Justice Bhagwati, in his ever humanistic tone advocated the concept of open government stating it to be the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1) (a) of the Constitution. It was held by the

learned Judge that, RTI or access to information is essential for an ideally successful democratic way of life. Hence, it is imperative that disclosure of information regarding the functioning of Government must be the rule and secrecy is justified only where the strictest requirement of public interest demands.

Liberal approach of apex court towards the disclosure of information is discernible in *Sheela Barse v. Union* of India[21] where court issued directions for release of information to her relating to under trials kept in different parts of country. Point to be noted here is that such direction was not issued by invoking Article 19 (1) (a). Therefore, it can be inferred that a person having proper stand can seek information from the government. Similarly, the court was unequivocal of the importance of people's participation and upheld their right to know in *Pune Environmental case*[22].

Supreme Court further in a historic decision provided the voter's right to know the antecedents of the candidates[23]. Scope of Article 19(1) (a) was widened and it was affirmed that the right to know of the candidate contesting election to a House of Parliament or a state legislature or a panchayat or a municipal corporation is a pre- condition to the exercise of a citizen's right to vote. Thus people have a constitutional right to know the antecedents of the candidates contesting election for a post which is utmost importance in democracy. Later Government brought an ordinance followed by an Act to nullify effects of the judgment. The Act was declared unconstitutional by the Supreme Court in *People's Union of Civil Liberties v. Union of India*[24]. An important observation was made by the court that *"the fundamental rights enshrined in the Constitution.... have no fixed contents. From time to time, this court has filled in the skeleton with soul and blood and made it vibrant."*

Freedom of speech and expression and its relation with RTI has been vividly described by the apex court in *Secretary, Ministry of I & B, Government of India v. Cricket Association of Bengal*[25] in the following words:

"The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self - fulfilment. It enables people to contribute to debates on moral and social issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy."

We may end this succinct analysis of the judicial decisions which have played a major role in granting RTI constitutional status via interpretation of Article 19 (1) (a) and assimilation of the spirit with which framers of the Constitution dedicated it to the people of India. Democracy thrives on RTI which is the foundation of democracy. The same is aptly echoed in the words of apex court as; true democracy cannot exist unless the citizens have a right to participate in the affairs of the policy of the country. The right to participate in

the affairs of the country is meaningless unless the citizens are well informed on all sided issues in respect of which they are called upon to express their views. One -sided information, disinformation, misinformation and non-information all equally create uninformed citizens which make democracy a farce when medium of information is monopolized either by a partisan central authority or by private individuals or oligarchy organizations. This is particularly so in a country where a large bulk of the population is illiterate[26].

Other provisions facilitating RTI in Constitution

RTI is not exclusively traceable in Article 19 (1) (a) only. There are some other provisions too, which in some or the other way provide right to access the information or to obtain the information to concerned persons. Article 22 (1) of the Constitution of India entitles every person who is detained to know the grounds of his or her detention. Similarly, Article 311 (2) of the Constitution provides that a government servant is entitled to know why he or she is being dismissed or removed or reduced in rank and to be given an opportunity to make representation against the proposed action. The horizon of RTI has expanded so much so that Supreme Court in a recent judgment has considered RTI to be the offshoot of Article 21 of the Constitution of India[27].

Grass root level Movement for Right to Information in India:

Paradoxes are galore in our system. But movements by the masses for a right to which they are entitled by the virtue of bring the part of democracy is a disturbing aspect. However it is true that, while the common public has been aware of the importance of RTI, those wielding the political clout have been reluctant in transforming the right into practical legal reality. It all began in 1990 when the Mazdoor Kisan Shakti Sangathan (MKSS), a collective of farmers and labourers, was formed in Devdungri, a Rajasthan hamlet. Members of the collective were working for a state employment generation scheme, yet were being paid significantly less than the guaranteed minimum wage[28].

This enticed them to demand their legal entitlement. In response they got an answer that the official documents are not consonant with the necessary work that ought to be done by them. Such official documents were wrapped in the walls of bureaucratic 'secrecy' unavailable even to the persons, to which they were related. However, some clues by the sympathetic officer indicated towards enormous anomalies. Tackling these discrepancies required some unique medium to sensitize the people directly and easily for this purpose, MKSS adopted the means of placing the disclosed information (whatever could be elicited) in the public domain through live wire village based public hearing colloquially referred as jan sunwais. This movement raised famous slogans like hamara paisa, hamara hisaab (our money, our accounts) and hum janenge, hum jiyenge (we will know, we will live). Overall it can be safely asserted that transparency and account liability were the two pronged demands of the movement, which they wanted to be instilled in the system as whole. Dawn of the RTI ushered with this movement, which made people realize that secrecy enabled corrupt officials to siphon off minimum wages and other entitlements of the poor. A

movement demanding the RTI was thus born and its first champions were the disempowered rural workers in the remote rural area of Rajasthan[29].

Movements for RTI cannot be seen as isolated events. They are coextensive with a movement to make democracy real and functional. RTI was demanded as the right to work, the right to obtain famine relief, or the right to receive minimum wages. Secrecy and national interest were some excuses which, were heavily used by the power wielders to wrap information insulating it from reach of the masses. Corruption, therefore, was breeding prolifically in face of lack of accountability and an open government. Importance of open government was observed by eminent juristic mind of the nation, Bhagwati, J, in the following words: "Open government is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception.[30]"

In response to the pressure of the grassroots movements as well as to satisfy the international money lending institutions to borrow the loans, some of the State Governments such as Goa (1997), Tamil Nadu (1997), Rajasthan (2000), Karnataka, (2000), Delhi (2001), Assam (2002), Maharashtra (2003), Madhya Pradesh (2003) and Jammu, Kashmir (2003) introduced the Right to Information Act. Among all these Acts, Maharashtra Right to Information Act was considered as the model act in promoting transparency, accountability and responsiveness in all the Institutes of the State as well as the private organizations which are getting financial support from the Government. Tamil Nadu Act was considered as the most innovative one in how to refuse the information to the seekers. The growing demand for a right to public information from various sections of the society, led by civil society organizations in these States could no longer be ignored. The need to enact a law on right to information was recognized unanimously by the Chief Ministers Conference on "Effective and Responsive Government", held on 24th May, 1997 at New Delhi. The Government of India, Department of Personnel decided to set- up a 'Working Group' (on the 'Right to Information and Promotion of Open and Transparent Government') in January 1997 under the chairmanship of Mr. H. D. Shouri, which submitted its comprehensive and detailed report and the draft Bill on Freedom of Information in May 1997. The Press Council of India, the Press Institute of India, the 'National Campaign for People's Right to Information' and the Forum for Right to Information unanimously submitted a resolution to the Government of India to amend the proposed Bill in February, 2000.

The Government of India introduced the Freedom of Information Bill, 2000 (Bill No.98 of 2000) in the Lok Sabha on 25th July, 2000. The Bill, which cast an obligation upon public authorities to furnish such information wherever asked for, was passed by the Parliament as the Freedom of Information (FOI) Act, 2002. However, the Act could not be brought into force because the date from which the Act could come into force, was not notified in the Official Gazette.

National Advisory Council (NAC) was set up by the United Progressive Alliance (UPA) government which came at the centre in 2004. FOI Act was a very weak law and did not confer the deserving status of constitutional status to RTI. NAC recommended various changes to be incorporated in FOI Act. The central government decided to make changes which would make the Act more participatory and meaningful. But later on the government decided to repeal the FOI Act, and enacted a new legislation, the Right to Information Act, 2005, to provide an effective framework for effectuating the right of information recognized under Article 19 of the Constitution of India.

Prime Minister of India, emphasizing on the importance of RTI in the governance of country, reflected the culmination of what was a sporadically vehement movement initiated by the otherwise disempowered masses. He said, *"Four years ago I said to you that an important challenge we face is the challenge of providing good governance. We have taken several steps to make Government transparent, efficient and responsive. The Right to Information Act was one major step. We have initiated reform and modernization of Government"*[31].

Conclusion

In *Maneka Gandhi vs. Union of India,*[32] Justice V. Krishna Iyar opined that *"A government which functions secretly not only act against the democratic decency, but buried itself with its own burial.*" In a democratic setup there must be direct participation of the people in the democracy. This participation is meaningless unless the citizens are well informed on all sides of issues in respect of which they are called upon to express their views. One sided information, disinformation, misinformation and non-information all equally create uninformed citizenry which makes democracy a farce, When medium of information is monopolized either by a partisan central authority or by private individuals or oligarchic organizations. Therefore to avoid this monopoly the duty of the government is to give information to the people of the country because the government is the trust of the people.

In this reference, Henery Clay rightly observed that *"government is a trust and the officers of the government are trustees and both the trust and the trustees are created for the benefit of the people."* Every democracy requires an informed citizenry and transparency of information which are vital for its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed. For setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities and to promote transparency and accountability in the working of every public authorities RTI is intrinsic right. No democracy can be meaningful where their citizens cannot audit the performance of the government business, bureaucrats and the other functionaries who act on behalf of the state. In order to audit the performance of the government, the people have to be well informed of its policy, actions and failures. An informed citizenry is a pre requisite for guanine and participatory democracy.

References:

[1] The Right to Information Bill, 2005 was passed by the Sabha on 1l[th] May, 2005 and by the Rajya Sabha on 12[th] May, 2005 and it received the assent of the President on 15[th] June, 2005. But all the provisions came into force with effect from 12[th] October, 2005.
[2] Herein after referred as RTI.
[3] AIR 1973 SC 1461 2.
[4] Prof. (Dr.) S. V. Joga Rao, Law Relating to Right to Information, 1[st] Edition (2009).
[5] S.P. Sathe, Right to Information, Lexis Nexis Butterworths.
[6] Avinash Sharma, "Right to Information : A Constitutional Perspective", Vol. VIII Nyayadeep, see at p. 121.
[7] Conway vs. Rimmer, (1968) A. C. 910.
[8]R. vs. Secretary of State for the Home Department Ex P. Simms, (2000) 2 LR 115(AC).
[9] Schwartz, Administrative Law, p. 129, (1984).
[10] Thomas Emerson, Legal Foundation of Right to know, Washington University Law Quarterly, p.2 (1976).
[11] Lamont vs. Post Master General, 14 Lawyer Edition 2d. 398 (1965).
[12] 22 L. Ed. 2d. 24. 542 (1969).
[13] Article 14 of the Declaration of the Rights of Man, cited in S. P. Sathe, Right to Information, p.11.
[14] United Nations General Assembly, resolution 59(1), 65m plenary meeting, 14 December 1946.
[15] See EHRR 433, Para 74, cited in S.P. Sathe, Right to information, p. 15.
[16] Protection of captain rights regarding freedom of speech, etc- (1) All citizens shall have the right (a) to freedom of speech and expression.
[17] AIR 1960 SC 554.
[18] AIR 1973 SC 106.
[19] AIR 1975 SC 885.
[20] AIR 1982 SC 149,
[21] AIR 1986 SC 1773.
[22] Bombay Environmental Action Group vs. Pune Cantonment Board, SLP (Civil) 11291/1986 (13[th] October, 1986), unreported, but reproduced in A. Rosencranz, Environmental Law and Policy in India, Cases, Materials and Statutes, p.149, (Tripathi Publication, Bombay, 1991) cited in Avinash Sharma, "Right to Information: A Constitutional Perspective", Nyaya Deep, Vol VIII, Issue 3.
[23] U.O.I. v. Association for Democratic Reforms, AIR 2002 SC 2112.
[24] (2002) 5 See 399.
[25] (1995) 2 See 161.
[26] People's Union for civil liberties vs. union of India. AIR 2003 SC 2363.
[27] Essar Oil Ltd. vs. Haldar Utkarsha Samiti, AIR 2004 SC 1834.
[28] Tarunabh Khaitan, "Dismantling the walls of secrecy", Front live, 44 (February 27, 2009).
[29] Supra foot note 28.
[30] S. P. Gupta vs. Union of India, AIR 1982 SC 149, p. 234.
[31] The Prime Minister, Dr. Manmohan Singh, addressing the Nation from the ramparts of the Red Fort on the 62[nd] Independence Day.
[32] AIR 1978, SC 597.

Human Rights of Prisoners

Dr. Pradeep Kumar*

The rehabilitation of prisoners need not be by closing our eyes towards the suffering of the victim of Crime. ……..Justice Thomas

Introduction

Prisoners are too human beings therefore the basic object of criminal law is to suppress criminal enterprise protects from transgressions of Law. To achieve this end, there must be correspondence between the crime committed, and the punishment imposed. Even though Article 20 (3) will not be applicable in such circumstances, reliance can be placed on Article 21 if such non-penal consequences amount to a violation of `personal liberty' as contemplated under the Constitution.

The Supreme Court has also recognized the rights of prisoners (under trials as well as convicts) as well as individuals in other custodial environments to receive 'fair, just and equitable' treatment. In *Sunil Batra v. Delhi Administration*[1], case it was decided that practices such as `solitary confinement' and the use of bar- fetters in jails were violative of Article 21. Hence, in circumstances where persons who refuse to answer questions during the investigative stage are exposed to adverse consequences of a non-penal nature, the inquiry should account for the expansive scope of Article 21 rather than the right contemplated by Article 20(3).

The prisoners were also entitled to 'personal liberty' though in a limited sense, and hence judges could enquire into the reasonableness of their treatment by prison-authorities. Even though 'the right against cruel, inhuman and degrading punishment' cannot be asserted in an absolute sense, there is a sufficient basis to show that Article 21 can be invoked to protect the 'bodily integrity and dignity' of persons who are in custodial environments. This protection extends not only to prisoners who are convicts and under-trials, but also to those persons who may be arrested or detained in the course of investigations in criminal cases. Judgments such as *D.K. Basu v. State of West Bengal*[2] case have stressed upon the importance of preventing the `cruel, inhuman or degrading treatment' of any person who is taken into custody.

Prisoners' rights derive from two principles:[3] *Firstly*, prisoners are also human beings. Hence, all such rights except those that are taken away in the legitimate process of

* ***Head of Department, Jagran School of Law, Selaqui, Dehradun.***

incarceration still remain with the prisoner. These include rights that are related to the protection of basic human dignity as well as those for the development of the prisoner into a better human being. *Secondly*, because prisoners depend on prison authorities for almost all of their day-to-day needs, and the State possesses control over their life and liberty, the mechanism of rights springs up to prevent the authorities from abusing their power.

International Perspective

There are some international documents which are thought not directly related to reformation of prisoners but very much concerned with prison justice and indirectly called for recognition of the inherent quality of prisoners as human being and their inalienable rights as members of human family and protective rights against tyranny and oppression. Some of the important provisions of those international instruments are discussed hereunder:

Universal Declaration of Human Rights, 1948

In the year 1948, a movement was started in the United Nations in the form of Universal Declaration of Human Rights which was adopted in the General Assembly of the United Nations. This document is commonly known as human rights and the document provided some basic principles of administration of justice. These principles embodied some universal concepts like equality of treatment, right to life, liberty and security of person, freedom from torture, and freedom from inhuman cruel or degrading treatment. Among the important provision in the said Universal Declaration of Human Rights, 1948, following are relevant to our theme:[4]

Article 1. No one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
Article 3. Everyone has the right to life, liberty and security of person.
Article 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
Article 6. Everyone has the right to recognition everywhere as a person before the law.
Article 9. No one shall be subjected to arbitrary arrest, detention or exile.
Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him.
Article 11. Every one charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.[5]

The European Convention on Human Rights, 1953

In the History of Human Rights Movement the European Convention has its own importance but like many other international conventions this convention also failed to attract the attention of member countries.[6]

Article 2. Every one's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by the law.

Article 3. No one shall be subjected to torture or to inhuman or degrading treatment or punishment. The detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.

Article 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release be ordered if the detention is not lawful.

Article 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6. In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by the law. Judgment shall be pronounced publicly but the press and public may be excluded from all or a part of a trial in the interest of morals, public order on national security in a democratic society.

Thus, from the important provisions of International Documents on Prison Justice it is revealed that the basic requirements of human dignity and conditions necessary for prisoners to return to normal life are common in all those documents. Due process of law, rule of law, right to know, freedom of person, freedom of expression subject to reasonable restrictions, prevention of torture, right to speedy trial, legal aid in deserving cases, open justice system, etc. all are regarded as sine qua non for a good prison justice system and legal order for a correctional justice accepted globally as major modern penological thinking towards treatment of offenders.

Standard Minimum Rules for the Treatment of Prisoners[7]

Amnesty International in 1955 formulated certain standard rules for the treatment of prisoners. These rules form certain basic principles of law in most of the democratic countries. But the document itself is not obligatory.

Declaration on Protection from Torture, 1975

On 9th December, 1975, the United Nations General Assembly by consensus adopted the above Declaration. There has been great controversies on the question that whether the human rights provisions of the United Nation Charters ever constitute binding legal obligations or not. The Declaration of 1975 has been named as the Declaration on the Protection of all Persons from being subjected to Torture or other Cruel, inhuman or Degrading Treatment or Punishment[8] Article 2 any act of torture or other cruel, inhuman or

degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights. Article 3 no State may permit or tolerate or other cruel, inhuman, degrading treatment or punishment. Exceptional circumstances such as a State of war or a threat of war; internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

International Covenant on Civil and Political Rights, 1976[9]

Article 7 deals with "...No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Rights of Prisoners in U.S.A.

The prison system in America has been generally criticized due to its cruelty and ineffectiveness. Rothman[10] demonstrated that the prisoner were institute in a Jacksonian hope that the human improvement was possible if a criminal's unfortunate upbringing could be overcome in an antiseptic and healthy setting. The purposes of prisons were thus benevolent though fearful.

Sixth amendment of the American Constitution declared: In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial. The right to speedy trial is a more vague and generically different concept than other constitutional rights guaranteed to accused persons and cannot be quantified into a specified number of days or months and it is impossible to pin-point a precise time in the judicial process when the right must be assented or considered waived.

