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VITASTA LAW JOURNAL

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MESSAGE

It is indeed a matter of great pleasure that Vitasta School of Law & Humanities, Pohru Crossing, Nowgam Bye Pass, Srinagar is publishing its next issue of the journal entitled **"Vitasta Law Journal"** for the year 2016.

In the life of academia, publishing of the journal has its own importance. This activity enhances the potential of our students to improve upon their knowledge. I would like to take this opportunity to congratulate the faculty and students of the School on the publication of this journal and hope that they bring laurels to the School.

I wish the journal a great success.

Prof. Khurshid Iqbal Andrabi

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Editorial

It is a matter of pleasure to present volume 6 of Vitasta Law Journal (VLJ 2016) to our esteemed readers. This volume contains research papers from dedicated scholars in the field of Law and society. Diverse but relevant themes covered in this volume include, 'Gender Equality', 'Protective Discrimination', Protection of Senior Citizens', 'Islamic Banking', 'Medical Negligence', 'the Concept of Plea Bargaining' and 'Codification of Parliamentary Privileges' . The Commission of Inquiry Act, 1952 has been critically analyzed so as to question its utility. The recent stand-off between the executive and the judiciary in the wake of attempted introduction of Collegium System of Selection of Judges viz a viz the independence of judiciary has been thoroughly evaluated. The fusion of law and equity has been analyzed in its historical perspective, giving rise to equitable commercial transactions. Last but not the least the Controversial attempt for a Uniform Civil Code has been critically evaluated.

The contributing scholars deserve appreciation for their valuable research products, which will be of immense help and guidance to the future researchers, students, lawyers, Law makers and social scientists.

In the present day Indian context, where a theological approach is being adopted in law, politics and governance, tending to divide the society on religious lines, there is urgent need to make a dispas-

sionate and unbiased research into the need for preserving the basic structure of the constitution wherein secularism finds a prominent place in the preamble and the freedom of religion is guaranteed as a fundamental right. Behind these basic pillars of the constitution stands the knowledge and wisdom of the constitution makers which is sought to be eroded by attempts to assimilate the religious minorities into the national mainstream, through threats like bringing about Uniform Civil Code in disregard of the tenet of secularism and freedom of religion. The nation has come to cross roads when the overt and the covert acts by the ruling class have put the minorities under a constant fear of their lives. This trinity aspect of the Indian Constitution, viz. The secularism in the preamble, the freedom of religion under part III and the directive of Uniform Civil Code under part IV of the constitution needs a thorough grinding and pounding at the hands of genuine and unbiased researchers so as to guide the nation to a path where there is no threat to and no annihilation of the minorities and were 'unity in diversity' is maintained and nourished in its real sense. It is hoped that the researchers would take up the challenge and come up to the expectations of the civilized world community.

Prof. Dr. Ali Mohammad Matta
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The Role of Equity in Making Commercial Transactions Equitable

Prof. Ali Mohammad Matta*

Abstract

The practice of sticking to the letter of law, both in the formation and the performance of contracts, resulted in situations of injustice, which, the common law sought to redress by resorting to the principles of equity and good conscience. The statutory law also contained some provisions in order to avoid ugly situations of injustice. These provisions included 'accord and satisfaction' which enabled the parties to alter their contractual obligations in order to bring about justice in situations of hardship. This principle, however, was not of much help as 'accord and satisfaction' was unenforceable in the absence of consideration. Hence the common law evolved the doctrine of waiver, which enabled the promisee to completely waive his contractual rights and relieve the promisor from his contractual obligations even without consideration. However, the doctrine of waiver was confined to cases where the parties stood in contractual relationship but had no application where such a relationship did not exist. Moreover, the courts in England have shown reluctance to apply waiver in the absence of consideration. Hence, the common law looked for other avenues and eventually filled up the lacuna by evolving the doctrine of promissory estoppel. This doctrine, in its inception was subjected to several qualifications such as the requirement of contractual relationship between the parties, followed by a representation by the promisee that he will not insist on his contractual rights, and detrimental alteration of his position by the promisor, in reliance on the representation, reaching a point when it would be inequitable for the promissee to go back on his representation. However, in the process of its evolution the doctrine successfully negotiated these obstacles till it reached its present form where it is invoked simply because the representee has altered his position in reliance on the representation, rendering it inequitable for the representer to go back on his representation. The doctrine has acquired flexibility so much so that it now applies in all situations to do justice in the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact situations to achieve justice. It now furnishes an independent cause of action, which was not the case earlier when it could be availed only as a defence. The doctrine unlike its formative days has been made available even against the statute. Herein an attempt has been made to examine and assess the doctrines of 'accord and satisfaction' and 'waiver' and to trace the historical evolution of the doctrine of promissory estoppel, the hitches that came its way at the hands of the traditionalists till it reached its present form of self-sufficiency and independence.

Key words: Equity, Contracts, Accord and Satisfaction, Waiver, Promissory Estoppel

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Law and Equity

Law and equity go together in a quest to realise justice in all human interactions. Equity forms the sole of law and gives it strength and acceptability. Equity may be equated to a watch dog to ensure that the object of the law is not lost in its technicalities. The role of equity was better explained in the case of *Lord Dudly* v *Lady Dudly* as under:

...now equity is no part of law, but a moral virtue, which qualifies, moderates, and reforms the vigour, hardness and edge of the law, and is a universal truth; it does also assist the law where it is also defective and week in the constitution...and defends the law from crafty evasions, delusions, and new subtleties, invented and contrived to evade and delude the common law, whereby such as have undoubted rights are made remediless ; and this is the office of equity to support and protect the common law from shifts and crafty contrivances against the justice of law. Equity therefore does not destroy the law, nor create it, but assists it[1].

The lack of good-faith in Contracts

It has eventually come to be realised that good faith is necessary for commercial transactions in order for them to be equitable. In the United Kingdom, its birthplace, the element of good faith in transactions has not been incorporated in the common law system. This is considered to be a lacuna in the system which has prompted the judges of the United Kingdom to remorsefully express their dissatisfaction and disapproval. They have expressed their eager desire to see good faith as the basis of commercial transactions. Lord Styne cherished fairness to be the basis of every legal rule and said that in contract law effect must be given to the reasonable expectations of an honest man in all possible situations. Tracing the significance of the concept of good faith in some major legal systems His Lordship said that in the *jus commune* of Europe there runs a general principle that parties must negotiate in good faith, conclude con-

1 [1705] PrecCh 241 at 244

tracts in good faith and carry out contracts in good faith. The principles of International Commercial Contracts published by Unidroit provide that in the international trade, parties must act in accordance with good faith and fair dealing, or that they may not exclude or limit this duty (Article 1.7 at 16-17). In the United States, the influential Uniform Commercial Code is explicitly and squarely based on the concept of good faith. Elsewhere in the Common Law world, outside the United Kingdom, the principle of good faith in contract law is gaining ground. It is the explicit basis of many international contracts[2].

Lord Bingham of Cornhill, making an excursion into the relevant case law, advocated honesty and good faith in contracts when he said in 2001 that the lessons of the past- the legal virtues of clarity, simplicity, intelligibility, uniformity, the alignment of sound market practice and legal principle, purposive interpretation, the overriding requirement of good faith, provide the surest guide in rapidly changing commercial world in which, business men and lawyers alike, we now live[3].

In the same tune Lord Browne Wilkinson, tracing the mix of the hard principles of law with that of equity opined that it is no use for commercial lawyers and commercial men to seek to exclude equitable principles from commercial transactions.... The requirement of the utmost good faith in certain relationships is a feature of all the developed legal systems but, for the most part, forms no part of the common law. The lack in the common law is provided by the equitable principles of fiduciary duties. Any attempt to have a sector of the law, commercial law, which omits one

2 Lord Styne said this while delivering the 11th Sultan Azlan Shah Lecture titled "Contract Law: Fulfilling the Reasonable Expectations of Honest Men", in the University of Malaya, Malaysia in 1996. His Lordship cited from '*Principles of European Contract Law, part 1:Performance, Non Performance, and Remedies'*, prepared by the Commission on European Contract Law, edited by Ole Lando and Hugh Beale, Article 1.106 at 53; See *Sultan Azlan Shah Law Lectures*, Sweet and Maxwell Asia, 2004 edited by Visu Sinnadurai p 265 at 272

3 His Lordship expressed these views while delivering 16th Sultan Azlan Shah Law Lecture in the University of Malaya, Malaysia in 2001 under the title of "The Law as the Hand maid of Commerce"; See *Sultan Azlan Shah Law Lectures*, Sweet and Maxwell Asia, 2004 edited by Visu Sinnadurai p359 at 373-374

whole strand of English law as a whole, is doomed to failure[4].
These expressions of remorseful dissatisfaction of the judges of highest standing in the United Kingdom about the position of the law of commercial transactions are not mere sentimental outbursts for the need of good faith in contracts but reflect their considered views on the hard realities of the commercial world.