Right to Religion Under the first Amendment, all persons are guaranteed the right to the free exercise of their religious beliefs. The first Amendment, as stated by Leo Pfeiffer,[11] launched a unique American Experiment in the development of the religious freedom and the separation of the Church and the State. "The experiment rested upon the principle that the government has no power to legislate in the field of religion either by restricting its free exercise or providing for its support[12]" Prefer further stated that it was radical departure from the firmly established tradition that, "the relationship between man and God was a matter of legitimate concern of political government."[13]

Indisputably, the 'religious freedom' as envisaged in the First Amendment has not only confirmed the feelings of the over-whelming majority of the Americans but also restricted the Congress to interfere in the so-called 'private affair'. Recognizing that this right is 'preferred'[14] that is of particular significance under the Constitution. The courts have held in a number of cases that freedom or religion does not terminate at the prison doors.[15] In the Cruz case, it was held that a Buddhist prisoner must be afforded "a reasonable

opportunity of pursing his faith comparable to the opportunity afforded to the other fellow prisoners who adhere to the conventional religious precepts."[16]

In *Pell v. Procunier*[17] is a leading American case on the rights of both the press and prisoners regarding interviews and the constitutionality of a State regulation, which prohibited face to face interviews between news media representatives specifically named and requested to interview. A majority consisting of six judges held that no constitutional right of speech of the inmates was violated in view of alternative channels of communication i.e. letters, visits from family majority judges holding that the free expression right of the press was not violated either, since its representatives had no greater right to have access to prison information than the general public, expressed the apprehension that interviews of designated inmates would bring extreme press attention resulting in undesirable publicity to them which could adversely affect prison discipline.

Right of Prisoners in England

The United Kingdom of Britain is considered to be a major democratic system of the World. Unlike most of the democratic systems of America and India, the United Kingdom has no written Constitution; hence, there is no formal guarantee of individual liberty as are generally contained in Constitutional documents. In spite of Parliamentary supremacy, the concept of 'rule of law' has always been given due consideration by the Courts in England in order to protect the inherent rights of the individuals. The 'rule of law' is generally used to denote all the traditional processes of ordinary law of the land and hence, the liberties of the individuals are secured by the ordinary law. Moreover, these liberties of the subjects are not open to arbitrary interferences by the State.

Today, in the era of the development of the human rights, the concept of 'rule of law' has been used widely as not merely including the basic freedom of the individuals within the State but it is interpreted in such a manner as to include the Universal Declarations and Conventions on Human Rights. One of the major Conventions of Human Rights is the European Convention on Human Rights.[18] Because of the national commitment of the United Kingdom to this Convention, a number of important protections have been guaranteed to the citizens of the England under various protocols[19] of this Convention which provides for the safety of the individual's rights against the might of the State.

Right to Consultant a Solicitor, no prisoner is generally allowed to meet with any person other than a relative or friend except with the leave of the secretary of the state. Right to Communications Telephone although, there are no specific provisions for the telephone calls of the prisoners and generally telephone calls are not allowed but in exceptional circumstances, these calls may be allowed. A governor has discretion to allow calls where urgent domestic problems would be eased by the prisoner contacting his/her family or where visits are impracticable either due to the infirmity of the visitor or geographical inaccessibility. These calls would normally be monitored by a prison officer. However, currently, there is an experiment being conducted in an 'open prison' in the north of

England which permits prisoners to use a coin-box telephone to make unmonitored calls at certain times of the day.[20] Rule 34(2)[21] provides: A convicted prisoner shall be entitled to send and receive a letter on his reception into a prison and, thereafter, once a week.

National Perspective

There are no specific provisions of prisoner's right in the Constitution of India, yet certain rights which have been guaranteed in Part III of our Constitution are also available to the prisoners because a prisoner be treated as a 'person' in the prison. The other provisions of the Constitution though directly cannot be called as prisoners' rights but may be relevant are Article 20 (1 & 2), Article 21, and Article 22 (4 to 7) which deals with rights of any persons. The Courts in India by interpretation widen the scope of these Articles and evolved a new jurisprudence of prisoners' right in India which may be compared with prisoners' right in U.S.A. and England.

The fundamental rights of the prisoner are not denuded except to the extent lawful incarceration by its own compulsion has the effect of limiting those rights. Ever, a prisoner enjoys the right guaranteed under Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to the procedure established by law and that the law establishing the procedure must be just, right and fair and not arbitrary, fanciful and oppressive. Article 21 of the Constitution of India protects personal liberty which reads as follows:-"No person shall be deprived of his life or personal liberty except according to procedure established by law."

While considering the above rights the Supreme Court in *A.K. Gopalan v. State of Madras*,[22] and *Collector of Malabar v. Hajee*,[23] held that the rights conferred under Article 19 of the Constitution are the rights of free man. These are natural law or common law rights and not created by a statute. As such every citizen is entitled to exercise such rights provided conditions to be imposed whenever so required by the State. In the case of *State of West Bengal v. Subodh Gopal*[24], while dealing with the scope of Article 19(1) of the Constitution, the Supreme Court held that these rights are great and basic rights which are recognized and guaranteed as the natural right and inherent in the status of a citizen in a free country. In *State of Maharashtra v. Prabhakar*,[25] Article 21 of the Constitution was made available perhaps for the first time to a prisoner while dealing with the question of his right of reading and writing books while in jail.[26]

It is now established that even where a person is convicted and imprisoned under sentence of Court, he does not lose all the fundamental rights belonging to all the persons under the Constitution, excepting those which cannot possibly be enjoyed owing to the fact of incarceration, such as the right to move freely Art. 19(1)(d) or the right to practice a profession Art. 19(1)(g) as held in *Sunil Batra v. Delhi Administration*.[27]

Subsequently, various aspects of prisoners' rights have been coming before Indian courts and they have interpreted the rights rather liberally in spite of the absence of anything like

a "due process" clause in our Construction. This in particular has been made possible by giving a deeper and innovative meaning to the concept of "procedure" and "liberty" in Article 21of the Constitution; a trend which commenced with the Supreme Court's decision in *Maneka Gandhi v. Uninon of India* and which has made a significant contribution to what is referred to as the emergence of "judicial activism" in the country. The constitutional rights of prisoners cover a wide range of rights of personal and political nature including rights such as pertaining to religion, associates and elections; what however, follows is regarding rights which are more vital and of direct relevance in the context of prison reforms in India.

A substantial part of the prison population in the country consists of under trials and those detents whose trials have yet to commence and the significance of this right is obvious. The right to have a lawyer of one's choice and to legal aid is provided for both in the Constitution and the Code of Criminal Procedure.[28]

In *M.H. Hoskot v. State of Maharashtra*[29] the Supreme Court dealt with the problem at length in the context of the inmates of the prisons. The petitioner was found guilty of attempt to cheat by forging and the High Court in an appeal by the State enhanced the punishment to three years. The following principles were laid down by the Court:

1. Courts shall forthwith furnish a free transcript of the judgment when sentencing a person to a person to a prison term.
2. In the event of any such copy being sent to the jail authorities for delivery to the prisoner by the appellate, revision or other court, the official concerned shall with quick dispatch, get it delivered to the sentence and obtain an acknowledgment thereof from him.
3. Where the prisoner seeks to file an appeal or revision, every facility for exercise of that right shall be made available by the jail administration.
4. Where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the Court shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign a competent counsel for the prisoner's defense, provided the party does not object to that lawyer.
5. The State which prosecuted the prisoner and set in motion the process which deprived him of his liberty shall pay to assigned counsel such sum as the court may equitably fix.

In *Franics Coralie Mullin v. UT of Dellu*[30], the Supreme Court got the opportunity of considering a few other aspects of the prisoner's right to have a lawyer and reasonable access to him without undue interference from the prison staff. It was said that the right of a detent to consult a legal adviser of his choice for any purpose is not limited to criminal proceedings but also for securing release from preventive detention or for filing a writ petition or for prosecuting any civil or criminal proceedings. A prison regulation, it was

pointed out, cannot prescribe any unreasonable and arbitrary procedure to regulate the interviews between the detent and the legal adviser.

In *Frances Coralie Mullin*[31] the petitioner, a British national, was detained in Tihar Jail of Delhi in connection with her alleged involvement in violation of the Conservation of Foreign Exchange and Prevention of smuggling Activities Act, 1974. One-of the issues was regarding the procedure and frequency of the exercise of her right to meet her five-year-old daughter and her sister who was looking after the girl. Rules of the Punjab jail Manual, applicable in Delhi, permitted the detents to meet friends and relatives only once a month while similar facility under the rules was available once and twice a week to convicts and undertrials respectively.

Such a dichotomy being clearly wrong and arbitrary, the Court held the relevant provisions of the conditions of the Detention Order to be vocative of Articles 14 and 21 of the Constitution. The Court also found the provision of the order prescribing that a detenu can have an interview with a legal advice only after obtaining permission of the District Magistrate and that the interview had to take place in the presence of certain officials of the Customs and Excise Department to be invalid. In reaching the above conclusions the Court also emphasized the distention between convicts and detents under preventive detention; the latter being on a higher pedestal compared to the former.

Right to Free Speech and Expression

An important aspect of the right to free speech and expression relates to the press. Quite often the press in interested in interviewing prisoners a part of investigative journalism and a prisoner on his part may also be keen for his own reason. The situation therefore, involves the fundamental right of expression and information of both the parties to an interview. In *Prabha Dutt v. Union of India*[32] the petitioner, a newspaper correspondent, filed a petition to interview two condemned prisoners, Ranga and Billa, for which she was not accorded permission by the Superintendent of Tihar Jail, Delhi. The Court allowed the interview holding that the Press is entitled to interview prisoners unless weighty reasons to the contrary existed. The Court noted that the right claimed by the petitioner was not the right to express any particular view or opinion but the right to means of information through the medium of an interview.

The right to speech and expression is an extremely valuable right; essential not only the democratic functioning of society but also for the development and protection of the creative faculties of human beings. The issue regarding the right was asserted by prisoners in the era of judicial activism. In *State of Maharashtra v. Prabhakar Pandurng Sanzgiri,*[33] the respondent was detained under the Defense of India Rules, 1962. He wrote a book in science but was not allowed to publish it by the prison authorities. The Bombay high Court issued a writ allowing Pandurang to publish the book.

The state government in an appeal to the Supreme Court argued that freedom to publish was only a component part of speech and expression and as the detenu ceased to be free in view of his detention, he could not exercise his freedom to publish his book in view of an observation made by Das, J. in *A.K. Gopalan v. State of Madras*[34]. Without going into the question regarding the relative positions of Articles 19 and 21, the Court observed that the view of Das, J. in Gopalan was not the last word on the subject. The court also found that there was nothing in the Bombay Detention Order, 1951, prohibiting a detenu from writing or publishing a book. Dismissing the appeal, the Court further held that the book being a scientific work could not in any case be detrimental to public interest or safety as envisaged under the Defense of India Rules (1962).

It is interesting to note that the prisoners, though they were willing to be interviewed, were not asserting any constitutional right of their own in the instant case. The Court nevertheless cited the relevant rules of the Jail Manual to support the rights of the prisoners to communicate and have interviews with relatives, friends and legal advisers and also the press, people not specifically included in the rules.

Remedy of Compensation

The remedy of compensation to prisoners must be available in appropriate situations involving various legal injuries to them during detention. It is only recently that the courts have become less hesitant in giving relief to prisoners in cases of wrongful imprisonment and physical injuries suffered by prisoners due to intentional or negligent acts of prison staff. In many cases where the State is sued for wrongful imprisonment or other injuries, the defense generally offered and accepted is what is known as "Act of State", i.e. the liability is negative on the plea that the injury was received or violation of a right took place in the course of the exercise of sovereign functions of the State.[35]

In *Rudal Sah v. State of Bihar*[36] the Supreme Court has, however, changed its stance and awarded damages to a victim of wrongful imprisonment or fourteen years after his acquittal. In England and elsewhere also the same trend is discernible, Compensation has been awarded, for instance, where a prisoner received injuries from a fellow prisoner due to the negligence of prison authorities, for injuries caused due to faulty equipment or outfit supplied by the prison administrators and injures received while doing some hazardous job assigned to the prisoner.[37]

Right of Speedy Trial of Under-Trial Prisoners

The undoubted right of speedy trial of under-trial prisoners, as held in a catena of cases of the Apex Court, reference to which not deemed necessary. Mention may only be made of the further leaves added to this right. These consist of ordering for release on bail where trial is protracted. The first decision in this regard is by a two-Judge Bench in Supreme Court *Legal Aid Committee Representing Under trial Prisoners v. Union of India*.[38] Wherein the bench was concerned with the detention of large number of persons in Jail in connection with various offence under Narcotic Drugs and Psychotropic Substances Act,

1986. The Court, after noting the stringent provisions relating to bail as incorporated in that Act, directed for release of those under trail prisoners who were languishing in Jail for a period exceeding half of the punishment provided in the Act. This decision was cited with cited with approval by another two-Judge bench in *Shaheen Welfare Association v. Union of India*,[39] in which provision of TADA were born in mind and the Bench felt that a pragmatic and just approach was required to be adopted to release TADA detents on bail because of delay in conclusions of trials. The bench classified these under-trials in four categories and passed different order relating to their release on bail.[40]

In *Delhi Administration NCT of Delhi v. Manoharlal*[41] case the High Court could only direct consideration of the case of premature release by Government and it is not right to commute the sentence. The order of High Court issuing mandatory direction to government to commute sentence by itself and leaving no discretion or liberty with Government was not proper. It was further held that powers of government regarding commutation of sentence should not be exercised as a matter of routine course at its sweet will and it should be exercised reasonably, rationally and with great circumspection.

Right Against Cruel, Inhuman or Degrading Treatment

In *Selvi & Ors vs State Of Karnataka & Anr*[42] case the narco-analysis or medical examination during the course of investigation can be read expansively to include the impugned techniques, even though the latter are not explicitly enumerated. The Article21 has been judicially expanded to include a 'right against cruel, inhuman or degrading treatment', which requires us to determine whether the involuntary administration of the impugned techniques violates this right whose scope corresponds with evolving international human rights norms. We must also consider contentions that have invoked the test subject's 'right to privacy, both in a physical and mental sense. In order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments.

The right to privacy

Prisoners have a right to confidentiality regarding their health. Prison officials may only disclose health information, including the results of an HIV test, with the informed consent of the prisoner. If prison officials know about the HIV status of a prisoner, they may only tell someone else if the prisoner has given them permission to do so. The World Health Organization (WHO) recommends that any kind of marking or coding of a prisoner's file or cell to indicate HIV status should be prohibited.

Right to Medical Treatment

The 1993 WHO Guidelines provide that "all prisoners have the right to receive health care, including preventive measures, equivalent to that available in the general community without discrimination". In *V. N. Ghiya v. State of Rajasthan*[43]case court held that the prisoners have a right of medical treatment like others. Court also held that "when State

imprisons someone it has liability for looking after health, necessary medical care, if not better has to be of reasonability same standard which is expected by person outside jail." In *Bibhuti Nath Jha v. State of Bihar*[44] Court held that prisoners cannot be deprived of health services as that would be violation of protection conferred under Article 21 of the Constitution of India. The court clarified that the prisoners cannot dictate his choice or the State can taking a decision basing on the status of the prisoners. The treatment method must be adequate, effective and necessary.[45]

Conclusion and Suggestions

"…imprisonment does not deprive prisoner of all or every basic right which the ordinary citizen enjoys…"

The prisoners are also human being so, continues to have their dignity, self respect and human rights even while under any form of detention or imprisonment. The prisoners should not be subjected to torture, cruel or degrading treatment or punishment even those are facing death penalty has their basic rights. In India, our prisons are overcrowded and the condition is appalling. Since independence many committees have gone into the need for reforms the condition of prisons. In the light of concluding remarks the causes of prisoner's sufferings in jails I have the following observations in the way of suggestion:

- A firm mechanism should be evolved to monitor and ensure the implementation of various recommendations made by different expert committees, courts and workshops from time to time. The NHRC and the State Human Rights Commissions could take up this work and ensure that follow-up action is taken to implement the recommendations.
- A Manual, explaining to the prisoners their rights and obligations, procedure for lodging complaints, the conduct that is expected to jail administration etc., should be prepared in simple language for prisoners' benefit. The Manual should be supplemented by the efforts of the NGOs to do legal literacy work amongst prisoners.
- Adequate training and retaining should be provided for such staffs to enable them to up to-date their skills.
- All the Acts pertaining to prison administration should be consolidated and the effective implementation of new standardized and comprehensive Prisons (Administration and Treatment of Prisoners) Bill, 1998 must be ensured by the concern authority.
- Appropriate assistance shall be rendered to every female prisoner on release whether during or after completion of sentence. The prisoners' authority shall take necessary steps to arrange the rehabilitation of the released prisoner either through the family or the Relief Centre or a voluntary organization.

- Female prisoners should be watched by female wardens. In every prison adequate number of female staff should be recruited and a separate women cell must be started in each jail.
- For making the prison system human rights friendly to the achievement of desired objectives, certain basic prerequisites must be ensured on which the Indian prison system can be restructured.
- Girls imprisoned should be kept separate from adult women. Habitual offender, prostitutes and brothel keepers must be kept in separate from other inmates in prison.
- Inmates with children require special attention of prison authorities and suitable orders from court may be in use to ensure the interest of both the interest of mother and child. As far as possible, children of inmates may not be kept within adult jails and visits by children to the inmates may be liberally allowed. At the time of release of the child on account of reaching maximum permissible age, the court and the prison management shall ensure that the mother-child link is not severed.
- It is necessary to keep identifying such prisoners who need and deserve legal aid. Legal aid workers must identify such prisoners and educate them about their right to legal aid.
- Legal aid workers should make greater use of the judgment of the Supreme Court in *Common Cause v. Union of India* (1996) 4 SCC 33 and approach the courts to get more persons released from jails.
- Prison officers shall not use force, except in self-defence or in cases of attempted escape or active or passive resistance to an order based on law or regulations.
- Public participation in prevention of crime and treatment of offenders must be made a part of our National Policy on Prisons.
- Scale of diet for prisoners shall be firm according to medical norms and special extra diet shall be given if medically prescribed. All corrupt practices of the jail staff with diet shall be stopped by immediate effects.
- The accommodation, sanitation and hygiene provided the prisoner shall confirm to prescribe standard and basic norms.
- The existing efforts and legal framework for reformation of prisoners are not enough; therefore, there is a need to be reformulated to make the rehabilitation and correctional programmes more efficient and effective.
- The National and State Human Rights Commissions should be given the mandate to appoint prisoners visitors. The visitors will provide report to the Commissions, heads of the prison department and make the report public through the use of mass media effectively.
- There should be separate custodial facilities for convicted and U.T. women. Qualified Lady Doctors and Nursing staff must be attached on a visiting basis to every female prison.

- To ensure the right to health of prisoner's an adequate infrastructural health care facility, like well equipped ambulances, stretchers, dispensaries, hospital beds etc. should be made available to the prison administration.
- To solve the problem of impediment in trials the recommendation of the Law Commission with regard to speedy trials and simplification of bail procedures made in its 77th and 78th Reports should be ensured.
- To solve the problem of overcrowding in prisons a bound for the Optimum capacity of prisons needs to be developed. Central Jails should not house more than 800 prisoners and district jails not more than 400 prisoners.
- Various incentives of the prison system should be judiciously used to promote self-discipline and modification of behavior of prisoners.
- Women who pose on security risk and satisfy other criterion may be housed in Open Jails where work facilities related to their agricultural or other occupational background should be available. So far women convicts are not sent to open prison.

References:

[1] (1978) 4 SCC 494.
[2] AIR 1997 SC 610.
[3] R. Sreekumar, *Handbook for Prison Visitors*, p. 4, Design and Layout: Chenthil Kumar Paramasivam, Commonwealth Human Rights Inactive, 2003.
[4] U.N. Doc. A/8-II (1948).
[5] Universal Declaration of Human Rights, 1948, GA Res. 217 A (III) of December 10 1948.
[6] The European Convention on Human Rights (1953-69).
[7] Amnesty International U.N. Doc./A/Conf./6/1 (1955).
[8] Helsinki Conference, 1975.
[9] GA Res. 2200A (XXI), entered into force March 23, 1976.
[10] *Braker v. Wingo* (33 L Ed. 2d 101, 1972), Comparative Indian Case, *Hussainara Khatoon* AIR 1979 SC 1360.
[11] Leo Pfeffer, The Liberties of an American (1952).
[12] *Ibid*, p. 33.
[13] *Ibid*, p.35
[14] Alber (1960), Legal Rights of Prisoners.
[15] *Ibid*, p.33.
[16] Cruz V. Bets [3] 4 Ed. 2d 263, (1972)].
[17] 41 L Ed. 2d 495 : 417 US 817 1974.
[18] European Conventions on Human Rights.
[19] *Ibid.*
[20] Baily, op. cit., p. 418.
[21] Prison Rules, 1964.
[22] AIR 1950 SC 27.
[23] AIR 1957 SC 688.
[24] AIR 1954 SC 92.

[25] AIR 1966 SC 424, quoted in Rama Murthy v. State of Karnataka, AIR 1997 SC 1739 at 1740.
[26] Ahmad Siuddiquis, *Criminology & Penology*, Lucknow, Sixth Edition, Eastern Book Company, 2013, pp.195-196.
[27] AIR 1980 SC 1579.
[28] *Ibid.*
[29] 1978 3SCC 544.
[30] 1981 1SCC 608 : 1981 SCC Cri 212.
[31] Ibid.
[32] 1982 SCC Cri. 41.
[33] AIR 1996 SC 424.
[34] AIR 1950 SC 27.
[35] Kasturi Lal Ralia Ram Jain v. State of U.P., AIR 1965 SC 1039 is an instance of such an approach.
[36] 1983 4SCC 141.
[37] Please See D'Arcy v. Prison Governor, 1956 DC Crim LR 56; Margan v. Attorney General, 1965 NZLR 134; Donald v. R., 1971 FC 417.
[38] 1994 6SCC 731.
[39] 1996 AIR 1161.
[40] Rama Murthy v. State of Karnataka, AIR 1997 SC 1739 at 1741.
[41] 2002 Cri Lj 4295.
[42] 2010 (7) SCC 263.
[43] AIR 2013 Raj 35.
[44] 2005 12 SCC 286.
[45] Bijoy Chandra Mohapatra, Negligence and Liability of Health care Professional in India: A Reassessment, *Criminal Law Journal*, May, 2014, Vol. 120, Part. 1373, p. 75.

Case Comment: Expanding the Horizons

Shobhit Singh*

Introduction

It is a tool in the hands of the information seekers to get a bird's eye view of the highly intricate, lengthy and puzzled decisions coming from various courts both national and international with apt analytical critique allowing them to save both the energy and necessary time by grasping the subject matter with ease. Case Comment therefore behaves like the key to open the minds of the judges as well as its author without wasting time to go into the unnecessary details of the case and other unwanted *obiter* matters inserted by the judges to give a holistic and explanatory viewpoint. The utility of a case comment can be assessed by the following example:

If one wants to know the essential features of a particular bike viz. capacity, engine strength, kind of materials used in manufacturing then naturally he does not go to open the bike and start analyzing the parts, instead what he does is that he uses the handouts, pamphlets or leaflets demonstrating the full information about the bike. The same function of proffering full information without delving deep into the entire matter of the case running into hundreds of pages is accomplished by the artifact of case comment which provides everything at hand, viz. title, issues, reasoning, analysis, correctness of the judgment, supportive materials and finely substituted conclusion diversifying the viewpoint of the reader.

Preparations to be made before writing a case comment:

- Going deep into the case with necessary attention paid on the major issues involved as well as working out an insight into the case which may take shape of an extracted essence complete in most vital parts of the case.
- Identifying & choosing the issues which suit one's interest best i.e. in which one feels comfortable in discussing and providing proper legal reasoning, analysis and critique.
- Investigating and sorting out the legal infirmities and problems involved with the decision if any.
- Having an analysis of the case: first evaluating the ratio and the conclusion of the judgment and then supplying one's own approach dealing with the propriety of the issues and their treatment by the court capitalizing on one's legal acumen, understanding of law and power of segregating wheat from the chaff.

**** LL.M. (One Year), Student, Jagran School of Law, Dehradun.***

- Substantiating one's analysis by furnishing the relevant case laws, legal principles and jurisric writings if there are any on the issue, linking these to the issues being dealt in the analysis, carving out the relationship and ultimately conveying the sense one wants to put through the critique of the case.

What does it contain?

The essentials of a case comment are:

- Introduction
- Background of the case
- Analytical Section
- Conclusion

The Introductory paragraph begins with titular identification of the subject matter of the case which acts as a name plate to any address/ destination i.e. any interested person feels at ease to identify with exactitude that whether it is the subject matter which he was likely to go into or was searching for. Then it goes on to locate in brief the abstract of the case with sketch of the main issues, the inconsistency if any apparent, the significance of the case, what will ultimately be established by one's own analysis either in support or in disregard to the reasoning/ conclusion of the court.

After this, under the heading 'Background' one should account the historical aspects of the case: it may take the shape of 'procedural history' or 'legal history' or 'setting of the case' or 'background in brief'. This portion should be restricted to one page at the most. Then it should be followed by the 'decision of the court' giving the issues, reasoning supplied by the judges, type of opinions i.e. whether majority, minority or dissenting. If the decision was challenged at appellate level then decision of the court of appeal with the issued raised and accepted there, reasoning of the appellate forum, the outcome which should mention whether the decision was upheld or reversed coupled with the reasoning given by the judges of the appellate forum in support or against the decision at the trial court. If the decision was further challenged at the last appellate level, then again one has to cite the issues set up and accepted by the last appellate court, reasoning supplied by the judges of the last appellate court to uphold or reverse the decision of the first appellate court or the trial court, and the final judgment of the last appellate court segregating it into majority, minority or dissenting according to the factual division of the judgment.

Now comes the part where one who intends to compose his own analysis, style of sequestration, ability of criticism, capability of the dissection of the *ratio* from *obiter*, sensitiveness to the socio-legal-political scenario and resultant linkage of such craftsmanship to the case at hand, gets the place and occasion to mention and comment. While assessing or appraising the judicial pronouncement one should not lose sight from the major issues to be dealt with connecting them with the following as applicable as per the content and subject matter of the original case:

1) The earlier developments and the deviation of the present judgment from the settled trend if that has happened in fact. Like in *His Holiness Kesavananda Bharati Sripadagalvaru and Ors.*v *State of Kerala and Anr*[1] the Court overruled the established precedent of the famous *Golaknath* v *State of Punjab*[2] putting forward the doctrine of Basic Structure[3] of certain though not exhaustive constitutional principles and precepts.
2) Right interpretation of the law i.e. if the judgment seems *per incurium* while comparing it with the statutory laws and case laws developed on the same subject matter in the applicable domestic or foreign domain of law. For exapmple, in *Santosh Kumar Satishbhushan Bariyar* v *State Of Maharashtra*[4] the Supreme Court of India declared that the decision made in *Saibanna* v *State of Karnataka*[5] was made *per incurium*.
3) The growth in the field of same branch of law to which the decision belongs that may ensue after the delivery of the judgment. For instance, after the delivery of judgment in *Golaknath,*[6] the Parliament passed the 24th Amendment[7] to the Constitution to abrogate the ruling of the judgment.
4) The effect that the decision may impart on the society or other related targeted group or class of society or object of judicial pronouncement. A prototype of which is the protest enkindled after the SC verdict in *Mohd. Ahmed Khan v Shah Bano Begum,*[8] as a result of which many sections of Muslims took to streets against the presumed attack on their religious personal laws.
5) The possibility of any reactionary element if any seems forseeable. The besetting of violent agitations against the recommendations of the Mandal Commission and the controversial judgment in *Indra Sawhney* v *Union of India*[9] may be cited as a pertinent example.
6) Over-reach, encroachments, transgressions if any made by the judiciary while delving into the legal dispute. Like, in *Rustom Cavasjee Cooper* v *Union of India*[10] the court dig for it a hole by declaring the ordinance unconstitutional which tried to nationalize 14 banks by terming the intention of the executive to shunt the parliamentary procedures, it ultimately resulted into enactment of 25th constitutional amendment[11] by the Parliament.
7) Explanations/ definitions/ skylines drawn by the judicial pronouncement. The definition of obscenity given by Justice Potter Stewart in *Jacobellis* v *Ohio*[12]is an illustrious explanation of obscenity.
8) Distinctions whether precise or vague induced by the judicial verdict. An illustration of which is the view taken by a two judge bench in *State of Himachal Pradesh* v *Raja Mahendra Pal & Ors*[13] that 'the primary test to determine whether an authority is a 'quasi-judicial' one is to check that it has any express statutory duty to act judicially in arriving at the decision in question' seems to be based on imprecise *terra incognita*.
9) Apparent or deep conflict among decisions of different benches of High court and Supreme Court on same issue and their binding ability. The judicial journey undergone in the often talked the *Naz Foundation*[14] is most suitable to be discussed

here: the afore-named NGO in 2001 had approached the Supreme Court through presenting a petition in Delhi High Court for decriminalization of sex between adult homosexuals which was disallowed by the Delhi High Court in 2004. Hence the petitioner approached the Supreme Court which directed the Delhi High Court in 2009 to reconsider it on merits. Thereafter, the Delhi High Court in its 2009 judgment legalized consensual gay sex between adults in private, giving a long sought respite to the LGBT community. The Supreme Court, in turn, while deciding the appeal made against the decriminalization of gay sex, recriminalized it on 11th December, 2013, by upholding s 377 of the Indian Penal Code citing public morality in support of its approach.

10) Lacunae left or void created while taking recourse to new approach of law by the judges on the issues presented instead of gap- filling. In *Supreme Court Advocates-on-Record Association* v *Union of India,*[15] the court snatched the constitutionally guaranteed power of the President to appoint judges after consultation with the CJI and replaced it with a collegiums system making the exercise of the power by the President in this regard a mere formality. This encroachment has been debated over for many years by jurists both for and against the active step taken by the Indian Judiciary and proposals were made to replace the collegium system by the National Judicial Appointments Commission (NJAC) and a Bill to actualize this was passed by both the Houses of Parliament in August, 2014 materializing into the National Judicial Appointments Commission Bill, 2014 and the Constitution (99th Amendment) Bill.[16]
11) Realization of restraint or constraint by the judges while meting out their opinions. In the *Balco,*[17] the court cited the majority decision in the *Narmada Bachao Andolan*[18]: "while protecting the rights of the people from being violated in any manner utmost care has to be taken that the court does not transgress its jurisdiction……in the exercise of its enormous power, the court should not be called upon to or undertake governmental duties or functions. The courts cannot run the government…the courts must, therefore, act within their judicially permissible limitations to uphold the rule of law and harness their power in public interest." The Court in its decision also added that PIL was not meant to be a weapon to challenge the financial or economic decisions which are taken by the Government in exercise of their economic power.
12) Judicial approval/ disapproval of the legislative provisions while interpreting any statute in question if any. For example, the Supreme Court struck down the Kerala Irrigation and Water Conservation (Amendment) Act, 2006[19] passed by the Kerala Assembly which limited the full reservoir level to 136 feet while commissioning studies to ascertain dam's safety. The Court found the statute in violation of the firmly established constitutional limitation- the separation of powers.[20]
13) Outcome of the judicial examination: dismissal or acceptance of petition which should also cover the cases of vexatious/ scandalous and frivolous litigation if termed by the court in that way. The observations made by Doraiswamy Raju and

Arijit Pasayat in *Dr. B. Singh* v *Union of India*[21] criticizing the wrong trend set up in PIL cases demonstrates the judicial attitude towards these category of cases.

14) Language adopted by the court i.e. either it is repressive/ inhibitory/ deterrent/ sarcastic/ critical/ sardonic or cherubic and commendatory. The aforementioned decision of *Dr. B. Singh v. Union of India*[22] fans out the long worked out judicial annoyance in frivolous litigation cases.
15) Construction of new doctrines in the realm of law addressed to in the judgment. In the field of Law of Torts many new doctrines have seen the light of the day as the court was quick off the mark to meet the legal challenges before it with the dynamism of modern world and complexities developing day by day. Like the doctrine of 'Absolute Liability'[23] came up because the court was receptive to demands of the facts making the polluters liable for the hazards they created.
16) Rules of interpretation i.e. call forth the liberal/ strict intonation of the judgment. Sometimes the courts take the help of various well settled doctrines of Constitutional and Administrative Law while interpreting the language which must be specifically spotlighted. In order to deal with the concept of equality enshrined under Art 14, in the *State of West Bengal v. Anwar Ali Sarkarhabib,*[24] the classic *nexus test* was vocalized by S.R. Das, J. in the following words: "in order to pass the test of permissible classification two conditions must be fulfilled viz. (i) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others left out of the group, and (ii) that the differentia must have a rational relation to the objects sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct and what is necessary is that there must be nexus between them."[25]
17) Neglect of some point of law i.e. *sub silentio* decision omitting the other view already present. An instant sample of which can be observed in *State of UP* v *Jeet S Bisht & Anr,*[26] where it was held that decision of the *All India Judges' Association & Ors* v *Union of India & Ors*[27] giving binding directions about salaries etc holding that judges should get adequate salaries and allowances to enable them to function impartially and with a free mind, was delivered *sub silentio* as the salaries, allowances and other conditions of service of judges are either fixed by the Constitution or by the legislature or the executive.[28]
18) Effect of subsequent legislative amendment on earlier precedent i.e. whether there has been supersession of judicial verdict by the legislative enactment. The judgment in *Shah Bano*[29] delivered by the court entitling a divorced Muslim woman alimony was diluted through the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986[30] by the Indian Parliament denying the divorcees the right to alimony from their ex- husbands.
19) Appreciation of application of principles like *Res Judicata* etc to prevent the abuse of process of court apart from the branches of law where it is statutorily applicable. The decision in *Daryao v. State of Uttar Pradesh*[31]discusses at length the relevance of this doctrine in application to writs filed under Art 32 of the Constitution of

India with simultaneous discourse on the weight assigned to it in foreign systems of law.[32]

The last segment under the title 'Conclusion' should summarize the findings and arguments advanced for or against the judgment. It is more or less like the leitmotif of the analytical section carving the pith and substance of substantial portions of the case comment.

Pros and Cons of this method

Pros

a) It helps to unfold the intricate points of a case and widens the compass of the reader's knowledge.

b) It makes available the diversified, indepth and typically analyzed fine contributions on points of law.

c) It allows access to unfolded mysteries of law by the experts on celebrated and rare cases as these are written mainly on rarified, uncommon but renowned decisions.

d) It helps to satiate the thirst for solutions to multifarious legal issues either not dealt with/ unaddressed or left open by judicial reasoning which are pin-pointedly hashed out by the writers of case comment in their analysis.

e) It blows the reader's mind with the interlinking of facts, events, data and values which a reader searches for.

f) In complex cases where the legal isssues are not short of kettle of fish, a case comment puzzles out the riddle and palliates the mix up.

g) The appendage of counter arguments against the opinions of the judges if there is disagreement with the decision, enhances the practicality of this form of legal writing.

Cons

a) Sentimental case comments stacked with writer's own bias may confound the reader with wrong coverage of criticism.
b) A case comment written after poor research may baffle the reader on critical points of law resulting into subsidence of his legal noesis.
c) Confrontation by the reader to moral judgments made in many case comments may altogether thwart the objective of case comment.
d) Awkwardly adumbrated relationships with the precedents dissimilarly drawn to the judgment to support one's own analysis may lead to mistaken decisively defeat the guile of case comment.
e) Case comments written with placing undue dependence on foreign case laws while criticizing the indigenous overture may lead to an outcome which is markedly different from the accepted notion of law of the land as there is no accounting for tastes while advocating adoption of novel trends in law.
f) In decisions which are delivered rightly and unvarnishedly, the role played by case comments is reduced to a mere formality as it just praises the reasoning and conclusion arrived at by the judges, and there is nothing newfangled to be appreciated by the reader.

g) Often a case comment seems more or less the transcription of the dissent of a particular judge in a given case; therefore, such copycatting lacks the excogitation of a legal research.

Closure Report

Hence, even a passing perusal of the matter which has been cautiously maneuvered in this research paper exemplifies the meaningfulness of case comment. A case comment is something which has a name on it by the ability to hand out everything readymade. To make its role realized to the legal researchers is like preaching to the converted therefore, there is no need to incline one's ear while concluding this research paper. However, the existing methods to write case comment are not armed at all points, and majority of the writers focus on few aspects ignoring some of other vital aspects leaving the reader in a displeasing situation furnishing only minified information on the chosen subject, therefore, what should be the requisites of an effective case comment have been manifested distinctly in the aforementioned subject matter. The reader should also put his mind to the fact that a case comment has only to play a second fiddle to the original decision, therefore, if one wants to get everything in detail, then naturally he shall have to recede towards the full verdict which will again unfortunately require lot of time to pick and choose issues with equal chop and change facsimileing the observation that 'a case comment is there because there is a case and not that there is a case because there is a case comment.'