The Statutory Provisions for Justice in Transactions

Emphasizing the need of equity in commercial transactions is not to suggest that the statutory law of commercial transactions under the common law system is completely bereft of the elements of justice. The Indian statutory law, which in turn is based on and is synonymous with the English common law, contains provisions based on principles of justice, which replenish the law with principles of equity. Thus under the Indian law the contracts have to be based on *consensus ad idem*, where the parties agree to the same thing in the same sense. This demands unanimity of minds and probably also of intentions. Hence, the formation of a contract is required to be based on free consent of the parties without any coercion, undue influence, misrepresentation or fraud[5]. Similarly, equity steps in so as to remedy any injustice that may result in the process of performance of a contract. Hence, the promisor is relieved from the performance of his contractual obligations if the same becomes impossible or unlawful. In such a situation the contract is said to be frustrated[6]. Justice is also sought to be achieved by making it possible for the parties, in cases of hardship, to bilaterally alter their obligations under the contract. The parties may agree to a performance different from the one agreed under the contract. This is made possible through the principle of 'accord and satis-

4 Lord Browne Wilkinson expressed these views while delivering the 10th Sultan Azlan Shah Law Lecture in University of Malaya, Malaysia in 1995, titled "Equity and Commercial at 260Law: Do They Mix?" See *Sultan Azlan Shah Law Lectures*, Sweet and Maxwell Asia, 2004 edited by Visu Sinnadurai p 243

5 Sections 15, 16, 17 and 18 respectively of the Indian Contract Act 1872

6 Section 56 of the Indian Contract Act 1872

faction' under section 62 of the Indian Contract Act 1872, which permits the parties to reach bilateral accord to their satisfaction, in the event of hardship arising due to change of circumstances. For example, where the price of the goods to be supplied under the contract has spiralled manifold, the buyer may agree to enhance the price or be content with the supply of only a part of the goods. Accord and satisfaction has been defined as the 'purchase of a release from an obligation' by means of any valuable consideration not being the actual performance of the obligation[7]. The accord is the agreement by which the obligation is discharged and the satisfaction is the consideration, which makes the agreement operative. This English Common law doctrine suffers from its own limitations. One such limitation is the requirement of consideration without which the accord would be ineffective in law. This lacuna was overcome by evolving the doctrine of waiver. However, the English courts have shown their reluctance to apply waiver in the absence of consideration. As against that the Indian statutory law has gone a step ahead by allowing alteration of the contract to the extent of absolutely freeing the promisor from the performance of his contractual obligations even without consideration. This is made possible under section 63 of the Indian Contract Act 1872 under which:

> Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend time for such performance or may accept instead of it any satisfaction which he thinks fit.

Unlike 'accord and satisfaction' the doctrine of 'waiver' under section 63 is much wider in scope as no consideration is required even for an absolute release of the promisor from his contractual obligations. It envisages unilateral release of the promisor from all his contractual obligations by

7 In India a narrower approach appears to have been taken of this principle. Astonishingly, in some Indian cases, the accord and satisfaction has been unnecessarily restricted to contracts only after a breach has taken place; See for example *Union of India* v *Kishori Lal Gupta* AIR 1953 Cal 642 at 644; *PRL Saminathan Chitty* v *L Palaniappa* 18 Cal WN 612 at 619-620 (PC)

the promisee. It may not necessarily be bilateral, as is generally required of contracts. Here the Indian law differs from the English law which does not admit of absolute gratuitous waiver but is content with the provision of bilateral 'accord and satisfaction'. The English courts adhere to the age old dogma that a mere voluntary courtesy would have no consideration to uphold an assumpsit[8]. In this approach the English courts still follow more than five centuries old rule evolved in the case of *Anon*[9], which was given a formal shape in *Pinnel's*case[10]and finally upheld by the House of Lords in *Foaks* v *Beer*[11]. The judgement in *Pinnel's* case reflects the traditional approach bereft of equity when it was held that:

> "Payment of a lesser sum on the day in satisfaction of a greater sum cannot be any satisfaction for the whole, because it appears to the judges that by no possibility can a lesser sum be a satisfaction to the plaintiff for a greater sum".

The court further said, unconvincingly though:

> "But the gift of a horse, hawk or robe, etc., might be more beneficial to the plaintiff than the money in respect of some circumstances or otherwise, the plaintiff would not have accepted of it in satisfaction."[12]

Thus, in the eyes of the court, anything in kind may constitute a good consideration for 'accord and satisfaction' but not a lesser amount in cash. This exposition of the rule did not go well in the juristic circles where it met vehement criticism[13]. However, the criticism was unconvincing for the House of Lords to prevent it from unanimously approving the rule in *Foaks* v *Beer*[14].

8 *Lampleigh* v *Brathwait* [1915] Hob 105: 80 ER 225
9 (1495) YB 10 Hy vii for 4p 14
10 (1602) 5 Co Rep 117a: 77 ER 237
11 (1884) 9 App Cas 605
12 Supra n 10
13 It was criticised by JESSEL MR in *Couldery* v *Bartrum* (1881) 19 Ch D 394, 399, and by Earl of Selborne LC in *Foakes* v *Beer* (1884) 9 App Cas 605
14 Supra n 11; Even the Law Revision Commission of England recommended the abolition of the rule but no legislative initiative has been taken in this regard

The Obsession with Consideration

The limited scope of the common law doctrine of 'accord and satisfaction' is reflective of the age old obsession of the English courts with the doctrine of consideration according to which any contract without recompense is *nudum pactum*. The courts in England were not prepared to diverge from their position till Lord Mansfield, a staunch opponent of the doctrine of consideration, became the Chief Justice of the Kings Bench of the House of Lords. The Lord Chief Justice treated consideration merely as evidence of the intention of the parties to be bound, which would be rendered unnecessary in cases where intention could be ascertained by other means such as the obligation having been undertaken in writing[15]. Such rejection of the doctrine of consideration, rather than dislodging it, instead generated an argumentative reaction as could be seen in the case of *Rann* v *Hughes*[16] in which it was proclaimed that:

> All contracts are, by the laws of England, distinguished into agreements by specialty and agreements by parol; nor is there any such third class…as agreements in writing. As if they be merely written and not specialties, they are parol, and a consideration must be proved.

In order to counter the reaction Lord Mansfield attempted a flexible definition for the doctrine of consideration in terms of morality when he said:

> Where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration….The ties of conscience upon an upright mind are a sufficient consideration[17].

Such a definition in terms of morality and rectitude had already been rejected by Lord Chief Baron Skynner in the case of *Rann* v *Hughes*[18] and was also rejected by Lord Denman in *Eastwood* v *Kenyon*[19] describing it as

15 *Pillans* v *Van Mierop* [1765] 3Burr 1663
16 (1778) 7 Term Reports 346 (HL)
17 *Haw Kes v Saunders* [1782] 1 Cowp 289 at 290
18 *Supra n* 16
19 (1840)11 Ad 7 El 430

an innovation of Lord Mansfield.

These developments created uncertainty in the law of contracts, which was attributed to the unnecessary extension of the doctrine of consideration. Sir Fredrick Pollock was astounded that the doctrine of consideration had been extended, with not very happy results, beyond its proper scope, which is to govern the formation of the contract and has been made to regulate and restrain the discharge of the contracts[20].

These periodic intervals of its approval and disapproval gave rise to a sort of uncertainty about the requirement of consideration for the validity of agreements. The literal approach of the courts towards the law relating to the obligation of performance of contracts resulted in hardships in cases where changed circumstances had rendered it inequitable to force the promisor to perform the contract in its strictness. The promisee's willingness to relieve the promisor from his contractual obligations was unenforceable unless supported with consideration. The English law was thus faced with a situation where the formal statutory law appeared to obstruct the flow of justice.

The requirement of consideration may sound good in as far as it creates an aura of seriousness and commitment around contracts but it would set asunder all efforts for a just solution in situations where, known to the promisee, the promisor, without being dishonest, is unable to fully perform his promise. The promisee might, on compassionate grounds, promise not to enforce performance of his obligations by the promisor, or to put them in abeyance or agree to variation in their performance. An indiscrete insistence on the requirement of consideration in such cases of discharge would be iniquitous. Similar situations of inequity were faced where one party was unjustly enriched at the cost of the other party or where the quantum of damages in the event of breach of contract was not fixed by the parties or where strict adherence to the terms of the contract resulted in unwarranted consequences or where the object of the contract

20 In his book on contracts (12th edition); at p 42

would be lost without implying terms in it. Hence, in the interest of justice, the judiciary, from time to time, resorted to equity manifested in the form of restitution, *quantum meruit*, quasi contracts, unconscionability, constructive trusts, frustration, implying terms in contracts, fulfilment of reasonable expectations of honest men, and finally the promissory estoppel. In the process Lord Mansfield's yearning for a theory of contracts without consideration came to some fruition. Consideration was thus losing its ground as a basic requirement of all contracts.

The New Trend

In order to make transactions fair and just equity assumed many forms at different intervals of time. While on the one hand the traditionalists were defending their approach towards the doctrine of consideration the psyche of the English judiciary was making reference to equity, good conscience and morality. The new trend culminated in the form of promissory estoppel. The beginning of the new trend was made in the case of *Jorden v Money*[21], in which the House of Lords held that a promisor would be estopped from going back on his representation stating certain facts to exist, in reliance on which the promisee had altered his position, so that it would be inequitable to change that position. Thus, promissory estoppel was evolving.

The Beginning of the Promissory Estoppel

Promissory estoppel prevents a promisee from insisting on the performance of his obligations by the promisor, after making a gratuitous promise that he will not. In its inception this doctrine was woven in a host of formal requirements. It was applied only in cases where a pre-existing contractual relationship existed between the parties. It was required that the promisee should have made a promise, either express or implied, that he will not insist on his contractual rights or that he will not insist on the

21 [1854] 5 HL Cas 185

performance of his contractual obligations by the promisor. The promisor must have believed that promise and altered his position to his detriment so that it would be inequitable for the other party to go back on his promise. Further, the estoppel was available only as a defence but not as a cause of action[22]. Gradually the strict requirements of promissory estoppel faded away in the process of search for justice. This is not to say that the doctrine had a smooth sail during the course of its development. In the process of development it had to negotiate many obstacles placed in its way by the adherents of the doctrine of consideration and other formalists who believed more in the letter of law rather than its spirit. Nevertheless, the doctrine succeeded in overcoming these formal requirements till it reached its present state of self-sufficiency and independence. It has undergone refinements and improvements so much so that it has now been shorn of almost all the requirements except the one that the representee has altered his position in reliance upon the promise made by the representer. The alteration of position by the representee need not be to his detriment as was required before. This equitable doctrine is no more restricted as a defence but has eventually been made available also as an independent cause of action.

The Process of Development of Promissory Estoppel

It would be worthwhile to look into the process of development of promissory estoppel during which it jettisoned most of its traditional requirements so as to be available in varying fact situations in need of justice.

The Requirement of Pre-existing Contractual Relationship

In Durham Fancy Goods Ltd v Michael Jackson (*Fancy Goods Ltd*)[23], the requirement of pre-existing Contractual relationship between the parties was not considered necessary while applying promissory estoppel. The

22 These Conditions Were Prescribed In *Hughes* V *Metropolitan Rly Co* (1877) 2 App Cas 439; *Central London Property Trust Ltd* V *High Trees House Ltd* [1947] Kb 130

23 [1968] 2 QB 839

court said:

> ...although in *Hughes* v *Metropolitan Rly Co,* the court of appeal assumed a pre-existing contractual relationship between the parties, this[did] not seem to be essential provided that there was a pre-existing legal relationship which could give rise to liabilities and penalties[24].

Hence, any kind of legal relation, not necessarily a contractual relationship, was sufficient for the application of promissory estoppel.

In the subsequent case of *Crab* v *Arun District Council* the House of Lords in the course of its judgment went a step further and reiterated that:

> the judge(court of first instance) was wrong in law in saying that he must find a pre-existing legal relationship between the parties...in any event, promissory estoppel can be created where a new legal relationship is to be brought into being. It is not limited to cases where the representation is intended to affect any existing contractual relationship[25].

Thus legal relationship, much less the contractual relationship, was no more considered as a necessary pre-requisite for promissory estoppel. Robert Goff J of the Queen's Bench, in yet another subsequent case, approved the suggestion that in relation to the legal effect of a transaction it does not necessarily follow that the underlying transaction should constitute a binding legal relationship for the attraction of promissory estoppel[26]. This was followed by the Australian case of *Walton Stores (Interstate) Pty Ltd* v *Maher & Anor*[27]in which the High Court applied the doctrine to pre-contract negotiations. In this case the lessees induced the landowners to adopt a belief and assume that the exchange of contracts for the lease would take place. This was so because the landowners had made

24 This was referred to by Edgar Joseph Jr SCJ in the Malaysian Supreme Court case of *Cheng Hang Guan &Ors* v *PerumahanFarlim (Penang) SdnBhd&Ors* [1993] 3 MLJ 352 at 402-403

25 [1976] Ch D 179

26 *Amalgamated Investment & Property Co Ltd* v *Texas Commerce International Bank Ltd* [1982] QB 84 at 102, 107

27 (1988) 2 QB 839

investments in developing the land in accordance with the requirements of the lessees, which the lessees knew but did not object. The lessees were held responsible for not having removed the fallacious impression of the landowners that there was a binding contract. This belief was relied upon by the lessor (landowner) who had altered his position in reliance on that understanding[28]. Thus, in cases where the action or inaction on the part of the representer, during the course of negotiations, creates an impression, false though, that a contract would be entered into, which was believed and acted upon by the representee, a duty was imposed upon him to remove that impression, for a successful defence against the application of promissory estoppel.

Similar opinion was held in *State Rail Authority (NSW)* v *Health Outdoor Pty Ltd*, in which McHugh JA of New South Wales Court of Appeal said that estoppel applies to pre-contractual negotiations. He saw no reason why the doctrine of promissory estoppel should be confined to the case of an existing contractual relationship. According to the learned JA the courts should not be deterred from extending the doctrine to pre-contractual negotiations[29]. These developments eventually encouraged the courts to apply this equity estoppel even to cases where there is no pre-existing contractual or any legal relationship between the parties[30].

In the USA the promissory estoppel has developed faster. It has taken statutory form in which no requirement is prescribed other than the requirement of promise which induces action or forbearance from the promisee and would result in injustice if withdrawn. Thus the American Restatement of the Law of Contracts provides that:

28 The ground for such a liberal approach was prepared in cases like *A-G of Hong Kong & Anor* v *Humphrey's Estate (Queens Gardens) Ltd*, although in this case the creation or encouragement of any expectation could not be proved for the invocation of the estoppel

29 [1986] NSWLR 170 at 193; the majority of the court in this case held that too great a willingness by the courts to discern, in pre-contractual negotiations, a basis for estoppel, will have the effect of introducing a serious element of uncertainty into our law of contracts, per Kirby P at 196

30 See for example the cases like *Amalgamated Investment and Property Co Ltd* v *Texas Commerce International Bank Ltd* Supra n 26, per Robert Goff J at 102,109; *Walton Stores (Interstate) Pty Ltd v Maher & Anor* (1988) 164 CLR 387

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires[31].

These developments were responsible for Williston, the celebrated American author on the law relating to commercial transactions, to say that in the United States there has been a development away from the idea of purchasing promise for a price and towards the idea of founding contractual liability upon action in 'Justifiable reliance on the promise[32].

In India the courts have shown a forward looking approach and applied the doctrine in situations which would otherwise result in injustice. The courts have thus described promissory estoppel as a promise intended to create legal relations or affect a legal relationship intending it to be acted upon and in fact acted upon creating estoppel against the promisor, irrespective of whether there is any pre-existing relationship between the parties or not. This, being an equitable principle evolved by the courts for doing justice, is not inhibited by the same limitations as estoppel in the strict sense of the term[33].

Requirement of Proof of Detriment

Lord Denning in the case of *W J Alan & Co Ltd* v *El Nasr Export and Import Co*[34] referred to a large number of cases to fortify his stand that no detriment needs to have been suffered by the promisee before pleading promissory estoppels[35]. The Federal Court of Malaysia in *Boustead Trading*

31 Art.90 of the American Restatement of the Law of Contracts 1932

32 See Williston on Contracts (1936) Vol 1, para 139

33 *See Union of India* v *Godfrey India Ltd* [1985] 4 SCC 369; *Mangalam Timber Products Ltd* v *State of Orissa* AIR 1996 Ori 13 at 16

34 [1972] 2 QB 189 at 213

35 His Lordship referred to *Brunner* v *Moore* [1904] 1 Ch 305; *Charles Richards Ltd* v *Oppenheim* [1950] 1 KB 616 at 621; *PlasticmodaSocieta Per Azioni* v *Davidsons (Manchester) Ltd* [1952] 1 Lloyd's Rep 527 at 539; *Panoutsos*v *Raymond Hadley Corporation of New York* [1917] 2 KB

(1985) Sdn Bhd v *Arab-Malaysian Merchant Bank Ltd*[36] expressly ruled out the requirement of detriment for invoking the doctrine of estoppel and held that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances. It is a doctrine of wide utility and has been resorted to in varying fact situations to achieve justice. Surely Justice could be achieved by preventing or remedying the injustice that would ensue in a case where the promisor resiles from the promise.

The Supreme Court of India in *Delhi Cloth & General Mills Ltd* v *Union of India* reiterated that:

> It is true that in its formative period, it was generally said that the doctrine of promissory estoppel cannot be invoked by the promisee unless he has suffered 'detriment' or 'prejudice'. It was often said simply that the party asserting estoppel must have been induced to act to his detriment. But this has now been explained in so many decisions all over. All that is now required is that the party asserting the estoppel must have acted upon the assurance given to him. Must have relied upon the representation made to him....The alteration of the position by the party is the only indispensable requirement of the doctrine. It is not necessary to prove further any damage, detriment or prejudice to the party asserting the estoppel...[37].