References:

[1] AIR 1973 SC 1461.

[2] AIR 1967 SC 1643.

[3] Vide paras 316, 359, 620, 1179, 1260, 1485, 1488, 1516 and 1526 of the *Kesavananda Bharati* judgment (n 1) for full appreciation of the doctrine.

[4] (2009) 6 SCC 498.

[5] (2004) 4 SCC 165; the facts of the case are that the accused in this case was a life convict and while on parole, he committed murder of his wife and daughter. The court sentenced him to death on a reasoning, which effectively made death penalty mandatory for the category of offenders serving life sentence. Therefore, the *Bariyar* judgment (note 4) quoted the observations made in *Mithu v. State of Punjab* AIR 1983 SC 473: "If the law provides mandatory sentence of death, the court has no option save to impose the sentence of death making it meaningless to hear the accused on question of sentence and it becomes superfluous to state the reasons for imposing the sentence of death" and relying on this reasoning, the Court questioned the binding ability of the *Saibanna* judgment.

[6] *Golaknath v. State of Punjab* 1967 SCR (2) 762, the effect of the decision was that Parliament was virtually divested of the power to take away or curtail any of the Fundamental Rights enshrined in Part III of the Constituion of India.

[7] Made in 1971 which enabled the Parliament to legislate even to the extent of abridging Fundamental Rights by the amending Art 368. The Statement of Objects and Reasons of this amendment read: "……The Bill seeks to amend Art 368 suitably for the purpose and makes it clear that Art 368 provides for amendment of the Constitution as well as procedure therefore. The Bill further provides that when a Constitution amendment Bill passed by both Houses of Parliament is

presented to the President for his assent, he should give his assent thereto. The Bill also seeks to amend Art 13 of the Constitution to make it inapplicable to any amendment of the Constitution under art 368. Quoted from: < http://indiacode.nic.in/coiweb/amend/amend24.htm> accessed 30th Sept 2014.

[8] 1985 SCR (3) 844.

[9] AIR 1993 SC 477.

[10]AIR 1970 SC 564.

[11] The statement of Objects and reasons of the 25th Constitutional amendment read: "(1)……in the *Bank Nationalisation* case, the supreme court has held that the Constitution guarantees right to compensation, that is, the equivalent in money of the property compulsorily acquired. Thus in effect the adequacy of compensation and the relevancy of principles laid down by the Legislature for determining the amount of compensation have virtually become justiciable……...(2) the Bill seeks to surmount the difficulties placed in the way of giving effect to the Directive Principles of State Policy by the aforesaid interpretation……."; Quoted from: <http://indiacode.nic.in/coiweb/amend/amend25.htm>

[12] 378 U.S. 184 (1964)

[13] AIR 1999 SC 1786

[14] *Naz Foundation* v *Government of NCT of Delhi and Others* WP (c) No. 7455/ 2001, available on <http://www.equalrightstrust.org/ertdocumentbank/Naz%20Foundn%20v%20%20Govt%20of%20NCT%20of%20Delhi%20_2_%20_3_.pdf>,http://www.nazindia.org/judgement_377.pdf http://www.escr-net.org/docs/i/1013889.

[15] (1993) 4 SCC 441, popularily known as *Second Judges* case

[16] Available on http://www.thehindu.com/opinion/op-ed/dont-close-the-door-on-national-judicial-appointments-commission-as-yet/article6350842.ece>

[17] *Balco Employees Union (regd.) v. Union of India & Ors* 2002 (2) SCC 333.

[18] AIR 2000 SC 3751; Quoted in *Balco* (n 17) in Paras 229, 232.

[19] The Original text is available at <faolex.fao.org/docs/texts/ind82245.doc>

[20] Available on http://timesofindia.indiatimes.com/india/SC-strikes-down-Kerala-law-on-Mullaperiyar-dam/articleshow/34795438.cms> accessed 3rd October, 2014.

[21] AIR 2004 SC 1923.

[22] *Ibid.*

[23]*MC Mehta v. Union of India* (*Oleum Gas Leak* case) AIR 1987 SC 965.

[24] 1952 SCR 284.

[25] *Ibid.*

[26] (2007) 6 SCC 586.

[27] (1993) 4 SCC 288.

[28] para 15 (n 26).

[29] *Ahmed Khan v. Shah Bano Begum* 1985 SCR (3) 844.

[30] Full Act is available at < http://indiankanoon.org/doc/1933289/>

[31] 1961 AIR 1457.

[32] Paras 583, 584 of *Daryao* (n 31).

Independent Directors under the Companies Act, 2013

Manan Dua, S. Spandana Reddy*
Mrs. Leena Chhabra**

Abstract

The recent governance frauds have made it mandatory to embrace the concept of Independent Directors in detail under the Companies Act, 2013. In this article researcher discusses in detail S. 149 and other concerned provisions of Independent directors which not only provides for term of office and liability but also deals with the appointment and qualification of independent directors as provided in the new Act. The article also covers the appointment of independent directors on certain committees as well as the functions and duties of independent directors as provided in the code of independent director in Schedule IV of the Companies Act, 2013.

Introduction

The provisions of the Companies Act, 1956 do not define the term independent director but only defines the term Director, Managing Director/Whole Time Director.[1] It was only after the introduction of Clause 49 of Listing Agreement in 2000 by SEBI which led to some changes in the Companies Act, 1956 in context of independent directors.[2] Independent directors are the directors on board of the company as independent individuals who do not have any other relationship or transaction with the company.[3] According to NASDAQ, Independent Director means, "a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship which, in the opinion of the company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director".[4] Companies Act, 2013 defines "independent director" under section 2 (47) which reads as 'independent director' means the independent director referred under sub-section (5) of section 149. The new Companies Act, 2013 on one hand bestows independent directors with greater say in corporate governance & on other hand places greater demand from them.[5]

Clause 49 of Listing Agreement

Definition of Independent Director

The 'independent director' shall mean non-executive director of the company who[6]-

a. Shall receive director's remuneration but do not have any pecuniary relation or any kind of transactions with the company, its promoters or with its subsidiary company.
b. Is not related to the promoters or management.
c. In the immediate preceding three years hasn't been an executive of the company.

**** IV^th^ Year students of B.A., LL.B. (Hons.) IIMT & School of Law, GGSIP University, New Delhi.***
*****Assistant Professor, IIMT & School of Law, GGSIP University, New Delhi.***

d. Hasn't been the partner or an executive of an audit firm associated with the company.
e. Is not related to company in any way as supplier, service provider or as the customer of the company and is also not the substantial shareholder of the company.

The SEBI has introduced new Clause 49 which will be effective from October 1st of 2014 on all public listed companies which will now be subject to higher corporate governance principles. The important changes approved by the SEBI have been discussed below.

The Companies Act, 2013

Qualifications of the Independent directors

An independent director means a director other than the whole time director or a nominee director or a managing director[7]-

a. Who is a person of integrity and have relevant expertise & experience.
b. Who was not a promoter or is the promoter of the company and also doesn't have any relation with the promoters or directors of the company or its subsidiary.
c. Who does not have any pecuniary relation with the company or its promoters or directors.
d. His relatives does not have any pecuniary relation with company or its subsidiary or its promoters or directors, amounting to 2% or more of its gross turnover or total income or 50 lakhs or any such higher amount as prescribed.
e. (i) Such person or his relatives does not have any key managerial position in the company or its subsidiary during the three immediate preceding financial years; or
(ii) Such person or his relatives are not the employee or has been during the three immediate preceding financial years of auditors firm or any consulting firm.
(iii) Such person does not hold 2% or more of the voting right of the company along with his relatives.
f. Who have such other qualifications as may be prescribed.

Exclusion of nominee directors from the definition of independent directors is welcome move.[8] One of the duties of Independent Directors is to bring in an independent judgment on the dealings of the company, uphold the interests of minority shareholders and give precedence to company's interest as a whole.[9] The new Act has added some new provisions with regards to independent director which were not present in the clause 49 of the listing Agreement. One important thing to be pointed out here is that these provisions are in harmony with clause 49 of the listing agreement.

Appointment of Independent directors

The institutes or associations as notified by the central government will maintain a data bank containing details of all the willing and eligible persons who can act as independent directors.[10] Every director shall be appointed in the general meeting of the company.[11] Central Government may provide for the procedure for the selection of the independent

directors who fulfills the criteria as specified under S. 149.[12] This provision will certainly help in maintaining the transparency in the selection procedure of independent director thus making the appointment procedure fairer. While appointing the independent director, the Board responsible for selection shall have appropriate skills, experience and knowledge which are required by the Board to perform its duties effectively and adequately.[13] It is also provided that every listed company shall have at least one-third of the total number of directors as independent directors and central government is authorized to prescribe minimum number of independent directors in case of any public company.[14] Accordingly, the immediate above condition will be applicable to public companies with a paid-up capital of INR 1 billion or turnover of INR 3 billion or aggregate loans/ debentures/ borrowings of more than INR 2 billion.[15]

Obligation of Independent Directors

Every independent director at the time of his first Board meeting and at the first Board meeting of every financial year, shall state the circumstances which might affect his position as the independent director of the company, or at any other time whenever any change has occurred or occurs.[16] This provision will certainly help to keep a check on the independent directors so that they cannot misuse the power granted to them by exploiting the same.

Term of Independent Director

An independent director is entitled to hold the office for a term of 5 years and shall be eligible for appointment only on the passing of the special resolution.[17] It also have been provided that they can hold office for only two terms of 5 years and period of 3 years (cooling off period) is necessary and it will be applied prospectively in the sense that no term served before the commencement of this act shall be taken into consideration.[18] But the recent changes made by the SEBI in the Clause 49 suggest otherwise. SEBI has decided that if a person has served as independent director on a board for 5 years or more, starting October 1st, 2014 he shall be eligible to only one term of 5 years.[19] The question here arises is whether SEBI can pass such standards which are contrary to the provisions of Companies Act, 2013 and whether SEBI has the power to apply this provision retrospectively where the S.149 clearly states that the provision will apply prospectively.

Remuneration of Independent Director

An independent director may receive remuneration for attending board meetings by way of fees and shall not be entitled to any stock option but he will be allowed to reimburse all expenses related to his participation in the Board and other meetings.[20] This provision is subject to S. 197 and S. 198 which talks about "maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits" and "calculation of profits" respectively.

Liability of Independent Directors

Any independent director and a non-executive director who is not a promoter or important managerial personnel shall be held liable for acts of omission or commission occurred in his knowledge or which is attributable through the process of the Board and which is done with his consent or where he was not diligent while performing his duties.[21] Nominee directors, despite not being considered as 'independent' under the new definition, would nevertheless be eligible for immunity, as long as they are non-executive.[22]

Numbers of Directorships

A person cannot hold an office as director of more than 20 companies at the same time and out of which director can be appointed in only 10 public companies.[23] But in the new Clause 49, SEBI has narrowed that to limit an independent director to 7 public listed company board positions, and only 3 as Whole Time Director.[24] This new clause becomes effective on October 1st, 2014.

Independent Directors on Certain Committees

Corporate Social Responsibility (CSR) Committee

The new Act requires company having net worth of 500 crore or more, or company having a turnover of 1000 crore or more or having net profit of 5 crore or more to constitute a CSR committee having three or more director out of which at least one shall be independent director.[25] The Board has to ensure that the companies spend 2% or more of the net profits made during the preceding immediate three years.[26]

Audit Committee

The new Act provides that every listed company or any class of company shall have an audit committee where there shall be minimum of 3 directors out of which majority should be independent directors.[27] It is to be noted that CSR committee requires at least one director to be independent where as the audit committee shall have majority of independent directors in the concerned committee.

Nomination and Remuneration Committee (NRC)

The new Act requires that every listed company shall constitute a NRC consisting of three or more non executive directors out of which half of them shall be independent.[28] The appointment of the directors to the committee shall be done in accordance with S. 149 and Schedule IV of the new Act.

Code for Independent Directors

The code of independent directors is provided under Schedule IV of the Companies Act, 2013. It talks about the professional conduct that is expected of independent director which not only shall help them in maintaining certain standards of integrity and honest conduct but will also help in increasing the trust of the shareholders and other key persons involved with the company. Independent director is mandatorily required to abide by this code as the expression used in the concerned schedule is "shall" and not "may".

Role and Function of the Independent Directors

Some of the important functions of independent directors are[29]

1. He should not be influenced by judgment of any other person on issues related to strategy, code of conduct, maintaining standards etc.
2. Evaluating and scrutinizing the performance of the management.
3. To make sure that financial control and other important financial information are stout and secure.
4. Interest of all the stakeholders and minority shareholder shall be taken care off or safeguarded.
5. In appointment and deciding the remuneration of various executive directors and other key persons of the management, independent director shall play a key role.

Duties of Independent Directors

Some of the important duties of the director are[30]

1. He should keep the people updated with latest skills and technology which are necessary for proper working of the company.
2. Expert advice shall be taken whenever necessary.
3. All efforts on his part shall be made to attend all the General and Board meetings of the company.
4. Keep a check on any kind of fraud or unethical behavior which is against the company policy and report about the same.
5. Not to disclose any confidential information or any other unpublished price sensitive information unless disclosure is required by the Board or operation of law.

Conclusion

The new Act incorporates the provision of independent directors in detail as contrary to the Companies Act, 1956 where even the term independent director was not even defined. In this context it is a welcome provision to the Companies Act, 2013 which will not only raise the corporate governance standards but also bestows more responsibility and trust on the independent directors which shall result in their great say in the management and other important decisions. Even SEBI in order to raise corporate standards has made some changes in clause 49 of the listing Agreement, which certainly shows the importance of corporate standards in our country. The inclusion of the provision related to independent director under the new Act has been done in keeping in mind the interest of all the stakeholders of the companies. It goes without saying that the provision of independent directors in the Companies Act, 2013 was need of the hour.

References:

[1]*Role of Independent Directors under Companies Act, 1956* (May, 21, 2014, 01:09 PM), http://www.indlaw.com/guest/DisplayNews.aspx?045740B6-70B2-4743-BC16-01624CE33A54

[2]Ajay Mishra, *Independent Directors under Companies Act 2013* (May, 22, 2014, 02: 05 PM),

http://www.caclubindia.com/articles/independent-director-under-companies-act-2013-18394.asp#.Uy6Of9x3jXV

[3]CS Dhanpal, *Independent Directors under Companies Act 2013* (May, 22, 2014, 02:15 PM), http://www.caclubindia.com/articles/independent-directors-under-companies-act-2013-19131.asp#.Uy6JQ9x3jXV

[4]Securities And Exchange Commission, *Marketplace Rules* (May, 23, 3014, 11:25 AM), http://www.sec.gov/rules/other/nasdaqllcf1a4_5/nasdaqllcamendrules4000.pdf

[5] Rishabh Amber Gupta, *Companies Act, 2013: Independent Directors* (May, 23, 2014, 03:51 PM), http://legaljunction.blogspot.in/2013/09/companies-act-2013-independent-directors.html

[6] Clause 49 of Listing Agreement (May, 24, 2014, 05:13 PM), http://www.sebi.gov.in/commreport/clause49.html

[7] S.149 (6) of the Companies Act, 2013

[8] Stayavati Berari, *Independent director: Role Makeover* (May, 24, 2014, 12:30 PM), http://thefirm.moneycontrol.com/story_page.php?more_category=by_invitation&autono=947523

[9] Ibid

[10] S. 150 (1) of Companies Act, 2013

[11] S. 152 (2) of Companies Act, 2013

[12] S. 150 (4) of Companies Act, 2013

[13] Schedule IV of Companies Act, 2013

[14] S. 149 (4) of Companies Act, 2013

[15] Krishnakanth Balasubramani, *Independent Directors under Companies Act, 2013-Boon or Bane?* (May, 25, 2014, 05:25 PM), http://www.mondaq.com/india/x/296148/Corporate+Governance/Independent+Directors+Under+Companies+Act+2013+Boon+Or+Bane

[16] S. 149 (7) of Companies Act, 2013

[17] S. 149 (10) of Companies Act, 2013

[18] S. 149 (11) of Companies Act, 2013

[19] *Corporate Governance: SEBI vs Companies Act, 2013* (May, 26, 2014, 03:55 PM), http://thefirm.moneycontrol.com/story_page.php?more_category=in_focus&autono=1043960&category

[20] S. 149 (9) of Companies Act, 2013

[21] S. 149 (12) of Companies Act, 2013

[22] See Supra Note 9

[23] S. 165 (1) of Companies Act, 2013

[24] See Supra Note 20

[25] S.135 (1) of Companies Act, 2013

[26] S.135 (5) of Companies Act, 2013

[27] S. 177 of Companies Act, 2013

[28] S. 178 of Companies Act, 2013

[29] Schedule IV of Companies Act, 2013

[30] *Ibid.*

Insurgency in State Affecting Human Rights

Varchasva Tiwari*

Introduction

First without going into Human right we will need to know what rights are. Rights have their origin from the word "right" which means "which is morally correct". As Stated in Hart-Fuller debate that the moral and law are interconnected but there is a thin layer of distinction between in both of them. Rights are moral or legal entitlements to have or to do something. Human Right are the right available to all human without any discrimination of sex, caste, creed or religion. In other way around we can say that 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.

Human Rights belong to every one of us without exception. But unless we demand they be respected, and unless we defend our right and the right of other, they will be just words in a decade-old document. The importance of human right has been underlined over and over again.[1] But as human evolve human right violated repeatedly by the human only in different form. Some times by using the curtain of religion, caste sometimes because of colour and sex. Now insurgency in state would cause violation of human right of civilian of that state.

What is Insurgency?

An insurgency is an armed rebellion against a constituted authority when those taking part in the rebellion are not recognized as belligerents. When insurgency is used to describe a movement's unlawfulness by virtue of not being authorized by or in accordance with the law of the land, its use is neutral. However when it is used by a state or another authority under threat, "insurgency" often also carries an implication that the rebels' cause is illegitimate, whereas those rising up will see the authority itself as being illegitimate.