It is now universally settled that promissory estoppel would apply when there is inducement of one party by the other, which induces the former to act, thereby altering his position, so that it would be inequitable to retract the inducement. This is the essence of the doctrine as enunciated by McGregor J in New Zealand case of *P v P*[38]. After scrutinising the requirements of promissory estoppel through various judgements, the learned J derived the principle that for the application of promissory estoppel

473; *Enrico Furst& Co* v *WE Fischer Ltd* [1960] 2 Lloyd's Rep 340 and the *High Trees* case [1947] KB 130

36 [1995] 3 MLJ 331

37 [1987] 3 SCJ 328 at 335

38 [1957] NZLR 854

there should be an inducement of one party by the other and the action or inaction of the induced party in reliance on the induced belief. When these conditions are present then it is for the court to decide whether it would be inequitable to allow the party seeking to do so, to enforce the strict rights, which he has induced the other party to believe will not be enforced. The requirement of detrimental alteration of position by the promisee is immaterial[39].The only other requirement which is now emphasised for the application of the doctrine of promissory estoppel, after the satisfaction of the reliance test, in almost all jurisdictions, is that the withdrawal of the promise of non-insistence on his legal rights by the promise would give rise to inequity. This is amply clear from the English case of *Soci'eteItalo-Belge Pour Le Commerce et I'Industries SA* v *Palm &Vegetable Oils (Malaysia) SdnBhd, The Post Chaser*[40]. In India too, the same approach is discernable from a large number of cases. The Indian cases of *MotilalPadam Sugar Mills Co Ltd* v *State of UP*[41]; *Delhi Cloth & General Mills Ltd* v *Union of India*[42]*; Union of India* v *Godfery Phillips India Ltd*[43]*; AP State Electricity Board & Ors* v *M/S Sarade Ferro Alloys Ltd*[44]*; Mangalam Timber Products Ltd* v *State of Orissa*[45]stand outright in reflecting the judicial trend in this regard, which requires a representation by one party, in reliance on which the other party has altered his position so that it would be inequitable to permit withdrawal of the representation.

In the recent case of *Devi Multiplex* v *State of Gujarat*[46], the Indian Supreme Court, in the context of a government contract, held that the doctrine of

39 Reliance was placed on *Hughes v Metropolitan Rly Cosupra n 19*, per Lord Cairns; *Birmingham & District Land Co v London & North Western Rly Co* (1888) 40 Ch D268, per Bowen LJ; *Combe v Combe* [1951] 1 All ER 767 (CA), per Lord Denning; *Central London Property Trust Ltd* v *High Trees House Ltd* [1947] KB 130 and *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, per Lord Cohen.

40 [1982] 1 All ER 19, QBD (Commercial Court) at 26

41 AIR 1979 SC 621 at 635

42 Supra n 37

43 Supra n 33

44 AIR 1993 SC 1521

45 AIR 1996 Ori 13

46 (2015) 9 SCC 132, 134

promissory estoppel is applicable against the government in exercise of its governmental, public or executive functions and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel. The court summed up the doctrine in this context as under:

> Where the government makes a promise, knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the government would be held bound by the promise and the promise would be enforceable against the government, at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by article 299 of the constitution.[47]

In this case also no mention was made of detriment to the representee as a requirement of promissory estoppel.

The Supreme Court, in the context of the governmental policies, which create reasonable expectations among the people, has recently asserted it as a duty of the government in formulating policies or taking administrative decisions that the state must think about pros and cons of the policy and its capacity to give the benefits, before laying down any policy under which benefits are promised to the subjects. State should not give any assurance without proper appreciation of all the relevant factors, as it will not only be in violation of the principals of promissory estoppel but also unfair and immoral on the part of the state not to act as per its promise. In the circumstances of the case, the state cannot revise the policy to the detriment of the promisee. If an assurance was given of 100% uninterrupted electricity supply for 5 years to the new industrial units, state cannot wriggle out of its liability by changing the policy and restricting the benefit of the incentive to cases where the electricity supply was reduced

47 The court applied *State of Punjab* v *Nestle India Ltd* (2004) 6 SCC 465

to less than 50% on a particular day....[48]. Even the change of government cannot justify a change in such a policy of the previous government under which some benefits were promised to the employees, even if the decision of the previous government was not expressed in the name of the governor as required under law.[49]

The sufferance of detriment by the party invoking promissory estoppel has not been considered necessary any more except in some Australian cases such as *Read v Sheehan*[50], where it was required that the representee should have suffered some 'material disadvantage' or 'substantial disadvantage' as a necessary concomitant of his action or inaction in reliance on the representation of the promisor. Here it is relevant to understand that the broader test of 'inequity' is itself susceptible to diverse interpretations. The inequity generally manifests itself in detriment, prejudice or disadvantage, measurable in monetary terms, as appears to be emphasized in the Australian cases just cited. However, the non-fulfilment of reasonable expectations, not necessarily resulting in monetary loss, has figured as a cause of action in a host of cases under the Common law System[51], which would constitute a ground of inequity redressable by the application of the doctrine of promissory estoppel.[52]

Promissory Estoppel as a Cause of Action

In its formative stages, it was said that the doctrine of promissory estoppel is available only as a defence against the party who, after having

48 *S.V.A Steel Re-Rolling Mills Ltd* v *State of Kerala* (2014) 4 SCC 186

49 *State of Bihar* v *Sunny Prakash* (2013) 3 SCC 559

50 (1982) 56 FLR 206 per Dean J, adopting Dixon J's dictum in *Thompson v Palmer* (1933) 49 CLR 506 at 547 ; and *Legione* v *Hateley* (1983) 57 ALJR 292, per Mason and Dean JJ at 297

51 See *Schmidt* v *Secretary of State for Home Affairs* [1969] 2 Ch 149 (CA) per Lord Denning; *R v Liverpool Corporation* [1972] 2 QB 299(CA); *Council of Civil Servants Unions* v *Minister for the Civil Service* [1985] AC 374 (HL); followed in India, where fulfilment of reasonable expectations has become a permanent feature of the administrative law, see *National Building Construction Corporation* v *Raghunathan* (1998) 1 SCC 66; *Secretary, State of Karnataka* v *Umadevi* 2006 (4) SCC 1 etc.,

52 See *Mohd Jamal* v *Union of India* (2014) 1 SCC 201; for further discussion see Spencer, Bower and Turner, *The Law Relating to Estoppel by Representation* (3rd edition 1977) Butterworths, London at p383

waived them, now desires to enforce his contractual rights. It did not furnish an independent cause of action to the party to whom the representation had been made. Hence, metaphorically, promissory estoppel was available as a shield but not as a sword. However, the doctrine has undergone radical changes since then and the law now allows this doctrine as a cause of action in itself[53]. Mason CJ of the Australian High Court lamented that even according to traditional orthodoxy a plaintiff may rely on estoppel because there is no logic or common sense in allowing a principle of law to be availed of by a party when he is a defendant and denying the same when he is a plaintiff[54]. Anson, a renowned author on law of contracts, had predicted the possibility of estoppel being in itself capable of creating a cause of action in contract, notwithstanding the absence of consideration[55]. In India the doctrine was made available as a cause of action even earlier. In *Subramanyam & Co* v *State of AP*[56], the Andhra Pradesh High Court held that such a representation gives rise to a cause of action. Hence promissory estoppel is available not only to the defendant as a shield but also to the plaintiff as a sword. The use of promissory estoppel as a cause of action is traceable in some very old cases[57]. Vaughan Williams LJ, drawing a distinction between the evidence estoppel and the equity estoppel said in 1897 that you cannot found an action on the former as you can in equity[58].

Estoppel against Statute

It is generally believed that there can be no estoppel against statute. This was recently reasserted by the Supreme Court of India in the case of *Joshi Technologies International Inc*. v *Union of India*[59].However, there are cases

53 See *Amalgamated Investments & Property Ltd* v *Texas Commerce International Bank Ltd*[1982] QB 84; Mason CJ of Australian High Court in *Walton Stores* supra n 24 at 400
54 Walton Stores supra n 24 at 400
55 See Anson's Law of Contract (25th Centenary Edition by AG Guest) at 120-121
56 AIR 1975 AP 126 at134
57 See for example*Hunt*v *Carew* [1649] Nels 46; *Pasley*v*Freeman* (1789) 3 TR 51
58 *Williams* v *Princkeny* (1897) 67 LJ Ch 34
59 (2015) 7 SCC 728 at 754

which have certainly weakened, if not completely demolished,this belief. In the Australian case of *Common wealth of Australia* v *Verwayen*[60],the plaintiff filed a case of negligence against the government, which was barred by limitation. However the Ministergave him assurance that the statute of limitation would not be pleaded in the case. The unanimous High Court held that the Commonwealth had not waived the defence but it was estopped from resiling from its promise not to plead the statute of limitation. This is an instance of clear application of the doctrine of estoppel against statute. The traces of tacit application of promissory estoppel against the spirit of law can also be found in various governmental schemes such as amenity from liability in certain situations of voluntary declaration, submission or surrender. The promise of amnesty for laying down of arms by Maoists in India is a glaring example. Plea bargaining also reflects a compromise on the spirit of law, under which confession from a criminal is bargained in return for a promise of lighter sentence. In India plea bargaining has received statutory approval since 2005.