In almost every year after World War II at least one insurgency has been underway in less developed area like- Kenya, Vietnam, Philippines, Laos, Cuba, and some other countries.
Even in last one and two year there were many cases of insurgency at different nation like in Libya, Syria, Sri Lanka, Pakistan, Egypt and even India. But insurgency is not only the conflict between the rebellion and the state because of it the citizen of that nation was suffered, the livelihood of the people was on stake. There rights were crashed like anything on each day until the solution of the problem did not arise or the rebel not stopped. In this

* ***BBA. LL.B. 2nd Year Student, Jagran School of Law, Dehradun.***

paper I will taken an account of three Asian nation where the insurgency create problems which lead to violation of human right of the people of that nation.

Syria

In December 2010, mass anti-government protests began in Tunisia and later spread across the Arab world, including Syria. By February 2011, revolutions occurred in Tunisia and Egypt, while Libya began to experience its own civil war. Numerous other Arab countries also faced protests, with some attempting to calm the masses by making concessions and governmental changes.[2] Syrian government did the same they also introduce some government policies to calm the rebels or protestor such as lifting the state of emergency, introducing a new media law, and granting citizenship to stateless Kurds but all are unsuccessful and not accepted by the masses.

As Syria is a repressive police state ruled under an emergency law since 1963, did not prove immune in 2011 to the pro-democracy Arab Spring movements. But at the root of the conflict was anger over unemployment, decades of dictatorship, corruption and state violence under of the Middle East's most repressive regimes. The brutal response of the security forces against initially peaceful protests demanding democratic reform and end of repression triggered a violent reaction. An armed rebellion to the regime soon took hold across Syria, dragging the country into a full-scale civil war.

Security forces responded brutally, killing at least 3,500 protesters and arbitrarily detaining thousands, including children under age 18, holding most of them incommunicado and subjecting many to torture. The security forces also launched large-scale military operations in restive towns nationwide.

Casualties in Syria Due to insurgency

Killings of Protesters and Bystanders

Security forces and government-supported armed groups used violence, often lethal, to attack and disperse overwhelmingly peaceful anti-government protesters from mid-March onwards. The exact number of dead is impossible to verify due to restrictions on access, but local groups documented 3,500 civilian dead as of November 15.Many of the killings took place during shootings on protesters and funeral processions, such as the April killings in the central city of Homs of at least 15 people at the New Clock Tower Square when protesters tried to organize a sit-in, and in the southern town of Izraa of at least 34 protesters. While in some cases security forces initially used tear gas or fired in the air to disperse the crowds, in many others, they fired directly at protesters without advance warning. Many victims sustained head, neck, and chest wounds, suggesting they were deliberately targeted. In several cases, security forces chased and continued to shoot at protesters as they ran away.[3]

Arbitrary Arrests, Enforced Disappearances, and Torture

As military operation were going on unlawful arrest of thousand of civilian were going on to lessen the amount of protest. In civilian especially women and children were torture and harassed by security official in the detention. At least 105 detainees died in custody in 2011, according to local activists. In cases of Custodial death reviewed by Human Rights Watch, the bodies bore unmistakable marks of torture including bruises, cuts, and burns. The *Universal Declaration of Human Rights* [GA Res. 217 A (III) of December 10 1948], Article 5 states that: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment in custody. Even in India State is held liable for custodial death of a person.[4]

Chemical Weapon Attack on 21 August 2013

In the mean while when protest is going on chemical weapon attack also took place we are not going to discuss that who had done this because it is matter of conflict but it is a total failure of Assad government and its policies as it fail to neutralize the situation at right time. As stated by the prestigious news agency the Guardian Thursday 22 August 2013 the death toll because of this attack rises up to 1400, that is also admit by the Syrian government.

Now some fact stated by different UN agencies:-

- 100,000 + have been killed in this civil war
- 2 million + have fled Syria- estimated by UN high commissioner on refugee
- ¾ of the refugee where women and children
- Another 4 million were displaced inside Syria

Sri Lanka

The conflict in Sri Lanka has been one of the greatest offenders in Human Rights violations. The Sri Lankan Civil War was a conflict fought on the island of Sri Lanka. Beginning on 23 July 1983, there was an intermittent insurgency against the government by the Liberation Tigers of Tamil Eelam (the LTTE, also known as the Tamil Tigers),a separatist militant organisation which fought to create an independent Tamil state called Tamil Eelam in the north and the east of the island. After a 26-year military campaign, the Sri Lankan military defeated the Tamil Tigers in May 2009, bringing the civil war to an end. For over 27 years, the war caused significant hardships for the population, environment and the economy of the country, with an estimated 80,000–100,000 people killed during its course. For the last 27 year this civil war causes many problems to the population of Sri Lanka. During this season with an estimated 80,000–100,000 people killed during this course.

India

India is a world largest democracy and seventh largest nation in respect of area in world. As it is so widely cultured it is difficult to administrate the nation with any single approach or strategy.

UN Rank India 136 in its Human Development Report, as we Know media is fourth Pillar of democracy and play a vital role in revealing truth India's rank is 140th in press freedom index in a report by "Reporter without Border" and by the same agency India ranked 122nd in justifying human Rights. India's effort to deal with armed rebellion within its borders is almost as old as Nehru's failed clean-up in his early days of governance. India is the union of state where parliament i.e. Sansad is the law making body at central and state legislature at state. Thus the power on various issues is divided among the state and central.

According to Indian quasi federal structure the action against the home insurgency come within the state responsibility. State police is force to handle the insurgent who are equipped with highly explosive weapon. The lack of sincerity shows by the state government in dealing with protestor result to a major insurgency for the state.
But now the situation is changing while developing an anti-insurgency strategy state police force is also joined by army and central police forces.

There were many case of insurgence in India from independence Naga insurgency is oldest, the Sikh terror , the Naxalite (Maoist) , communist insurgency and the recent one is Boko Haram in North eastern state of India due to these many arm rebellion cases the civilian suffered they are the one who has to sacrifice their rights which they bound to have.

Some of them I have discussed below:
Naga Insurgency: This is the oldest and most mature insurgency in India, and is called Mother of Insurgency. The insurgents in northeast India have looked upon the Naga insurgents for inspiration. Naga insurgency has been able to hold its ground for more than 50 years and perpetrate violence at will. Recently, one of the two factions of Naga insurgents started talks with the government of India for a peaceful solution.

Kashmir Militancy: Though the insurgency has been active for only about 25 years, its consistently high level of violence and daring actions beyond its area of influence put it close to the level of the Naga insurgency.

Mizo Insurgency: This was active for about 10 years, but during that time, the level was very high. It arrived at a peaceful solution with the government of India, and the insurgents achieved part of their demands. Its leaders went on to participate in state democratic politics and gained power off and on. Sikh Militancy of Punjab: - Punjab militancy was very violent and daring. For about 18 years, it created terror in Punjab and nearby areas, including the national capital region. It attracted international attention by its level

And if we go on the root cause of this insurgency in India we will find out that most of them took place due difference in ideology and religion. Though we cannot move decline the fact that linguistic differences is not one of the root causes of the same. And even the

current Maoist insurgency is the outcome of linguistic differences. In this paper I am only dealing with Maoist insurgency and its affect on civilian.

Maoist Insurgency (A war against humanity)

With roots in a 1967 peasant uprising in the West Bengal village of Naxalbari—hence their name, Naxalite—the Maoists have recently grown more potent. They have an estimated 14,000 full time fighters and loosely control a broad swathe of central and eastern India, albeit in jungle areas where the state is hardly present. India-wide, they are considered to be found in over a third of the country's 626 districts. Last year 998 people were killed in Maoist-related conflict. With almost 300 killed this year, it could be even bloodier. The things which give more fire to the issue are the government activity such as filling sedition charges against the writer of magazine and news daily who just peacefully raise their voice in support of such insurgent.

On 25 May 2013, Naxalite insurgents attacked a convoy of Indian National Congress leaders in the Darbha Valley in the Sukma district of Chhattisgarh, India. The attack caused 32 deaths, including that of former state minister Mahendra Karma and Chhattisgarh Congress chief Nand Kumar Patel. Vidya Charan Shukla, a senior Congress leader also later succumbed to his injuries on 11 June 2013. As by the above incident we came to notice that when Minster with fully fledged security are not secure how a common men can be.

Estimated loss of the Anti-insurgency force against Maoist is as that till 2013, in just five years more than 2500 civilians had been brutally killed by Maoist. The Anti-insurgent force against Maoist which were design to identify Maoist force the thousands of villagers to evacuate their land and settle into government camps. And those who oppose are severely beaten and impose penalties on them[5]. In several instance police use excessive force to quell protest by marginalized local communities, including small farmer, Adivasis and Dalits. The authorities also fail to carry out impartial and timely inquiry in these instances. People defending the rights of Adivasis and other marginalized communities and those using the recent legislation to obtain the information to protect rights of people are targeted by state and non – state agencies. According to 2006 Annual Report of National Crime Records Bureau a total of 1,444 complaints were receives against police personnel in Chhattisgarh during 2006.

Violence against women and children

Apart from being specifically targeted in armed conflict situations, women were also victimized by the societal cruelties. The adoption of the Witchcraft Atrocities (Prevention) Act, 2005 by the Government of Chhattisgarh in July 2005 failed to prevent abuses against women on the charges of being "witches".[6] According to official sources, as many as 22 cases of harassment of women on the charges of practicing witchcraft were reported in the State during 2005. About 10 of the victims were reportedly killed.

It was also found that across the states at least 3,000 children as young as six are being recruited by insurgent groups across India, according to a new report published by a human rights group. It was also found that other side of the two guns (insurgent and counterinsurgents) the police authorities in Chhattisgarh have admitted using around 300 children as "Balarakshaks," which the rights group describes as child police officers. Seven children were also deployed in an armed police battalion. It didn't describe the roles these children played[7].

"We have a sufficient number of officers in our police force. Why would we send children to the conflict areas? Chhattisgarh police has 70,000 officers and only 300 'Balarakshaks,' why would we require their help?" Ram Niwas, an additional director general of police in Chhattisgarh, told India Real Time. "Our main motive is to support them economically. The children have lost their fathers fighting in service or other ways, so we help them. It's a goodwill gesture," he said. And when we came to heard this type of statement from authorities in power it seems humanity lost its relevance somewhere in this wagering world. Thus there is continues violation of children writes by both the side.

Repression on the freedom of the press

The Chhattisgarh Special Public Security Act 2005 was signed into law by the President of India in March 2006.[8]The Act includes any expression "by uttering words or in writing form or by indication or by visual representation or otherwise" as an unlawful activity and prohibits any journalist from reporting any activity which has been termed as "unlawful". The Act also severely restricts freedom of association, assembly and collective bargaining as public rallies, meetings, seminar or symposium of the political parties, the civil society groups and victims aggrieved with policies and practices of the State Government or its institutions can be banned.

The journalists faced repression both from the State and the non-state actors such as the Naxalite and the anti-Naxalite. Human right and weaning the population away from supporting the insurgents is the major plank of India's counterinsurgency operations. To achieve this India need multidimensional approach which include civil society people, education reform, resources management and good arbitrator between the insurgent and government of the state.

Conclusion

The world has been witnessing longer insurgency (arm rebellion), civil war since world war. A Rand Corporation study of 89 insurgencies concluded that modern insurgencies last approximately 10 years. AS we know war be cannot be done with machine only and these 128 armed conflicts since 1989 have resulted in at least 250,000 deaths each year of civilian. It must be remembered that this vast destruction of humanity lead to us nowhere in future there are more things to fight for in life rather than taking up arms become a rebel. There are plenty of way to change the system if one is not happy with it become belligerent is not the right way for which one is go for.

Government of nation which are suffering from insurgency which lead to such vast destruction of human and his rights should find a peaceful way to solve the problem of rebellion and should fix their problem when it is problem of protestor not arm rebellion. At last I want to end with the famous saying for administrator of countries is that "what we plant in the soil of contemplation, we shall reap in the harvest of action."

Reference:

[1] Message of UN Secretary-General Ban Ki-Moon.
[2] Timeline of Arab spring.
[3] World Report 2013, Human Rright watch Syria.
[4] D. K. Basu v. State of west Bengal SCC 1997, Writ (cri) No. 539 of 1986.
[5] Human Right Watch-2012.
[6] In Raipur, witch scare grips the superstitious, govt. too, The Indian Express, 20 December 2006.
[7] Asian Center for Human Rights, New Delhi.
[8] Chhattisgarh Security Act, 2006, 13 March 2006.

Deficiency in Services under Consumer Protection Act, 1986 with Special Reference to Legal and Medical Profession

Satish Kumar Vishwakarma [*]

Introduction

Professionals in all sectors are may be held liable for their work when they make decisions related to life or death lawyer, medical professionals and engineers or when they hold in their hands the wealth of their clients accountants and financial advisors or when they judge the behaviors of others and inform the public of these behaviors in the scope of obtaining information and expressing it journalism and media professionals or others. These professionals and insurance companies are in consistent need for legal advice that helps them to assess the risks of their professions and provide them of insights of the ways that lessen these risks and defend them if necessary.

On the other hand, everyone who deals with these professionals need legal guarantees to ensure obtaining their rights in case of a professional mistake, especially that both the professional and the client do not stand at the same point of professional knowledge in most cases. We have to go to a lawyer, doctor or other professional at ones time or the other. Their help is indispensable in our lives. We are consumers of their services. Law protects those who seek the help of these professionals. There are Acts of parliament covering the qualifications and conduct of doctors, dentists, nurses, pharmacists and lawyers. There are several other professions not covered fully by such laws, like that of engineers and architects. They have only association of professionals.[1]

The legal profession is one of the most maligned one. Literature abounds in disparaging remarks again them, like this quote from Shakespeare: “The first thing we do, let’s kill all lawyers.” There are several remedies against erring lawyers, thought most people avoid confrontations with them as in the case of doctors. Lawyers can be sued like doctors from breach of contract and negligence. Claims from compensation can be filed before the consumer forums for loss suffered due to lawyer’s negligence. A lawyer has duty to take care and be skilful while handling your case, through there is no remedy against bad advocacy. If you do not like your lawyer, you are free to try another. But it is not advisable to change him just because you do not like his advice or he warns you that you may lose. A

**** Ph. D. Scholar, Faculty of Law, University of Lucknow, Lucknow.***

lawyer who is sought to be replaced may also strike back by not returning the case filed until a hefty bill is paid. He can claim a lien over it.[2]

The conduct of lawyers is governed by the Advocate Act 1961. Under this law, Bar Council have been set up in the states and at the Centre to enroll law graduate as lawyers, to hear and decide cases of misconduct again lawyers, to law down standard of professional conduct, and to establish procedures of disciplinary committees. They have other functions, which are more from the welfare of the lawyers than for their clients. Bar councils are also enjoined to set up legal aid committees. A client may complain against his lawyer to the state Bar Council which will refer it to its disciplinary committee. This committee has the powers of a civil court and can summon witnesses and records. If the complaint is found to be true, the lawyer may be reprimanded, suspended from practice, or permanently removed from the roll of advocates. Since only advocates are allowed to practice in the courts, the last step would throw him out of the profession. Some of the instances of professional misconduct are: Handling over the brief to another lawyer without the client's consent, representing conflicting interests without telling the clients, soliciting briefs, undercutting fees, and putting indecent questions at trail. A lawyer could be tried as any other offender in case of cheating or other criminal offences. Proof of misconduct must be beyond reasonable doubt.

Medical profession is one of the oldest professions of the world and is the most humanitarian one. Inherent in the concept of any profession is a code of conduct, containing the basic ethics that underline the moral values that govern professional practice and is aimed at upholding its dignity. Moral values to which a Medical Practitioner takes oath while obtaining his/her degree of MBBS or nursing etc. to serve human being for his/her whole life has now become a formality of courses and its ethical value, has lost its importance.[3] Deficiency in service legal and medical profession, in simple terms, is the failure to take due care and caution. It is a breach of a duty caused by the omission to do something which a reasonable person – guided by those considerations which ordinarily regulate the conduct of human affairs – should have done. It may also be doing something, which a prudent and reasonable person would not have done.

The essential components of deficiency in service legal and medical profession are: 'service', 'duty', 'breach' and 'resulting damage'. These definitions are rather relative and can change with the circumstances. When trying to drag a person away from the clutches of an attacking animal, one cannot ask whether this would cause damage to the person's limbs. Lawyer and Doctors can also be faced with similar contingencies. On finding an accident victim in a dangerous condition, a doctor may have to attempt a crude form of emergency surgery to try and save the person's life. No negligence is involved in such cases.

The jurisprudential concept of deficiency in service legal and medical profession differs in civil and criminal law. What may be negligence in civil law may not necessarily be

negligence in criminal law. For negligence to amount to an offence, the element of *mensrea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Deficiency neither in service legal and medical profession which is neither gross nor of a high degree may provide a ground for action in civil law but cannot form the basis for prosecution.

Statement of the Problem

Deficiency in service legal and medical profession is an important branch of the civil wrongs or tort. The person who by his/ her negligence commits a civil wrong or the torts must compensate the injured party. A sub- branch of this is deficiency in service legal and medical profession, which deals with situations in which a lawyer, physician or surgeon or other member of the medical and legal profession may have to pay compensation, if he/ she has not exercised responsible care while diagnosing or providing treatment to the patient coming to them.

Ones a lawyer and doctor accepts to treat a client or patient, this principle become applicable, whether the lawyer and doctor accepts fees or not and whether the lawyer and doctor is a private practitioner or a public servant, general practitioner or a specialist. A person, who offers legal and medical advice, implicitly undertakes that he/ she has the requisite skill and knowledge. Such a person owes to the client and patient certain duties, of which the following are important:

(a) duty of care in deciding whether to take in a cases;
(b) duty of care in diagnosis and in deciding what treatment to give;
(c) duty of care in administering the treatment; and
(d) a duty of care in answering a question put to him/ her by a patient when he/she knows that the patient intends to rely on his / her answer.