In the end it is important to mention that promissory estoppel may not always force the promisor to completely waive his legal rights. The rights may only be temporarily suspended. Promissory estoppel, like waiver, may only have temporary effectin the sense that the representer may only have suspended his rights against the representee or put them in abeyance, which he has a right to revive. Hence, the representer may at times be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist upon his strict legal rights. However, withdrawal of the promise is permissible only up to a certain time after which no withdrawal would be allowed if that would result in inequity. For example when the party invoking promissory estoppel has suffered an irreparable loss in reliance on the promise, no withdrawal of the promise may be allowed. Lord Denning conveyed the same when he said that

60 (1990) 170 CLR 394

in some cases no withdrawal is possible as it may be too late to withdraw, or it cannot be done without injustice to the other party[61].

Conclusion

Law has never remained static. It grows according to the needs of the growing society. It is the equity that supplies law with vitality contemporaneousness and resonance. In the area of commercial laws the courts have realised the need for evolving and adopting the principles of equity in one form or the other. More so because the statutory provisions based on fairness and good- conscience were, in certain situations, insufficient to cater to the need of justice. The principle of 'accord and satisfaction' gave the parties the option to alter the hard terms of their contract. The utility of this principle is limited as it does not apply in the absence of consideration. This shortcoming was removed by evolving the doctrine of waiver, a rule of broader scope. Waiver also suffered from its limitations as its application was restricted to cases of contractual relationships leaving other legal relationship cases remediless. Moreover, the obsession of the courts in England with the doctrine of consideration further restricted its scope. This prompted the courts to search for and evolve newer principles of equity. Consequently, the doctrine of promissory estoppel was evolved under which one who promised not to insist on his contractual rights was estopped from resiling from his promise. Promissory estoppel during its infancy was woven into many requirements. Adherence to these strict requirements of the doctrine of estoppel prevented justice from reaching all deserving cases. This was realized by the courts which therefore assisted the system to become bolder in doing justice according to the spirit of the law in tandem with equity. As a consequence of the judicial efforts these requirements of promissory estoppel gradually faded way. It now applies to cases even in the absence of any relationship. The proof of detriment to the other party is no more a necessary condition for the application of

61 In *WJ Allen & CoLtd* v *El Nasr Export and Import Co supra n 32*; see also *High Trees case supra n 36*; *Hughes v Metropolitan Rly Co* supra n 19

the doctrine. The doctrine has been made available to the plaintiffs as a cause of action without being restricted to defendants alone as a defence. It seems to have been applied even against statute, which is a possibility rich in future prospect. Its permanent or temporary nature is determinable on the basis of circumstances of the case. The estoppel would be permanent when the promise is made of permanent waiver of one's legal rights so that it would now be inequitable for him to revive them by withdrawing the promise. It would be temporary when the representer has only suspended his legal rights, in which case the rights can be revived after giving reasonable notice to the representee. However, in some cases it may be too late for him to revive his rights as the representee might have so irreparably altered his position that it would now be inequitable to allow the representer to withdraw the representation. All these developments vouch for the important role played by equity in shaping the law towards accommodative justice.

Of State's Obligations and its Response: A Critical Analysis of Commissions of Inquiry Act, 1952

Showkat Hussain*

Abstract

In all legal systems, amongst all rights, Fundamental Rights/ Human Rights enjoy a special status. These rights are sacrosanct and not liable to be abridged by any individual or by the State itself, except to the extent provided under law. A State has an inherent duty to secure for its every citizen enjoyment of these rights. Indeed modern democratic societies in a way owe their existence to this guarantee under the scheme of Social Contract. State is under a fundamental obligation to ensure that its subjects are able to enjoy these rights and that any violation thereof is dealt with severely. However, States have most often failed to perform this duty. Instead, States have devised ways and means to divert attention of its subjects everytime these rights have been violated. In India the situation has been no different. Every time a grave violation of Human Rights takes place, different methods have been adopted by Governments to divert attention of its subjects. One of the means the Government has liberally resorted to is to order a probe / investigation. In India, the main Legislation regulating and making provision for the probes/inquiries/Commissions etc is the Commissions of Inquiry Act 1952. The Act was enacted to aid the government in arriving at a right decision after asserting the correct facts of an incident of public importance and the causes and consequences thereof. A plain reading of the Act and its working from the time of its enactment would however reveal that the Act and its working have many shortcomings. Given these limitations, one may even question the very need of the Act in its present form. In this paper, an attempt has been made to analyze the provisions of the Act and to give a brief account of the shortcomings of the Act. In the concluding part, some changes to the Act have been suggested to make it relevant and a vibrant piece of legislation in securing to the citizens enjoyment of their rights.

Keywords: Fundamental Rights, Human Rights, Social Contract, Discretion, Commission of Inquiry, Administration of justice

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Introduction:

Human rights have been variously defined. These are basic to the existence of a human being and fundamental for his survival and enjoyment of his life and liberties. Fundamental Rights/ Human Rights are sacrosanct and not liable to be abridged by any Legislative or Executive Act or order,[1] except to the extent provided under law. A State has an inherent duty to secure for every of its citizens, enjoyment of these rights. These rights are basic to the very existence of both the individual as a unit and for assemblage of the individual units to form a society. To these rights has been attached so much of importance that they have been declared as 'Fundamental in the categories of rights in various Constitutions across the Globe including that in the Constitution of India. Indian constitution devotes a whole chapter[2] to Fundamental Rights and provides mechanism for their enforcement[3] as well. It can well be said that it is for these rights that a modern democratic State gives to its subjects a fundamental guarantee of their protection and promotion. In fact it is a fundamental duty of State to ensure security of enjoyment of rights and liberties to its subjects. Indeed modern democratic societies in a way owe their existence to this guarantee under the scheme of Social Contract. As observed by High Court of Delhi, 'The classical theory of social contract highlights that the social contract is on account of the rules of conduct required by a just society. All persons are basically the same in terms of the innate human nature and the society is created and the norms are laid about the interaction between individuals amongst themselves. Since the people rationally foresee the consequences, they authorize a power to create a social environment in which the people adhere to their respective promises to govern the society. The most important aspect is the necessity of Government in the interest of all citizens where people are essentially free and live together with some laws to produce a more happy life than

1 The State of Madras v. Srimathi Champakam Dorairajan, A.I.R. 1951 S.C. 226
2 INDIA CONST. pt III.
3 *Id*. art. 32.

living in anarchy. The social contract, thus, establishes legal equality and encourages minimal restriction of individuals' freedom by the State. A cardinal principle underlying the theory is the consent of the governed given to the Government on a basic premise - the promise of the Government to provide them security, safety and well being in return for minimal restriction of their rights and freedom.'[4] Thus State is under fundamental obligation to ensure that its subjects are able to enjoy these rights and that any violation thereof is dealt with severely.

But notwithstanding the sacrosanct nature of these rights, States have most often, if not always, failed to keep its promise. States have probably done everything they could in response to a call for performance of its duty, except for performing the duty itself. In the event of the governments failure to keep its promise and to avoid social reaction, ways and means have been devised to divert attention of its subjects. In India the situation has been no different. Every time a grave violation of Human Rights takes place, different methods have been adopted by Governments to divert attention of its subjects. One of the means the Government has liberally resorted to is to order a probe / investigation. Such investigations may vary from investigation by an Authority into its own acts (internal inquiry) to investigation by special Agencies like Central Bureau of Investigation, Special Investigation Teams etc. And the one that commands more respect (though theoretically) is the investigation led by members of judiciary. Given the number of inquires ordered and their outcome, it is interesting to analyze the legal basis of such enquires, investigations, probes or Commissions by whatever name they are called.

Genesis:

In India, the main Legislation regulating and making provision for the probes/inquiries/Commissions etc is the Commissions of Inquiry Act 1952. The Act was enacted by Parliament of India after consultation with States to facilitate setting up of commissions with requisite powers to

4 Ashwani Gupta v. Government of India And Ors, 1 (2005) A.C.C. Delhi H.C. 361.

enquire into and report on any matter of public importance. Setting of a commission every time by means of a separate enactment was a tardy process. 'On the other hand, Government felt convinced of the utility of such inquiries as a means of arriving at a proper appraisal of matters of public importance and of infusing the confidence of the public in its administration and conduct. As the necessity of such inquiries was bound to recur, it was felt advantageous to have an enactment regarding the powers which Commissions of inquiry may exercise'[5] and which the governments could use to arrive a just and fair conclusion in public interest.