Deficiency in service legal and medical profession claim is one aspect of broader consumer challenges to legal and medicine which have brought changes to the context in which legal and medicine is practiced. There is evidence across a number of countries that deficiency in service legal and medical profession claims are increasing, and this is commonly viewed in terms of a crisis. Deficiency in service claims also serve to change the usual rules of the lawyer's client relationship and doctor's patient relationship. No human being is perfect and even the most celebrated specialist could make a mistake in detecting or diagnosing the true nature of a disease. A lawyer and doctor can be held liable for service only if one can prove that she/ he is guilty of a failure that no doctor with ordinary skills would be guilty of if acting with reasonable care.

Objectives of the Study

The objective of this study is to inspire, motivate, cultivate inquisitiveness, shape the opinion and enlighten the society on deficiency in service legal and medical profession in general and the client and patients in particular. The overall content will consist of

milestones at the national and international levels, critical analysis of the situation, and role of various stakes like lawyer and doctor's.

In view of all above facts in mind the following objective of the proposed study are being framed-

1. To specify the legislations that organizes the different professions and evaluates them according to the developments in these fields deficiency in service legal and medical profession.
2. To identify the need of special legislations that organize the legal aspects related to the professions, particularly the issue of professional liability in deficiency in service legal and medical profession.
3. Discussing the issues related to the protection provided by the law to the professionals and the need of imposing a special protection for them that is proportional to the nature and risks of their professions as in the case of media workers, lawyer and Physicians.
4. To highlight the issue of insurance against "Professional Risks and Liability", as well as studying the possibility of implementing compulsory insurance in certain professions.
5. To shed light on the view of legislation in different countries in the field of professional liability for the sake of comparison in deficiency in service legal and medical profession.
6. To define the conceptual importance of deficiency in service in democratic setup.
7. To identify various causes of deficiency in service legal and medical profession.
8. To study the various aspects of deficiency in service in global prospect.
9. To review the constitutional and national provisions in the context of deficiency in service legal and medical profession.
10. To analyze a legal Study of causes, ethics and issues in deficiency in service with reference to legal profession and medical profession in India
11. To analyze observation and Guidelines of the Apex Court.
12. To analyze the available remedies to the victim of deficiency in service and their effectiveness in present day legal, medico-economic metamorphosis.

Hypothesis

1) Concept of deficiency in service is different in legal and medical profession.
2) Legal practice and Medical practice being different than that of consumerism have to be treated differently.
3) The alleged deficiency in service should be of gross nature to attract criminal and civil liability.
4) Many a complaint prefers recourse to criminal process as a tool for pressuring lawyer and doctor for extracting unjust compensation.
5) A private complaint may not be entertained unless the complainant produces prima facie evidence.

6) The service done by lawyer and medical practitioners is the noblest of all. They have to be protected.
7) The loss of reputation suffered by a lawyer and medical practitioners cannot be compensated by any standard.
8) A lawyer and doctor should not be arrested in a routine manner but the victim may also not suffer of his lack of professional knowledge.
9) Statutory rules need to be framed by the Government of India and State governments in consultation with Bar Council Act and Medical Council of India.

Research Methodology

The proposed study shall be carried out in a very objective, systematic and unbiased manner. All the primary as well as secondary documentary sources will be utilized to make the study advanced, orderly and methodical. Various reports, articles, judicial decisions, international, national, constitutional norms and national measures will be taken as important research tools. The Hypothesis will be evaluated on the basis of provisions practices and Apex court judgments. A critical analysis would be made to evaluate the deficiency in service legal and medical profession in the context of client and patients. The research will be pursued by consulting various institutional libraries. The study will certainly enrich the existing knowledge about the legal aspects of right of client and patient and duties of lawyer and doctors.

The aim of this paper is to consider the problems of the accountability of the lawyer and doctors, complexities of the lawyer client relationship and doctor patient relationship, the law applicable to this relationship and profession, redressed arrangement for the remedy and the legal issues relating to legal protection to the client and patient in a very sure and culminating way.

Deficiency in Service under Legal Profession and Liability of Lawyers:

The legal profession is the one of the most maligned one. Professionals such as doctors, lawyers, architects and others are included in the category of persons professing special skill. Any reasonable man practicing a profession requires particular level of learning and impliedly assures the person dealing with him that he possesses such requisite qualifications and that he will profess his skill with reasonable degree of care and caution. It follows that a professional man should command corpus of knowledge of the profession he is practicing. He should not lag behind other intelligent members of his profession in knowledge. He should be alert to the hazard and risk in any professional task he undertakes. He must bring to any professional task he undertakes expertise, skill and care similar to other ordinary members of his profession, but need bring no more. The standard is that of the reasonable average. He need not possess the highest or a very low degree of care and competence. This note deals with perception of professional negligence of lawyers in general and critically analyses whether the liability of legal practitioners would

'fall within the ambit of the services as defined under section 2(1) (0) of the Consumer Protection Act, 1986.

The prime purpose in regulating legal service plans like that in much other regulation is to ensure performance of their commitments; and to that subject we shall give extended consideration. We shall then give more summary attention to control over the quality, quantity, and cost of legal services; to the fairness of contracts; and to fairness in competition. All these variations have a bearing on the need for and the most appropriate forms for the regulation of legal service plans. The prepaid, or risk spreading, element suggests the possibility of insurance-style regulation; the involvement of lawyers evokes consideration of the traditional system of regulating the legal profession. Plans covering employee groups, like other employee benefit plans, are subject to a regulatory regime of their own under federal law. Special regimes also exist for other groups, such as automobile clubs and students. Legal service plans, widely regarded as the key to better availability of legal services for Americans of moderate incomes, have not yet found their proper place in the legal and regulatory framework.

Uncertainty about regulatory requirements threatens to hold up progress. This article presents the results of a three year study of alternative approaches to the regulation of legal service plans. It analyzes the inherent dangers of various types of plans and suggests ways of providing adequate protection for consumers while preserving maximum freedom and flexibility for experimentation with new delivery systems. Specifically, the authors recommend the existing and time-tested system of insurance regulation as the most suitable model for plans having a significant risk-carrying element, subject, however, to appropriate amendments to accommodate the unique features of some kinds of plans, such as bar-sponsored nonprofits organizations, and with special procedures to ensure close cooperation with disciplinary authorities as far as the conduct of lawyers is concerned. A volume containing all the principal and background papers prepared in this study, including a modified version of the present article, will be published by the American Bar Foundation as Legal Service Plans: Approaches to Regulation.[4]

Lawyers and their professional organizations need not themselves become risk carriers to be involved in and to influence the manner of organization and operation of legal service plans. They can act and have in many instances acted as consultants and have contributed their expertise as board members of consumer-sponsored organizations; or they have provided liaison with individual attorneys, drafted participating attorney agreements, and encouraged the members of the bar to participate. The role of financial intermediary and risk carrier is beyond the traditional interest and expertise of lawyers and their professional organizations; it requires special actuarial, management, and marketing skills that usually have to be obtained by hiring experts. Even more important, it requires substantial financial resources in order to get such an operation started and to keep it in sound condition. These difficulties have convinced some bar associations that had originally intended to operate plans themselves to stay in the background and to assign the risk-carrying and

administration functions to specialists, such as insurance companies or professional administrators. We regard this as prudent, although, given proper caution and advice; a professional organization could successfully operate a risk carrying legal service plan. But whatever its merits from an economic and professional point of view, an operation of this kind raise a number of regulatory questions, which we now explore.[5]

The absence of immunity of advocates for negligence may affect the behaviour of lawyers adversely. An advocate's duty to the court epitomizes the fact that the course of litigation depends on the exercise by the counsel of an independent discretion of judgment in the conduct and management of a case.[6] The judiciary has acknowledged the concerns of the legal practitioners and it has been supported by various courts in India as well as in England.

It is also pertinent to note that if the defence advocate is to be exposed to a civil liability in respect of his discharge of his public duty and the role will be unique among all the participants. All the others the public prosecutor, the judge and the witness are in public Interest immune. The same logic applies to the defence advocate whose role derived from the public interest as that of the other participants. If he alone is to be subjected to civil, liability, he will be unable to obtain a contribution from any other participant, although they may be equally blameworthy for what went wrong.[7] The conduct of lawyers is government by the Advocate Act 1961. Under this law, Bar Councils have been set up in the states and at the Central to enrol law graduates as lawyers, to here and decide cases of miscount against lawyers, to lay down standards of professional conduct, and to establish procedures of disciplinary committees. They have other functions, which are more for the welfare of the lawyers than for their clients. Bar councils are also enjoined to set up legal aid committees.

The intention and object of the Consumer Protection Act is to provide a speedy remedy and for better protection of interests of consumer. The Supreme Court in *Kishore Lal v. Chairman, Employes; State Insurance Corp.,*[8] observed that jurisdiction of the consumer fora has to be construed liberally so as to bring many cases under it for their speedy disposal. The Act being a beneficial legislation, it should receive a liberal construction. The Supreme Court in the case of *Lucknow Development Authority v. M.K. Gupta*[9] has analyzed the concept of service under the Consumer Protection Act as under:

The High court of Madras in the case of *Srimathi and others v. The Union of India and others*,[10] has decided that the services provided by the legal practioners fall within the ambit of the Consumer Protection. The high court observed that there is no such provision in the Advocates Act to bar the jurisdiction of other courts and authorities or tribunals in relation to mattes connected with the advocates Act does not have any provision to enable the bar council to deal with the dispute between the client and the advocate if the clients seek a remedy of damages or refund of money paid to the advocates or sums on monetary claim. The bar council is empowered to deal with merely disciplinary matters and consider

whether the advocate is guilty of misconduct which will fall under section 6 (1) of the Advocates Act, 1961.[11] Hence, the contentions that 'the Advocates Act prevails over the Consumer Protection Act and consumer redressal forum has no jurisdiction to deal with claims against the advocates' were held to be untenable. As the first part of the section makes it clear, service of any description will fall service of al lawyer to his client.

In the case of *D.K. Gandhi v. M. Mathias*,[12] the national consumer redressal commission made it clear that all professionals, including lawyers, should come under the ambit of the Consumer Protection Act. The plaintiff had engaged the professional services of a lawyer and filed a consumer complaint against him at the district consumer forum. The district consumer forum directed the lawyer to pay Rs. 3,000 as compensation for mental agony and harassment. State consumer disputes redressal commission overruled the district forum's order by stating that a complaint against a lawyer was not maintainable before the consumer forum as the service rendered by lawyers did not come under the section the reasoning given by the state commission was erroneous. The national commission stated that "the ambit and scope of Section 2(1)(o) of the Consumer Protection Act which defines "service" was very wide and well established. It covered all services except rendering of services free of charge or a contract of personal service. Undisputedly, lawyers were rendering service. They were charging fees. It was not a contract of personal service. Therefore, there was no reason to hold that they were not covered by the provisions of the Consumer Protection Act, 1986".

If doctors can come under the Consumer Protection Act, so should lawyers. In fact, if lawyers blunder and do not make the right arguments by flawed drafting of a case, they should be held accountable. It will certainly improve the judicial system and weed out substandard professionals in the legal profession. It will accelerate the improvement in service delivery in legal counselling. Lawyers are just like service providers in any other profession and if technical consultants can come under the provisions of the Consumer Protection Act, so should lawyers since they provide similar service to clients as technicians. The national commission says that a lawyer may not be responsible for the favourable outcome of a case as the result/outcome does not depend only on lawyers' work. But if there is deficiency in rendering services promised, for which consideration in the form of fee is received by him, then the lawyers can be proceeded against under the Consumer Protection Act.[13]

The Supreme Court in the case of *Indian Medical Association v. V.P. Shantha*,[14] observed that in the matter of Professional liability, professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success of failure depends upon factors beyond the professional man's control. In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. If

there is negligence on the part of medical practitioner, the right of affected person to seek redress would be covered by the Consumer Protection Act. The same principle would apply in case of service to be rendered by lawyer.

Lawyers render service and charge a fee for it, the basic requirement of service under the Consumer Protection Act, 1986. A lawyer may not be responsible for the favourable outcome of a case, but he should be liable if there is a deficiency in rendering the promised services. It is beyond reasonable doubt that the services provided by the legal practitioners falls within the ambit of the services under the Consumers Protection Act, 1986. But certain Difficulties are faced by the courts in determining the liability of the legal practitioners under the Consumer Protection Act, 1986. it is believed that in order to promote a sense of accountability and responsibility and restore the faith of general public in these professionals and legal institutions, they should be covered under the Consumer Protection Act, 1986. There is a need to examine the amplitude of the services and deficiency of services under this Act. The question "whether all the acts or omission of the legal practitioners may constitute the deficiency of service as defined under the Consumer Protection Act 1986," is to be answered. Judicial interpretation of the terms 'services' and 'deficiency of service' with respect to the legal practitioners, keeping into account the intention of the legislature and objectives of the special enactment, is the need of the hour.[15] The conduct of the legal practitioners has been deteriorating. It is strongly believed that there is a need to redefine the liability of these professionals under the Consumer protection Act, 1986, which is capable of providing speedy and economical justice to the aggrieved person.

Deficiency in Service under Medical Profession

The medical profession is a noble profession and the medical professionals have a great role to pay in building individuals and communities and serving the people thought their life giving works.[16] But some profit oriented black sheep among them with motive of self service are destroying its noble character by their callous attitude in the treatment of patients, especially the poor ones and thereby destroying their lives.[17] We have to go to a doctor or other professional at one time or the other. Their help is indispensable in our lives. Laws protect those who seek the help of these professionals[18]. A person, who holds himself out to give medical advice and treatment, implicitly undertakes that he is possessed of the skill and knowledge for the purpose. Such a person, when consulted by a patient, owes him certain measure duties. If a person practitioner's failed to measure duties up to that standard in any respected, he has been negligent and to compensation to the person harmed by him.

The medical profession must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable decree of care. Neither the highest, nor a very low degree of care and competence judged in the light of the particular circumstance of each case, is what the law requires, a person is not liable in negligence because someone else of better skill and knowledge would have prescribed different treatments or operated in a different way,

not is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, although a body of advance opinion also existed among medical men.[19]

Informed consent means that a doctor has warn a patient of the inherent risk of a proposed medical procedure. Most countries now accept this. According to the *American doctrine*, it means that the doctor should give such information as a reasonable patient would like to know. Under the *English doctrine*, fact is measured according to the standard of the ordinary skill man exercising and professing to have that special skill[20]. The doctrine of informed consent is introduced in 1957 in a case, law and is based on patient's rights to self-determination. In conterbury vs. Spence[21] it was held that:

(i) Every person who is adult and sound mind has a right to determine what shall be done to his/ her body
(ii) The consent is informed exercise of choice
(iii) The doctor must disclose all material facts
(iv) The therapeutic privilege enables doctor to withhold information[22].

All kind of medical treatment and surgical procedure involved interference with human body. Thus, it is necessary to protect patient's right of self determination. In *Schloendorff vs. Society of New York Hospital*[23] it was held that, "every human being of adult years and sound mind has right to determine what should be done with his body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages."

The law on consent to medical treatment in Hong Kong is concerned with a real consent. This not the same as what is sometimes called the doctrine of informed consent. For there to be a valid consent, what a doctor needs to do is to inform the patient in broad terms of the nature of a procedure intended. If a patient consents after being so battery[24]. This is to be distinguished from the law of negligence which imposes a duty on a doctor to informed a patients of certain risk associated with a particularly treatment or procedure. In realty, the law on consent to medical treatment and the duty of disclosing risk have to be distinguished from the requirement of understating with is closest to the idea of an informed decision. *Coardozo J in Schloendroff vs. Society of New York Hospital* has provided the class expansion of the concept of self- determination as, "every human being of adult and sound has a right to determine what shall be with his own body; and a surgeon who performed an operation without his patient's consent commits an assault[25].

Doctor should surely do their best to give patients the information they want. But it is time to consider the possibility that doctor will never be able to communicate to patient all the information they need in a way that they can use effectively. It is the rare physician who has the skill and the time to probe deeply enough into the patient's mind to discover the misapprehension of fact and inapt reliance on truths that distort what patients hear and think about the problems they face. It may therefore be time to chart the limits of informed

consent and to consider what other approaches might help patients secure what they want and from medicine[26].

Duty to Treat

Prime objectives of a doctor providing Medicare to every individual should be the primary objective of a doctor as the right to life is a basic fundamental right. A doctor when consulted by a patient owes him certain duties, viz. a duty of care in deciding whether to undertaken the case, a duty of care in deciding what treatment to give or a duty of care in administration of that treatment. Lard Atkin general principal related to the duty to take care of patients "Every person is obliged to some persons in some circumstances to conduct him with reasonable care as not to injure those persons likely to be affected by him want of care.

(A) Duty of the Care to the Patient

It means duty to exercise skill and care, it comes into existence as soon as the Doctor—Patient relationship is established. A doctor, who deals with a patient with the intent of the acting as a healer, has a legal obligation from that very moment exercise a duty of the Skill and care .Any breach of the duty is a ground for negligent action.

(B) Standard of Care and Skill

Standard of care expected of a doctor in India the duties which a doctor owes to his patient have been succinctly laid down by the Supreme Court, as under *L.B Joshi V T.B. God bole*[27],.

.....A person who hold himself out to give medical advice and treatment, implicitly undertake that he is possessed of the skill and knowledge for the Purpose. Such a person, when consulted by a patient, owes him (to the patient) certain duties, viz. a duty of care in deciding whether to undertake the care, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the Patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care .The supreme court adds that neither the highest degree of care enough. What is required is a reasonable degree of care and competence, judged in the light of the circumstances of the case[28].

The observation of the Supreme Court of India[29] on the duties of a medical practitioner when consulted by a patient. The Supreme Court said the medical practitioner owns the following duties:-

(i) A duty of care in deciding whether to consider the case;
(ii) A duty of care in deciding what treatment to give and;
(iii) A duty of care in the administration of the treatment.

(C) Breach of Duty

In cases not involving any special skills, breach of duty of care means "omitting to do some things, which a reasonable man would do, or doing something, which he would not do[30]" without claiming particular knowledge or competence, he is the normally prudent average man.

In *Phillips vs. Britannia Hygienic Laundry Co Ltd*.[31] the Court opined that consideration of some of the medical cases involving negligence will best illustrate the development of the law and the application of its principal to medical practice. The cases reflect the state of medical knowledge at the time rather than differing standard of care or of component and skill. Neither can it be assumed that the physician and surgery of today with his complex and highly sophisticated instrumental and mechanical aids, is more skilled or competent than he forbears, who performed to rely mere upon personal observations and clinical judgment.