Brief analysis of the Act:

The Commissions of Inquiries Act is a short Legislation comprising of only 12 sections. The Act is applicable to whole of India including the state of Jammu & Kashmir. For the state of Jammu & Kashmir, the scope of the Act is restricted to the matters enumerated in List I and List III in the Seventh Schedule to the Constitution of India as applicable to the State. [6]

Section 2 of the Act deals with definitions of the terms/expressions used in the Act. Section 2 (a) defines 'appropriate Government' as *"appropriate Government means –*

i. the Central Government, in relation to a Commission appointed by it to make an inquiry into any matter relatable to any of the entries enumerated in List I or List II or List III in the Seventh Schedule to the Constitution ; and
ii. the State Government, in relation to a Commission appointed by it to make an inquiry into any matter…"

Thus both Central and State governments have been given powers to appoint Commissions for making inquiry into any matter of public importance in the respective legislative competence of State Legislature and

5 Law Commission of India, 24rth Report, *Report on the Commissions of Inquiry Act 1952,* (1962) Dec. 1.

6 Section 1, The Commissions of Inquiry Act, 1952, No. 60, Acts of Parliament, 1952, (India).

Parliament. Under the scheme of the Act, commissions can be appointed in two situations:

i. Where the appropriate Governments deem it necessary that the commission should be appointed in public interest; and
ii. Where a Resolution is passed by each House of Parliament or State legislature for such appointment as the case may be.

A Commission once appointed has powers of a civil court with respect to summoning and enforcing attendance of any person, examining him on oath; delivery and production of documents; receiving evidence on Affidavits; requisitioning of any record; issuing commissions for examination of witnesses etc.[7] The commission can utilize services of any officer/s or investigative agencies for conducting investigation pertaining to any inquiry for which it is set up.[8] Proceedings before a Commission appointed under the Act are deemed to be judicial proceedings within the meaning of Sections 193 & 228 of Indian Panel Code.[9] By virtue of Section 8 of the Act, a Commission has power to regulate its own procedure. Any contempt of a Commission appointed under the Act or of any of its members is punishable with simple imprisonment for a term which may extend to six months or with fine or both.[10]

Section 7 of the Act empowers an appropriate Government to dissolve a commission when its continuance becomes unnecessary. A commission appointed by way of a Resolution passed by Parliament or State Legislature, can only be dissolved by way of another Resolution (for its discontinuance) by Parliament or State legislature as the case may be.

Purpose:

The Act was enacted to aid the government in arriving at a right decision after asserting the correct facts of an incident (of public importance) and

7 *Id.* Section 4.
8 *Id.* Section 5-A,
9 *Id.* Section 5 (5).
10 *Id.* Section 10 A.

the causes and consequences thereof. It is aimed at reposing faith of common citizens in Government. A commission appointed under the Act is a fact finding body. Commissions 'help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.'[11] The Supreme court of India in *Shri Ram Krishna Dalmia* Vs *Shri Justice S. R. Tendolkar* observed thus that 'recommendations of a Commission of Inquiry are of great importance to the Government in order to enable it to make up its mind as to what legislative or administrative measures should be adopted to eradicate the evil found or to implement the beneficial objects it has in view.'[12] The commission of Inquiries Act was also designed to cope with and overcome the inadequacies and limitations of the ordinary process of law. As stated by Lord Chancelor Viscount Kilmuir in his reply to a debate in House of Lord in Water's case, 'the modern system has developed in consequence of inadequacies of the machinery of inquiry by Select Committee on the one hand and limitations of the ordinary process of law on the other.'[13] However, a deeper analysis and working of the Act would reveal that the Act has fallen short of the above objectives. The working of the Act has lead to the situation where the very purpose of the Act has been challenged. However, common perception about the appointment of Commissions and ordering of probes may be different. It gives an impression that the government is serious about speedy and effective dispensation of justice. Though, this is far from reality in view of the limitations inherent in the Act.

Limitations:

A plain reading of the Act and its working from the time of its enactment

11 Justice Cory, Canada (Attorney General) v. Canada (Commission of Inquiries on Blood System) 440, 3 S.C.R. (1977), C. f. J. John H Gomery, *The Pros and Cons of Commissions of Inquiry*, 51 McGill L J, 792, 783-798 (2006).

12 Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar , A.I.R. 1958, S.C 538

13 Parliamentary Debates, Lords, The Water Tribunal, 1958-59, Vol. 216, 470-72.

would reveal that the Act and its working have many shortcomings. Given these limitations, one may even question the very need of the Act in its present form. A brief account of the shortcomings of the Act is given hereunder:

1. ***Discretion to appoint and to refer a matter to Commission:*** As stated above, a Commission under the Act can be appointed in two ways: a) by the Executive order of Government or b) by a Resolution of Parliament or State Legislature depending upon the subject matter of inquiry. In the former case, complete discretion lies with the Government if the Government is satisfied that it is necessary to do so in public interest. A government may be reluctant to order an inquiry if its own stakes are involved and which may expose failure of its policies and/ or their implementation. In the later case, the Government does not seem to have much discretion if a Resolution to appoint a Commission is passed in Parliament/ State Legislature.[14] It may well be argued that the discretion to appoint a Commission may be limited by the concerned Legislature by passing a resolution to that effect. This however, seems practically difficult in Parliamentary form of government prevailing in India more so if the ruling party enjoys majority in Parliament/ State legislatures. The strength of the ruling party or Coalition may prevent Parliament or the State legislature to pass such a resolution. More so in India a Party Whip prevails over everything and seemingly over the Constitution as well. A member may in his individual capacity wish to press for such a resolution but he can not go against party whip. If he so chooses to do that would amount to defection and thus his/her disqualification from the House.[15] What is a matter of public importance may also become debatable. Discretion again lies with the Government to decide.

Thus, except in case of a Commission appointed by way of a relevant Res-

14 See The Commissions of Inquiry Act, 1952, *supra note* 6, Section 3.
15 INDIA CONST. art. 102, cl. 2 & art. 192, cl. 2. (Schedule X)

olution, Executive has absolute discretion to decide as to whether a matter is one of public importance and if a commission requires to be appointed to conduct inquiry. In a parliamentary form of government, executive being a limb of ruling political party / amalgamation of parties, the Government may be reluctant to appoint a commission or order an inquiry for bare political considerations. 'It is not an unwarranted presumption that the executive will not institute an inquiry into its own actions…[16] The executive can dodge the demand for an inquiry till its hands are forced.'[17]

On the contrary and as expressed by Law Commission of India in its 24th Report[18], ' in absence of specific clear cut provisions for the purpose, there is a danger of inquiries being instituted in relation to matters in which the remedies available under the ordinary law are adequate and effective.

2. ***Terms of reference to Commission:*** Even in cases where a Commission is ordered to be set up by appropriate government, voluntarily or under public or political pressure, the Government may still not concede all ground to its opponents. The power and discretion to decide the terms of reference to the commission lies with the Government. For reasons cited above, the government may craft the terms of reference to the commission in such a manner that the very objective of appointing a commission will be frustrated or at least diluted. The Government may frame the terms of reference in a way suitable to its own convenience and agenda. This is a serious limitation of the Act. It has been suggested that before appointing a commission, 'there should be a brief discussion in Parliament on the terms of reference and the views expressed there be taken into account before finalizing them.'[19] It is submitted that the views expressed by the opposition must be taken into account while deciding the terms of reference.

16 J.B. Monterio, *Commissions of Inquiry. Their Limitations*, 11 July The Economic And Political Weekly. 1137, (1964).
17 *Id*. 1139.
18 See Law Commission of India, 24rth Report, *supra* note 5 at 4.
19 See J.B. Monterio, *Commissions of Inquiry. Their Limitations*, *supra note* 16 at 1139.

3. ***Findings of the Commission not binding:*** The most serious of all limitations of the Act is that the findings of the commission appointed hereunder, whatever be its terms of reference or constitution, are not binding upon the Government. It is not obligatory for government to accept findings of the Commission. It may or it may not. Thus, the entire process of appointment of commissions, conduct of its proceedings, examination of its witnesses, collection of evidences comes to naught if the Government decides not to accept the conclusion drawn by the commission. Here again, the government has the absolute discretion. It may accept the findings, reject it, or partly accept it and partly reject it. There is nothing in the Act which makes the findings of a commission binding upon the Government. In the light of existing provisions of the Act, Supreme Court and various High Courts have time and again observed that a Commission appointed under the Act is only a fact finding body and the government is not bound to accept the report of the commission. In *U. Dakshinamoorthy* Vs *The Commission of Inquiry*,[20] Madras High Court observed that 'The Commission of Inquiry is purely a fact-finding Commission as it has not the moorings of a Court as it is popularly understood, nor are there two persons placed on either side to place their views on a given subject, nor is there a lis in issue before it.' The Andhra high Court in the case of *Md. Ibrahim Khan Vs Susheel Kumar and Anr,*[21] held that 'The function of the commission is purely to investigate, assess the ascertained facts and report. That is the purpose and the end. The report of the commission is not binding on the Government.' The Court further observed that the commission is only machinery set up to enquire into a definite matter of public importance and to make a report so as to enable the Government to take such action as the Government may deem fit.

In the celebrated case of *Shri Ram Krishna Dalmia* Vs *Shri Justice S. R.*

20 *U. Dakshinamoorthy v. The Commission of Inquiry,* (1980) 1 M.L.J. 121.
21 *Md. Ibrahim Khan* v. *Susheel Kumar and Anr,* (1983) A.I.R. A.P. 69.