Law imposes duty on everyone to confirm to certain standards of conduct for protection of others .The duty of medical practitioners arises from the fact that he does something to a human being who is likely to cause physical damage unless it is done with proper care and skill as held in *Philips India Ltd. V. Kanju Punnu.*[32]

Conclusion

We have to go to a lawyer, doctor or other professional at ones time or the other. Their help is indispensable in our lives. We are consumers of their services. Law protects those who seek the help of these professionals. There are Acts of parliament covering the qualifications and conduct of doctors, dentists, nurses, pharmacists and lawyers. There are several other professions not covered fully by such laws, like that of engineers and architects. They have only association of professionals.[33]

The legal profession is one of the most maligned one. Literature abounds in disparaging remarks again them, like this quote from Shakespeare: "The first thing we do, let's kill all lawyers." There are several remedies against erring lawyers, thought most people avoid confrontations with them as in the case of doctors. Lawyers can be sued like doctors for breach of contract and negligence. Claims for compensation can be filed before the consumer forum for damages suffered due to lawyer's negligence. A lawyer has duty to take care and be skilful while handling your case, through there is no remedy against bad advocacy. If you do not like your lawyer, you are free to try another. But it is not advisable to change him just because you do not like his advice or he warns you that you may lose. A lawyer who is sought to be replaced may also strike back by not returning the case filed until a hefty bill is paid. He can claim a lien over it.[34]

C.P. Act, 1986 is the largest development in India to protect the interest of consumers. Any person can claim compensation under the provision of Act including negligent doctors. To get relief under C.P. Act, 1986, the complainant should be a consumer as defined under S-2(1)(d) of the Act and the "service" for the deficiency of which the complaint has been

made should comes within the circle of "service as defined under S-2(1)(o) of the Act. As soon as the person, who is trying to file a suit for compensation in the Consumer Forum under the C.P. Act,1986, proves that he is in the status of consumer, and the act against which the complain is there "service" under C.P. Act,1986, he becomes entitled to do so. The question is, whether the service of medical practitioners comes within the limit of "service".

Since there is no express provision in CP. Act to include the medical practitioner's service within the purview of the Act, therefore the role of judiciary has become very important with this regard, before the enactment of the Act the liability of the doctor was decided on the basis of 'tort' by taking some principle like *res ipsa loquitor* and the principles laid down by the British court like *Bolom* test etc, but after the enactment the question has been raised, whether patients are being saved by applying the C.P. Act in case of medical practitioner.

In this scenario, judiciary has played very significant role to protect patient from legal and medical negligence. In the landmark decision of the supreme court delivered in *Indian Medical Association* v. *V.P. Shanta,* A clear and effective law has been laid down by the Supreme Court and has given a clear cut ruling with regent to the inclusion of service under C.P. Act, Supreme court make it clear that service render to a patient by medical practitioners by the way of consultation diagnosis and treatment both medicinal and surgical would fall within the ambit of the 'service', as defined in Sec. 2(1)(o) of the act except those service which are render by the doctor free of charge.

It was also made clear in this case that a person who has taken health policy thought not paying charges but are consumer and are entitled to get relief under C.P. Act, 1986 because in such condition the payment was given by insurance company. I tried my best to put the view of various courts in the test of medical profession and consumer protection while I am thinking as a common citizen. I find that poor people who cannot afford costly medical aid cannot get the compensation of negligence of Government doctors I do not at all agree with the view of National Commission as well as Madras High Courts view that medical profession does not come under consumer redressal whether private of Governmental. But I am much agree with present view of Supreme Court in *Dr. Suresh Gupta's* case and very recent in *Martin D'Souza* case including *Jacob Mathew's* case in which courts brought the service rendered by medical practitioner under the preview of C.P. Act, 1986 and also has given direction to save them from false litigation.

Suggestions

For better expeditions and effective redressal of the victim of legal and medical negligence, the following suggestions are made:

1. The Constitution of the consumer fora should be modified and the representatives of the legal and medical profession with integrity and proven track record should be incorporated to the forum, so that as and when a case of legal and medical negligence

comes up before the forum, it can be decided in a professional manner by following the strict professional standards.

2. In order to assure the lawyer and doctors and to prevent cantankerous litigation, Sec.26 of the Act should be amended so that a false complainant may be fined heavily and penalized.
3. Consumer Redressal Agencies should carry out preliminary inquiries and screening of all the cases filed against the lawyer and doctors to detect the existence of a prima-facie case. This should be made mandatory at the time of admission of the case itself.
4. Consumption and intoxication of liquor by lawyer and doctors should be forbidden during working and duty hours.
5. Private practice by the government lawyer and doctors should be banned strictly.
6. Lawyers and doctors should be encouraged to follow ethics and model code of conduct.
7. The doctrine of 'Informed consent' should be adopted. The client and patient's right to self determination which forms the basis and enables him to form a rational and informed choice should be respected and enforced.
8. No attempt should be made in diagnosis and treatment to amend cases of gross negligence of glaring deviations from the accepted norms of code of ethics for legal and medical professionals.
9. Private/corporate hospital, also should be made responsible at par with government hospitals in paying compensation when right to life is infringed which is protected under Art. 21 of Indian constitution.
10. A doctor and lawyer should be cautions in passing remarks against another doctor and lawyer who had treated the patient and client. The complaint of the patient and client about the other doctor or lawyer should be verified from the other and the record of the patient should be carefully examined. The doctor and lawyers should always keep the client and patient's ailments confidential.
11. An institution of "Legal Ombudsman" and "Medical Ombudsman" should be created to deal with complaints of deficiency of service, negligence against the lawyer and doctor as and when they tend to be indifferent or negligence in performing their function.
12. A lawyer when entrusted with a brief is expected to follow the norms of professional ethics and try to protect the interest of client in relation to whom he occupies a position of trust.
13. There should be a greater coordination between the various professional association and bodies like the Bar Council of India, Indian Medical Council and several associations like Bar Association, Indian Medical Association in ensuring the compliance with the code of ethics and minimizing the cases of deficiency in legal and medical profession.

References:

[1] M.J. Antony, *Consumers Rights*, 4th Edition, August 1996, Hind Pocket Book (p) Ltd. Delhi
[2] Ibid
[3] Pradeep Kumar, & Dr. Priti Saxena, "Liability of Medical Practitioners: National and International Perspective", *Jigyasa Research Journal*, Poddar Foundation, BHU, Varanasi, ISSN 09774 - 7648, Volume III, No. 2, June 2010, pp. 24 - 46.
[4] Werner Pfennigstorf and Spencer L. Kimball, Regulation of Legal Service Plans, American Bar Foundation Research Journal, Vol. 2, No. 2 (1977), pp. 357-454
[5] Ibid
[6] Supra note 8.
[7] Id. At 744.
[8] (2007) 4 SCC 579.
[9] (1994) 1SCC 243 at 254-255.
[10] AIR 1996 Mad 427: 1996 (2) CTC 402: (1996) II MLJ 482, para 7.
[11] S. 6 of the Advocates Act sets out the functions of the state bar council.
[12] Order dated August 06, 2007 in RP No. 1392/2006 of the National Consumer Disputes Redressal Commission, New Delhi.
[13] *Supra note* 24.
[14] (1995) 6SCC 651.
[15] Mann, Jeet Singh, "*Liability of the Legal Practitioners for Professional Negligence: A Critical Analysis"*, JILI, Vol. 51 No.3 July-Sep, 2009, pp. 385-394
[16] Pradeep Kumar, "*Medical Autonomy, Consumerism and Law: A Study with Special Reference to Medical Negligence*" Under Publication.
[17] P.D. Mathew S.J., "Rights of Patients" Legal Education Series No. 63, p.5, Indian Social Institute, New Delhi.
[18] M. J. Antony 4th edition, August 1996, Hind Pocket Book (P) Ltd.
[19] Halsbury's Law of England, Vol. 26, p. 17
[20] Balam vs. Friern Hospitial Management Committee, (1957) 2 All E.R. 118: (1957)1 W.L.R. 582, 586
[21] (1972) 464 F (2d) 772
[22] P.D. Mathew and P.M. Bakshi, "Medical Negligence" Legal Education Series No.21, Indian Social Institute, New Delhi.
[23] (1941) 103 NE 92
[24] Chatterton vs. Gerson (1981) 1 QB 432, per Bristo J at 443.
[25] Athena Liu, "Human Organ Transplantation Ordinance: Facilitation Adult Live Donor Transplantation? Michael Freeman and Andrew Lewis, "Law and Medicine", Oxford University Press, 2004
[26] Caarl E. Schneider and Michael H. Farrell, "Information, Decisions, and the Limits of Inform Consent" Michael Freeman and Andrew Lewis, "Law and Medicine", Oxford University Press, 2004
[27] A.I.R. 1969 SC 131
[28] A.I.R. 1975 bom.306
[29] AIR 1969, SC, Page 128, 131-132
[30] C. V. W. Cox, "Medical Jurisprudence and Toxicology" (1998)
[31] (1932) 2 KB 832.
[32] AIR 1975 Bom. 306: 1975 ACJ 311: 77 Bom. LR 337:1975 Mah. LJ 792.
[33] M.J. Antony, *Consumers Rights*, 4th Edition, August 1996, Hind Pocket Book (p) Ltd. Delhi
[34] Ibid

Constitutional Delineation of Right to Education: A Critical Appraisal

Ravindra Kumar*
Dr. Preeti Misra**

Abstract

Education is the manifestation of perfection already in man. Education is enlightenment. It is the one that lends dignity to a man. Education is keystone for self-sustaining and livelihood and the education is life insurance for all children. Education seeks to build up the personality of the pupil by assigning his physical, intellectual, moral and emotional development. Right to education for all is one of the biggest challenges of our times. It is crucial that the right to education in its various dimensions is incorporated in the commutations and legislation. Right to education is a most important part of the developments and the right to education is a basic human right. The following issues may be discussed, which are involved in the right to education, whether every individual has access to education as a fundamental right? What is the essence of article 21-A in recognizing right to education as a fundamental right? Whether the Right of Children to Free and Compulsory Education Act, 2009 ensures free and compulsory education in a true spirit? This paper analyses different aspects of right to education, judicial analysis. The methodology of this paper is purely doctrinal.

Key words: Compulsory Education, Constitution, Human Rights, Fundamental Rights.

Introduction

Education has several aspects within and beyond the constitution as well as its contents and development in pre–independent period. The concept of education primarily intended the learning and imparting of knowledge. This issue may involve a variety of question relating to the opportunities available liberty of the people to learn, their assess ability in their area and the Right to Education. It further involves several modes and methods of education centers, including the issues as to eligibility and availability of education to several classes of beneficiaries. When we talk about right to education it becomes significant that what does it mean and how far it is desirable looking to the needs and resources of the country.

Education is a basic human right and is the foundation of a free and fulfilled life. Education plays an important role in building a good society, it also promotes for good governance and transparency in a State. The growth and development of a State is primarily depending

* Research Scholar, Department Of Human Rights, School For Legal Studies, Babasaheb Bhimrao Ambedkar University Lucknow.

** Associate Professor, Department Of Human Rights, School For Legal Studies, Babasaheb Bhimrao Ambedkar University Lucknow.

upon the quality of education given to the people. The State has the obligation to ensure elementary education to all irrespective of one's religion, race, caste and place of birth. The constitution of India has also directed the state to provide elementary education to all up to the age of 14 years. The Supreme Court of India has also recognized the right to education as a fundamental right under in Article 21-A of the Indian Constitution. In this context right to education may be discussed in three phases – First aspect is position before 86th Amendment Act, 2002 which is the position of the original constitution and gives the idea of what constitution makers intended to do, and Second aspect is the role of the judiciary in realization of the fundamental right to education, and third aspect, what is done by policy makers to realize this constitutional mandate i.e., the position after the passage of the 86th Amendment Act, 2002.

Position Before 86th Amendment Act

The Constitution of India has recognized the significant of education for social transformation. It is document committed to social justice. The Constitution devoted several Articles to the Right to Education, but it was not in the form of fundamental right. Constitution makers place (right to) education in Part IV of constitution in the form of Directive Principles of State Policy. Article 41 provides, 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. The original Article 45 was made the provision for free and compulsory education for children. This Article said that the State shall endeavor to provide within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of 14 years. After Constitution 86th Amendment Act, 2002 the amended Article 45 provides that the State shall endeavor to provide early childhood care and education for all children they complete the age of 6 years. According to Article 46 the State shall promote with special care the educational and economic interest of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Though Part IV of the Constitution directs the State to act within a timeframe but does not give any enforceable right to citizen. Collectively, these Articles command the State to provide an educational atmosphere within the limits of its economic capacity and development within ten years from the commencement of the Constitution. Also the right to free and compulsory education to all children until they complete the age of 14 years and promotion of educational interest of scheduled castes and scheduled tribes and other weaker sections were assured as directive principles of state policy. Article 15(1) provides that, the state shall not discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them, and sub-clause (3) of this article provides that, nothing in this Article shall prevent the State from making any special provision for women and child. Therefore, it may be concluded that our constitution makers intended that every child should have an opportunities for education until the child completes a

particular age thereafter his education would be circumscribed by the limits of the economic capacity of the States.

Role of Judiciary

Upon executive's failure to implement of Constitutional mandate of Article 45, the judiciary stepped into the shoes. Judiciary did so indirectly, by arguing that civil and political rights, which are fully protected by the Constitution, are worthless without the resources necessary to exercise them. Right to education was held for the first time a fundamental right by Delhi High Court in Anand Vardhan. Chandel vs. University of Delhi, AIR 1978 Delhi 306 at 314, In this case the Court has observed that the law has now settled that the expression 'life and personal liberty' in Article 21 of the Constitution includes a variety of rights, though they are not enumerated in Part III of the Constitution, provided that they are necessary for the full development of the personality of the individual. The right to education is, therefore, also included in Article 21 of the constitution.

The next judicial pronouncement in this direction was that of Karnataka High Court in the case of Bapuji Education Association vs. State, AIR 1986 Karnataka, 129. The Court has prolonged the delineations of personal liberty guaranteed by Article 21 of the Constitution to the extent that it includes in its ambit the right of the minorities to education.

The right to education for the first time got attention of the Supreme Court in Mohini Jain vs. State of Karnataka, AIR 1992 SC 1858. While deciding issue of capitation fee in educational institutions in Karnataka, the Court held that the right to life under Article 21 and dignity of an individual couldn't be assured unless accompanied by the right to education.

In the next year in Unnikrishanan J. P. vs. State of Andhra Pradesh, AIR 1992 1993 SC 2178 the Supreme Court held that the citizens of this country have a fundamental right to education but this right is limited up to 14 years of age. The Court explained that the right is however not an absolute right. Its content and parameters have to be determined in the light of Article 45 and 41. In other words, every child of this country has a right to free education until he completes the age of 14 years. Thereafter his right to education is subject to the limits of economic capacity and development of the State. The significant aspect of the Unnikrishanan J. P. case has been that the Court pronounced the doctrine of implied fundamental rights. The Court asserted that in order to treat a right as fundamental it is not necessary that it should be expressly started in the Constitution as a fundamental right.

Position After 86th Amendment Act

Now we can see after Mohini Jain & Unnikrishanan J. P. cases, the process of realizing right to education got augmented. In this regard, mention may be made of the two important committees on education. The first was Kothari Commission 1966 and second was Saikia Committee 1997. Both Committees recommended that schooling should be

made compulsory for all children. In furtherance of the recommendations of both Committees, a constitutional amendment bill was introduced in the parliament in 1997 and bill acquired the Statues of an 86th amendment Act, 2002 subsequent to considerable internal and external pressure. The 86th Amendment Act, 2002 makes education as a fundamental right for those between the ages of 6-14 years. The Act provided for the following three insertions/ changes in the Constitution:

1. The insertion of Article 21-A, which provides that the State shall provide free and compulsory education to all children of the age of 6 -14 years in such a manner as the State may by law determine.
2. An amendment to Article 45, that is provision for early childhood care and education to children below the age of 6 years, the State shall endeavor to provide early childhood care and education for all children until they complete the age of 6 years.
3. In Article 51-A, after clause (j), the following clause (k) has been inserted: "a parent or guardian shall provide opportunities for education to his children or ward between the age of 6 -14 years."
   Therefore finally Article 45 of the Constitution has been given a new life. However

Article 21-A is without the spirit of article 45 of the Constitution because the earlier it Article 45 envisaged the right to education "for the children until they complete the age of 14 years" whereas Article 21-A has provided the right to education only "to all children the age of 6-14 years." The Act failed to recognize that the period from 3-6 years of children is very crucial from the point of view of mental and physical growth of the child. It is the important age of mental as well as physical growth of the child.The provision of Article 21-A is directory in nature. It is difficult to understand that up to 6 year of age right to education has not been given the status of fundamental right rather it is in the shape of directive principles of state policy and word acquire the status of a fundamental right only after the child attains the age of 6 year; whereas the fact is that the fundamental rights, if they are really fundamental, are acquired by birth, and not subsequently.

As noted above, Article 21-A, as has been inserted by the Constitution (86th amendment Act 2002), guarantees fundamental rights of free and compulsory education to all children in the age group of 6-14 years, in such a manner as the state may, by law, determine. To enforce article 21-A parliament has enacted, The Right of Children to Free and Compulsory Education (RTE) Act, 2009. The 86th Amendment Act, 2002 making elementary education a fundamental right and its consequential legislation. The RTE Act, 2009 came into force 1 April, 2010. Now we have reached a historic milestone in our country's struggle for children's right to education.The RTE Act, 2009 of under Section 3 provides that, the every child of the age of six to fourteen years shall have a right to free and compulsory education in a neighbourhood school till complition of elementary education. This Act has also provides for 25% reservation for studants of disadvantaged groups and of economic weaker section of society in admission to class 1 in all private

schools excluding the unpaid minorities` schools` . It ensure reimbursement by the government to these unaided schools, based on per child expenditure incurrwd towards admitting these students (Sec.12).

Implementation of Article 21A

In order to implementation of new the new fundamental right article 21-A, the central government passed the RTE Act - 2009, which has been amended in 2012. Though the meaning of constitutional amendment is clear, section 3 and 12 of the Act compels private educational institutional along with aided and government school to provide free education and to reserve 25% of the total seats for the same. However, the school will be reimbursed the expenditure incurred for providing such 25% reservation. Thus there is mandate on the unaided schools to admit the students without collecting fee; the same would be reimbursed by the government which amount to cross subsidization. Even though the fee part has been taken care of by the RTE Act, the unaided institutions are not ready to comply with the legislation. As the result, constitutional validity of the Act has been challenged in the Society For Un-Aided Private School Of Rajasthan vs. Union Of India & Anr., (2012) INSC.248 (12 April, 2012). However, the Supreme Court held that the Act is constitutional validity.

Conclusion & Suggestions

It is submitted that though the judiciary has made right to education as a fundamental right yet it is for the State to secure it far all the people. Right to education is a fundamental right under in Article 21-A of the constitution. It is beyond any doubt that education is a transcendental important and it has fundamental significance to the life of an individual and the nation. Without education, the human right cannot be secured to the people and the basic objective set forth in the preamble to the constitution would fail. Therefore, the crying need of the day is that elementary education should be compulsory and available free to all.

I don't say that nothing is done towards realization of right to education in India but something more is necessary. The 86th Amendment Act failed to recognize that the period from of 3-6 years is very crucial from the point of view of mental and physical growth of the child. It is the important age of mental as well as physical growth of the child. So there are my some suggestions as follows:

1. Right to education should be right (good) education.
2. RTE Act 2009 should be amend and include the age group of 3 - 6 years.
3. There is urgent need to amendment the RTE, Act for inclusion of four more years that is from 9th -12th class in free and compulsory education.
4. The age group of 6 – 14 years should be increase and decrease from 3 – 18 years for free and compulsory education.
5. The Right to free and compulsory education for the age group of 6 – 14 years should be equal the age of right to vote (18th year) , adult, right to work, right to marriage, etc.

6. Special training should be given to a child who require for completion of elementary education.
7. The school management committee should also be established in unaided private schools to safeguard the children who are from weaker sections and disadvantaged groups.
8. Those parents, who fail to admit their child to a school for obtaining elementary education, should be debarred from availing total government facilities like as ration card, water facility, electricity facility, LPG gas facility, job card facility, etc.
9. The elementary education pattern of all aided and unaided schools should be nationalize under RTE Act.
10. The right of transfer to other school, a child should be allowed to seek transfer to any unaided private school also from any other school for completion of his elementary education.
11. The State should also clearly impose the fees for a child in unaided schools for obtaining elementary education. Otherwise the private unaided school management would fix the fee arbitrarily and exorbitantly.
12. The proposal is expected to have a positive impact on eradication of child labour.

References:

1. Dr.Mishra, Pawan Kr (2010): "Constitutional Contours Of Right To Education: An Implicit Fundamental Right", Indian Bar Review, Vol. XXXVII (1&2) 2010, January – June 2010: 53-73.
2. Doddawadmath, v. Jayashree (2010): "Right to Education and Human Rights", The Karnataka Law Journal, 2010(2): 56-64.
3. Chaturvedi, Swarupam (2005): "Fundamental Right To Education: Myth Or Reality", Journal Of Constitutional And Parliyamentary Studies, Volume 39; Number 1-4, January-December 2005: 163-182.
4. Prof. Basavaraju, C. & Mahesha, B.P. (2010): "Right To Education As A Constitutional Perspective", Indian Bar Review, Vol. XXXVII (3&4) 2010 July – December 2010: 19-24.
5. Dr. Babu Dinesh (2010): "Right To Education As A Fundamental Rights Legislative And Judicial Perspectives In The Present Scenario", M.D.U. Law Journal. Vol.-XV, Part-II, 2010: 201-214.
6. Jain, M.P. (2003): "Indian Constitutional Law", Wadhwa Publications, Vol.1, Nagpur.
7. Dr. Raghuram, R.K. (2009): "Recommendations of Kothari Commission", Crescent Publishing Corporation, New Delhi.
8. Saikia Committee Report (1997): Ministry Of Human Resource Development, Department Of Education 1999, New Delhi.
9. The Constitution of India, 1950
10. The Right Of Children To Free And Compulsory Education Act, 2009
11. Anand Vardhan. Chandel v. University of Delhi, AIR 1978 Delhi 306
12. Bapuji Education Association v. State, AIR. 1986 Karnataka, 129
13. Mohini Jain v. State of Karnataka, AIR 1992 SC 1858
14. Unnikrishanan J. P. v. State of Andhra Pradesh, AIR 1992 1993 SC 2178

15. Society For Un-Aided Private School Of Rajasthan V. Union Of India & Anr., (2012) INSC.248 (12 April, 2012)
16. http://www.legalcrystal.com
17. http://www.advocatekhoj.com/library/judgments
18. http://www.education.nic.in
19. http://www.sikshana.org
20. http://mhrd.gov.in
21. http://www.nhrc.nic.in
22. http://www.un.org
23. http://www.right-to-education.org
24. http://www.schoolnetindia.com
25. http://www.rightsofthechild
26. http://www.childlineindia.org.in
27. http://www.thehindu.com

The Prohibition of Unlawful Assembly (Interference with the Freedom of Matrimonial Alliances) Bill-2011

Vivek Kumar*

Now a day there is a growth of unlawful interferences by caste Panchayats that the Law Commission of India has propose a draft Bill. Supreme Court of India in its decisions has also highlighted the need to take actions to curtail such unlawful activities and bring in a culture of accountability. The effort of the Law Commission in this direction is creditable. The proposed draft by the Commission is a significant effort to retain continued attention on an evil which otherwise will vanished from public memory till the next incident happens.

The draft Bill aims to criminalise acts of groups against the freedom vested in every individual. Additionally, it seeks to affirm the right to family of an individual, which can be read within the penumbra of rights within right to life under Art.21 of the Indian Constitution. The Bill is perceived to be a social legislation. It is therefore imperative to understand its repercussions on the target demographic, that is, family units. The ethics of the family should not be breached at the same time individual's right shall not also be sacrificed. Creation of substantive offences and criminalisation as its necessary corollary will result in several oddities including less reporting of offences as individuals will be unwilling to report against their family members or persons in the neighbourhood, more so, when adversaries possess political clout.

Although such intimidation or acts of violence constitute offences under the Indian Penal Code, yet, it is necessary to prevent assemblies which take place to condemn such alliances. This Bill is therefore, proposed to nip the evil in the bud and to prevent spreading of hatred or incitement to violence through such gatherings. The Bill is designed to constitute special offences against such assemblies, in addition to other offences under the Indian Penal Code.

Proposed Changes to the Provisions of the Act[1]
Short title, extent and commencement[2]
(1) This Act may be called the Prohibition of Unlawful Assembly (Interference with the Freedom of Matrimonial Alliances) Act, 2011.

**** Research Scholar, Department of Human Rights, School for Legal Studies, Babasaheb Bhimrao Ambedkar (A Central) University, Lucknow.***

(2) It extends to the whole of India except the State of Jammu and Kashmir.
(3) It shall come into force in a State on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different States.

Unlawful Assembly[3]

(1) No person or any group of persons shall gather, assemble or congregate at any time with the view or intention to deliberate on, or condemn any marriage, not prohibited by law, on the basis that such marriage has dishonoured the caste or community tradition or brought disrepute to all or any of the persons forming part of the assembly or the family or the people of the locality concerned.

Explanation: 'Marriage' shall include a proposed or intended marriage.
(2) Such gathering or assembly or congregation shall be treated as an unlawful assembly and every person convening or organizing such assembly and every member thereof participating therein shall be punishable with imprisonment for a term of not less than six months but which may be extend to one year and shall also be liable to fine up to ten thousand rupees.

Suggestion: - Section 2(1) use the words marriages 'not prohibited by law'. These words create grey area because law does not prohibit marriages even by minors, though it is punishable under the law. Therefore, this loophole must be remedied and the Act must apply to marriages and the like between consenting adults. Delete the expression 'not prohibited by law'. The ambit of the word 'marriage' should also be enlarged to include live in relationships and the like. The prohibited action in section 2 is "gather assemble or congregate at any time with a view or intention …". This seems to suggest only gathering/assembly/congregation in the physical space. The section should also take into consideration the technological advancement and include virtual participation through social networks and the like. It should cover both direct and indirect participation. The action intended in section 2 may not always be collective action. As mentioned in the general observation above, if intimidation, threat or coercion can occur from within family/or one of the member of the family. Such act need not always be to break marriages but could also be to coerce someone into marriage. Therefore, under the prohibited action in section 2, such acts should also figure in.

Endangerment of Liberty[4]

Any member of an unlawful assembly who alone or in association with other such members counsels, exhorts or brings pressure upon any person or persons so as to prevent, or disapprove of the marriage which is objected to by the said members of the unlawful assembly, or creates an environment of hostility towards such couple or either of them or their relatives or supporters, shall be deemed to have acted in endangerment of their liberty and such an act of endangerment shall be punishable with imprisonment for a term of not

less than one year but which may extend to two years and shall also be liable to fine up to twenty thousand rupees.
Suggestion: - Section 3- suffers from ambiguity where it uses the phrases 'creates an environment of hostility' and 'brings pressure'. These phrases need to be guided, as they are very general.

Criminal Intimidation[5]
(1) Any member of an unlawful assembly who, with a view to secure compliance with the illegal decision of that assembly in relation to the marriage that is being objected to, indulges in criminal intimidation of the couple or either of them or their relatives or supporters shall be punishable with imprisonment for a term of not less than one year but which may extend to three years and shall also be liable to fine up to thirty thousand rupees provided that if the threat be to cause harm or injury of the description referred to in second part of Section 506 IPC, the maximum punishment shall extend to seven years of imprisonment instead of three years and fine extending to thirty thousand rupees. Explanation: The expression 'criminal intimidation' shall have the same meaning as is given in section 503 of the Indian Penal Code.

Suggestion: - Section 4(1)- not only must the Act prohibit criminal intimidation but also extortion. This is in light of various cases which have occurred where the family of the couple has been made to pay huge fines to the Khap Panchayat. There seems to be no section 4 (2), therefore the numbering of the section as 4 (1) is unnecessary.

Provisions of IPC remain unaffected[6]
The provisions in Sections 2, 3 and 4 shall be in addition to and not in derogation of the provisions in the Indian Penal Code.

Presumption[7]**.**
In a prosecution under section 3 or section 4, if it is found that any accused person participated or continued to participate in an unlawful assembly, the Court shall presume that he intended and decided to take all necessary steps to put into effect the decision of unlawful assembly including the commission of acts referred to in Sections 3 and 4.

Suggestion:- Section 6- uses the word 'participation'. Participation should be defined to mean not only physical presence but also political, financial and other influences. Also, it should include virtual participation in light of the increase in use of technology and the internet in form of Facebook, Twitter and the like. (Please also see the last suggestion for section 2)

Amendment of Act 43 of 1951[8]**.**
In the Representation of the People Act,1951, 8, in sub-section (2), after clause (c), the following shall be inserted, namely

"(d) any provision of the Prohibition of Unlawful Assembly (Interference with the Freedom of Matrimonial Alliances) Act, 2011."
Suggestion: - Section 7 - the intent of section 7 though commendable cannot be achieved if framed in the present manner. The amendment shall be made in the concerned enactment.

Power to prohibit certain acts[9].
(1) Where the Collector or District Magistrate receives information that there is a likelihood of convening of an unlawful assembly, he shall, by order, prohibit the convening of any such assembly and doing of any act towards the commission of any offence under this Act by any person in any area specified in the order.
(2) The Collector or District Magistrate may take such steps as may be necessary to give effect to such order, including giving of appropriate directives to the police authorities.
(3) The Collector or District Magistrate shall also take such steps as may be necessary to ensure the safety of the persons targeted pursuant to the illegal decision taken by the unlawful assembly.

Suggestion:- Section 8- does not include punishments for omission on part of the authority, which receives information about the said offenses but fails to take appropriate action. The Protection of Women from Domestic Violence Act, 2005 has a provision of accountability. Also, the Supreme Court in Bhagwan Das v State of Delhi (decided on 9 May, 2011) has suggested ensuring accountability on the part of responsible office/officers. Addition of accountability element in the section may be considered. Further in this section in addition to Collector or District Magistrate, the Judicial Magistrates should also be given powers under the Act. The ambit should be enlarged to include prohibitory and protective orders. Punitive measures should be resorted to when there has been a breach of such orders. Therefore section 8 need to undergo a major overhaul, in the line of general comment made above.

Trial of offences under this Act[10].
(1) Notwithstanding anything contained in the Code of Criminal Procedure, all offences under this Act shall be triable by a Special Court constituted under a notification issued in the official gazette and the special court shall be presided over by an officer of the rank of Sessions Judge or Addl. Sessions Judge.
(2) The State Government shall in consultation with the High Court constitute one or more Special Courts for the trial of offences under this Act and every Special Court shall exercise jurisdiction in respect of the whole or such part of the State as may be specified in the notification.

Suggestion: - Section 9 (1) - Though the provision for Special Courts is attractive, the strength of the cadre of judges to manage these Courts should be kept in mind before creation of such Courts. The Special Courts shall not be drawn from the existing cadre which itself is short of optimal human resources. Till the Special Courts are established the Sessions Courts may try the offences. The phrase 'unlawful assembly' present throughout

the Bill, creates vagueness as it is already defined in Section 141 of the IPC with its own requirements. Therefore, this phrase needs to be swapped with a neutral expression. Even the word 'association' may not be appropriate as an association has a feature of permanence, organization and administrative nucleus, which is missing in a Khap Panchayat or a motley crowd. Therefore, the most viable option is to amend Section 141 IPC to incorporate the assembly indicated in this Bill.

Procedure and power of Special Court[11]

(1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

(2) Subject to the other provisions of this Act, a Special Court shall, for the purpose of the trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, so far as may be, in accordance with the procedure prescribed in the Code of Criminal Procedure for trial before a Court of Session.

Power of Special Court with respect to other offences

(1) When trying any offence under this Act, a Special Court may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence.

(2) If, in the course of any trial of any offence under this Act, it is found that the accused person has committed any other offence under this Act or any other law, the Special Court may convict such person also of such other offence and pass any sentence authorized by this Act or such other law for the punishment thereof.

Offences to be cognizable, non-bailable and non- compoundable[12]

Notwithstanding anything contained in the Code of Criminal Procedure, all offences under this Act shall be cognizable, non- bailable and non-compoundable.

Conclusion

The Bill is a reaction to a despicable phenomenon and the legislative response is to criminalise the action. The experience of Dowry Prohibition Act, 1961 and the abysmal level of its performance should teach us a lesson or two in the making of this enactment. The law should be capable of achieving the objectives it intends to. It should be verified to see whether it is capable of realising the proposed objectives[13].

Regarding the proposed law it submitted that the Bill needs to focus more on prohibiting acts rather than punishing them. As this is a piece of social legislation, it will be very difficult to implement it if its emphasis is on criminalisation. Social legislations which have been proved to be effective focused on prohibition rather than criminalising. The colonial experience in Bengal by which Satis and Female infanticide could be considerably reduced offer models for emulation. It was through a concerted action of the administration supported by law that success could be achieved [14]. The method was intense, whenever

there was a death of a male member, appropriate authorities cause to send officials both police and administrative to make sure that sati is not performed by overseeing the funeral. These were measures taken at the grass root level and were so effective that the number of incidents of sati reduced drastically. Female infanticides were controlled by periodical visits by the local authorities to assess the well being of the girl child born when information is passed on by designated authorities.

The phrase 'unlawful assembly' present throughout the Bill, creates vagueness as it is already defined in Section 141 of the IPC with its own requirements. Therefore, this phrase needs to be swapped with a neutral expression. Even the word 'association' may not be appropriate as an association has a feature of permanence, organization and administrative nucleus, which is missing in a Khap Panchayat or a motley crowd. Therefore, the most viable option is to amend Section 141 IPC to incorporate the assembly indicated in this Bill[15].

The provisions of this proposed Bill are without prejudice to the provisions of Indian Penal Code. Care has been taken, as far as possible; to see that there is no overlapping with the provisions of the general penal law. In other words, the criminal acts other than those specifically falling under the proposed Bill are punishable under the general penal law[16].
This model can offer some guidelines. District authorities on receipt of information or suo motu may initiate actions to prevent prohibited activities declared by law. On intervention by court, prohibitory orders and wherever necessary protection orders should be issued. However, there should be strict secrecy over names and identity of the persons giving such information. There is need to establish fast track court through this legislation for providing speedy justice. Special cells should be created for spreading awareness about the procedure. Also, these cells would act as more approachable bodies for the victims to discuss the problems and avail assistance to lodge complaints. Cooption of non-governmental sector could be adopted. In light of the ostracism faced by such couples and their families, there could be economic schemes devised to help the victims to rebuild their lives. This will incorporate curative aspect in the Bill. Institutional support systems in the line of the Protection of Women from Domestic Violence Act, 2005 and the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 could be incorporated. The Bill does not provide for witness protection, which is very important due to societal pressure that exists with regard to these offenses. Protection to whistleblowers also should be considered. The Bill must not only prohibit breaking of marriages but also address forced alliances.

References:

[1] http://lawcommissionofindia.nic.in/reports/report242.pdf accessed on dated, 6/2/2015
[2] http://lawcommissionofindia.nic.in/reports/report242.pdf accessed on dated, 6/2/2015
[3] ibid
[4] http://lawcommissionofindia.nic.in/reports/report242.pdf accessed on dated,6/2/2015.

[5] Ibid.
[6] http://lawcommissionofindia.nic.in/reports/report242.pdf accessed on dated, 6/2/2015
[7] ibid
[8] ibid
[9] http://lawcommissionofindia.nic.in/reports/report242.pdf accessed on dated, 6/2/2015
[10] Ibid
[11] http://lawcommissionofindia.nic.in/reports/report242.pdf accessed on dated,6/2/2015
[12] ibid
[13] http://lawcommissionofindia.nic.in, last visited on 11.02.15
[14] (see, P. Ishwara Bhat, Law and Social Transformation, Eastern Book Company, 2009, pp 102-106)
[15] lcidla@nic.in, last visited on 11.02.15
[16] Bill-Honour killing matrimony Bill-2011 report242, last visited on 11.02.15

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