Tendolkar [22] wherein the constitutional validity of the Act was challenged, the Supreme Court while upholding the constitutional validity of the Act inter alia held that 'The Commission is merely to investigate, record its findings and make its recommendations which are not enforceable proprio vigore.' Later, in the case of *State of Karnataka* Vs *Union of India & Another*[23] the court observed that 'It is clear from these provisions and the general scheme of the Act that a Commission of Inquiry appointed under the Act is a purely fact-finding body which has no power to pronounce, a binding or definitive judgment. It has to collect facts through the evidence led before it and on a consideration thereof it is required to submit its report which the appointing authority may or may not accept.' In the case of *Dr. Subramanian Swamy* Vs *Arun Shourie*[24], the Supreme Court observed that 'the commission constituted under the 1952 Act is a fact finding body to enable the appropriate government to decide as to the course to be followed. Such Commission is not required to adjudicate upon the rights of the parties and has no adjudicatory functions. The Government is not bound to accept its recommendations or act upon its findings.'

All the judgments quoted above are in line with the provisions of law as they exist as on date. However, the question that arises is that if the commissions are only fact finding bodies and the findings are not binding in nature why are governments attaching so much of importance to these commissions? Practically, successive governments have been resorting to the practice of appointing commissions to create an impression of its seriousness vis a vis the issue in question. But, the working of the commissions appointed by the governments would reveal that the whole process seems to be a futile exercise involving wastage of public money. For example, the Liberhan Commission set up under retired Justice M S Liberhan in 1992 to probe into Babri Masjid demolition case took 17 years to submit its Report having taken more than 40 extensions. The Report was

22 *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar,* A.I.R. 1958, S.C 538.
23 *State of Karnataka v. Union of India & Another,* (1978) A.I.R. 68.
24 *Dr. Subramanian Swamy v. Arun Shourie,* (2014) A.I.R. S.C. 3020.

tabled in Parliament and the opposition staged a walk out and the rest is history. Justice B N Kripal Commission set up in 1985 to probe into the bombing of the Air India Flight 182 was criticized for over spending and frequent travel of the commission to foreign countries.[25] Similar has been the fate of other commissions appointed under the Act.

As such, the very purpose of commission/ inquiries appointed under the Act is meaningless and the process under it is rendered to be a mere formality. It can not even be equated with a Police Report/ a charge sheet even though conducted by experts. In this backdrop, the relevance of appointing a commission or ordering a probe is validly questionable. On this ground alone, the Act and the very purpose of appointment of commissions under the Act has been criticized to be a mere eye wash; an act to buy time and divert attention of public and cool tempers.

4. ***Publication of Reports and its dissemination:*** After a commission is appointed by an 'appropriate government' and it has concluded its findings and submitted its Report to the government constituting it, there is still some scope for mischief. The government is not bound to publish and disseminate the Report submitted to it by the commission. Section 3 (4) of the Act however requires that the report submitted to the Government shall be laid before each House of Parliament or State Legislature as the case may be. The Report shall be accompanied by a Memorandum of the action taken by the Government.[26] In *Shri Ram Krishna Dalmia* Vs *Shri Justice S. R. Tendolkar*[27], the Supreme court has observed that 'The whole purpose of setting up of a Commission of Inquiry consisting of experts will be frustrated and the elaborate process of inquiry will be deprived of its utility if the opinion and the advice of the expert body as to the measures the situation

25 Sarita Yadaw, *Inquiry Commissions in India are Black Holes*, IGOVERNMENT, (Mar., 03, 2008, 10:07 PM), http://www.igovernment.in/articles/24574/inquiry-commissions-in-india-are-black-holes.

26 See, The Commissions of Inquiry Act, 1952, *supra note* 6 at Section 3 (4).

27 *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar,* A.I.R. 1958, S.C 538.

disclosed calls for cannot be placed before the Government for consideration notwithstanding that doing so cannot be to the prejudice of anybody because it has no force of its own.'

However, in many cases, this provision has not been seriously adhered to or has been followed as a matter of mere custom. A case on the point is the Shah Commission Report. The Commission was set up to inquire the excesses committed by former Prime Minister Mrs. Indira Gandhi during Emergency. The Commission submitted its detailed Report in 1978. The Report was however reported to be lost after Mrs. Gandhi returned to power in 1980.[28] It has been widely believed that the Reports were destroyed.

Publication of Reports of the Commissions and their wider dissemination serves a social purpose even if the findings are not binding on Government. As observed by the Law Commission of India, it may expose guilty persons in the eyes of public. 'A prosecution is not the only method of punishing persons... many persons would prefer to suffer a sentence in secret rather than public with their dark deeds.'[29]

5. ***Other Shortcomings:*** The working of the Act and the purpose served by the Commissions appointed so far under its provisions would reveal that the Act has been widely used by successive governments to buy time to cool down the tempers and to divert attention of public for the time being. Every time some scandalous or terrible event strikes and the Governments are caught unprepared, resort to appointing Commissions has been made. Taking advantage of short public memory, Governments have been successful in hiding its mismanagement or failures.

Appointments of commissions can also be an impediment in conducting a normal investigation by enforcement agencies when both the agen-

28 D Surendra Rao, *A Historical Document on Emergency*, THE HINDU, (Feb., 08, 2011, 10:31 PM). http://www.thehindu.com/books/A-historical-document-on-Emergency/article15133060.ece

29 See Law Commission of India, 24rth Report, *supra note* 5, at 7.

cies and the Commission are to collect and examine the same evidence. It may also influence the courts where the persons accused of offences in relation to an incident referred to a commission are being tried. Justice K K Mathew in his Introduction to a book titled 'The Law Relating to Commissions of Inquiry'[30] by S. C Gupta has pointed out that 'when an established criminal court is seized of a case and has to go into the facts and circumstances pertaining to it, it would be most inexpedient for a Commission to go into the matter at the same time and give its findings especially if the evidence before both the forums is practically the same. If a Commission were to arrive at certain findings, the invisible effect of such findings as a brooding omnipresence in the mind of the criminal court cannot be denied by anyone who makes a realistic approach to the question. But it is said that the object of an inquiry under the Act is a probe to find the truth, whereas that of a criminal trial is to find the guilt of the accused. It sounds rather strange to be told that the object of a criminal trial is not to find truth but something else.'

Conclusion:

The Commissions of Inquiry Act was enacted to help the Government to arrive at a right conclusion by ascertaining the real facts of case or of the causes of an incident so that the Government may take necessary steps to prevent the repetition of the incidents or at least mitigate its negative impact. It was designed to be an important tool for making administration efficient. However, the working of the Act over a period of time has revealed that the Act has not been able to achieve the said objective. It has instead been used by successive governments as a tool for their political gains. The inherent shortcomings of the Act have enabled the governments over a period of time to misuse it to their political advantage. In the process, the guarantee to the citizens of their enjoyment of Fundamental Rights would not been fulfilled. The limitations of the

30 S C GUPTA, THE LAW RELATING TO COMMISSIONS OF INQUIRY, (Indian Law Centre, 1977) , C.f. *Dhirendra Brahmachari v. The Union of India And Ors*, I.L.R. 1979, Delhi, 65.

Act cited above make a strong case for amendment of the Act in order to make it useful in administration of justice. This is more so in the case of Human Rights violations where the apparatus of the State are themselves involved. In the context of above discussion, it is submitted that following changes may be made to the Act to make in relevant and useful:

1. Findings of a commission appointed under the Act be made binding upon the government with an opportunity to challenge the findings in High Courts or Supreme Court. As suggested, the Act be brought 'in line with the truth Commission in South Africa and similar laws in other countries which make the findings of the commission binding on the government.'[31]
2. As held by Supreme Court and different High Courts, a commission appointed under the Act has no power to adjudicate. However, it is submitted that the Report of the commission may at least be treated as a Charge Sheet. Otherwise the whole process of appointing a Commission and incurring expenses for mere debates in Parliament or State Legislature seems to be a meaningless exercise with no concrete results. In case of Reports of Commissions headed by sitting High court or Supreme Court judges, the norms of evidence for prosecution be relaxed with presumption in favour of the findings of the Commission. The accused shall however be given right to rebut the evidence in accordance with the principles of natural justice.
3. The Reports of a Commission, in addition of being debated in Legislatures be given wide publicity so as to form an informed citizenry which forms the cornerstone of a democratic system.
4. The discretion of the government to decide the terms of reference should be limited. Alternative course would be to refer the matter to a Parliamentary Committee/ Committee of a State Legislature as the case may be, which shall consist of the members from both the ruling

31 B N SriKrishna, *Errors of Commission*, THE INDIAN EXPRESS, (July 2, 2009, 4:17 AM), http://indianexpress.com/article/opinion/columns/errors-of-commission-2/

party and opposition.

The changes if made to the Act would help in making the Act a vibrant piece of legislation in securing to the citizens enjoyment of their rights and justice. Or else, the Act in its present form would remain a piece of legislation enacted with one objective but utilized for a different purpose/s; all at the cost of security of enjoyment of rights of its subjects by a state.

Collegium System in India: Independence of Judiciary

Fatima Shah*

Abstract

The judiciary is one of the pillars on which the edifice of the constitution is built. The role of judges is indispensible in the delivery of justice. For any democratic country Judiciary is of utmost importance as people pose a great trust on their judicial system. Similarly in India also, the concept of Independence of Judiciary attracts a lot of attention when it comes to judicial appointments of higher courts like High Courts and Supreme Court. However, the method of appointing judges has undergone a sea change from pre-independence era to the present decade. The whole debate of judicial appointments boils down to the question – who is to judge who judge us.

The main purpose of this study is to comment on the controversies in the appointment procedure of higher judiciary which began in a series of three judgments that is now clubbed together as the "Three Judges Cases" viz., S.P. Gupta v. Union of India, popularly known as "The First Judge's Case" S.C. Advocate On Record Association v. Union of India popularly known as "The Second Judge's Case" and "The Third Judge's Case" (Re Presidential Reference^). The Third Judges Case of 1998 is not a case but an opinion delivered by the Supreme Court of India responding to a question of law regarding the collegium system, raised by then President of India K. R. Narayanan, in July 1998 under his constitutional powers.

Keywords: *Separation of Powers, Collegium System, Judicial Independence, Judicial Appointment, NJAC Bill, Executive.*

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Introduction

The judiciary in India enjoys the privilege and the liability of acting as the custodian and theconscience keeper of the constitutional vision, the constitutional ideology and the cherished goals[1] which have been prescribed to be pursued by the State. The body is an importantsupport system for the preservation of the Rule of Law and in the delivery of justice to one and all. Besides this, the judiciary assists in the progression and protection of the society by preventing injustice in addition to being an arbiter of disputes and upholder of the rights of citizens. The judiciary is a means for bringing about social change for the betterment of the citizens and democracy of India.

"An independent judiciary and a judiciary with the power to issue practical orders, is more important than any number of grand theoretical declarations about the rights of man."[2] Diarmuid F. O' Scannlain, a United States Circuit Judge, has observed[3] in reference to the role of judiciary in upholding Rule of Law that "justice needs to be delivered by competent, ethical and independent representatives and neutrals."The Rule of Law would be a fallacywithout independent courts to comment upon the legality of an action, to ensure equal protection of laws, to apply laws indiscriminately on all and to offer redressal to the grievances of the citizens. The Judiciary, which is entrusted with such a mammoth task, needs to be strong, responsible and independent. In the absence of an independent judiciary, the constitutional title of justice would appear to be deceptive, ornamental and futile.

Independence of the judiciary is directly linked to the quality of personnel manning theinstitution and such quality, in turn, is dependent on the manner and mode of inducting judges into the system. During the

1 INDIA CONST. PREAMBLE (stating "Justice, Liberty, Equality and Fraternity") ["CONST."]
2 M.N. Venkatachalliah, *Rule of Law: Contemporary Challenges*, 45 INDIAN J. PUB. ADMIN 322 (1999)
3 Diarmuid F. O' Scannlain, U.S. Circuit Judge, Lecture at the University of Notre Dame-London Law Centres (Feb. 21, 2013)

process of appointments, substantive emphasis, ought to be placed on the absence of extraneous considerations or parameters while focusing on the merit, credibility and independence of a prospective candidate. It is in public interest that the system of selection of Judges be kept distant from 'irrelevant influence, untested prejudices and elitist empathies' and be guided by 'democratic circumstances, political ethos and constitutional values'.[4]The independence of judges reflects "not onlythe independence of their mind and discretion but also the independence of their seat and tenure from political vicissitudes."[5] It has been aptly observed that "any method of judicial selection shall safeguard against judicial appointments for improper motives."[6]The debate on judicial appointments revolves around the crux of the matter as to who has the power to appoint judges. The significance of every single appointment to the Supreme Court or a High Court was emphasized in the majority opinion in the case of *K. Veeraswami v. Union of India*[7]. It said:

"A single dishonest judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system...a judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof".

The appointment of judges to the Supreme Court of India and the High Courts has over the years been a subject of intense conflict between the judiciary and the executive. Much of the conflict has stemmed from the need to preserve judicial independence, a term oft-used but little explicated in India's constitutional literature. Judicial independence has meant different things to different people over time— to several members of the Constituent Assembly, it was a principle to allow judges to adjudicate free

4 V R Krishna Iyer, *'Quae Curia (What a Court)!A new Indian Judicial Order is the Need of the Hour'*, *in* ESSAYS ON HUMAN RIGHTS, JUSTICE & DEMOCRATIC VALUES 80 (2004).

5 *supra*note 5 at 322.

6 U.N. Basic Principles on the Independence of the Judiciary, adopted by the 7th U.N. Congress on the Prevention of Crime and the Treatment of Offenders (1985) endorsed by G.A. resolution. 40/32 of 29 November 1985 and 40/146 of 13 December 1985 ["UN Basic Principles"]

7 (1991) 3 SCC 655.

from extraneous considerations, to a majority of judges of the Supreme Court over time, a requirement of the rule of law enshrined in the basic structure of the Constitution and to several popularly elected governments, aprinciple which had to be carefully bypassed, while appointing sympathetic judges to the higher judiciary. However, the present study does not analyse each of the senses in which the term has been used by judges, politicians and academics but is mainly concerned with a conceptual enquiry into judicial independence with a view to outlining its precise relevance to the process of judicial appointments in India.

Now when it comes to judicial appointments of higher judiciary, it is very important to look in to the history as well as the present scenario that is actually prevailing.

Judicial Appointments in India

The aspect of judicial appointments in India is rich and varied in issues. Under the Government of India Act, 1919 and the subsequent Government of India Act, 1935, appointments to the High Courts were the prerogative of the Crown with no specific provision for consulting the Chief Justice in the appointment process. The Constitution of India lays down under Article 124(2)[8] that the appointment of Supreme Court judges should be conducted by the President after consultation with judges of the High Courts and the Supreme Court as the President may deem necessary. Again highlighting a provision of the Constitution i.e. Article 217(1)[9] which lays down that the High Court judges should be appoint-

8 Art. 124(2) reads:

'Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted…'

9 Art. 217(1) reads:

'Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice,

ed by the President after consultation with the CJI and the Governor of the state. This is all about what the Constitution speaks about when it comes to appointment of Judges in the Judiciary. Under this scheme of Constitution, both the judiciary and the executive must have a say in the appointment of judges and they are required to act in harmony and cooperation. The key issue before the Constituent Assembly was to institute a system which would secure judicial independence.[10]During the debates on how to achieve these ends, there was broad consensus that the power of appointment would vest focally, albeit not entirely in the executive. The underlying reasons for this view were clear— the system of executive-led appointments which was widely prevalent at the time across the world was seen by the drafters as incorporating a degree of public accountability in the process. At the same time, the unfavourable colonial experience regarding unfettered executive discretion in judicial appointments convinced the drafters that efficient checks and balances on executive power would have to be instituted. This would ensure that judges, in Nehru's words, would be "people who can stand up against the executive government and whoevermay come in their way".[11]

After briefly considering and dismissing a legislative role in appointments for being practically unwieldy and reducing the status of judicial office by making it an object of political bargain,[12] the Constituent Assembly agreed on a system by which the President would appoint judges, albeit after mandatorily consulting the Chief Justice of India. The Chief Justice of India was entrusted with this constitutional role since he could provide the necessary apolitical antidote to politically motivated selections by the executive, if they were mooted. However, Ambedkar himself, speaking

the Chief Justice of the High Court…'

10 The key discussions on the issue of appointments were held between the 24th and 27thof May, 1949. See Constituent Assembly Debates, Vol. VIII (New Delhi: Lok Sabha Secretariat, 2003) 229-399 (hereinafter "CAD").

11 CAD vol VIII, 246-247 (24th May 1949).

12 Ibid. , 258 (24th May 1949).

in the Assembly, was careful to stress that consultation did not amount to a veto being exercised by the Chief Justice of India, since that would result in an untrammelled power being vested in a single person, a constitutionally unwise precedent.[13] In this way, a careful inter-institutional equilibrium in the process of judicial appointments was envisaged by the Constituent Assembly—a multiplicity of authorities across the wings of government, checking and balancing each other to ensure that the dignity of the judiciary was maintained and judicial independence remained sacrosanct.

But in the early years of the operation of the constitutionally envisaged system of appointments in independent India, concerns were raised that the role of the executive, especially in the states, was leading to the erosion of the independence of the judiciary.[14] This marked the genesis of a belief that the judiciary itself, through its representatives, was best placed to decide on its own composition, and thereby secure judicial independence.

The later developments in the process of judicial appointments witnessed changes with the passage of time.The absence of clear-cut formulae in the Constitution regarding the subtle intricacies connected with judicial appointments, which could not possibly have been laid down in black and white, has given birth to numerous controversies in the process of judicial appointments. Granville Austin has observed that the act of recommendation or non-recommendation ofnames for judicial selections on 'undisclosed criteria' has been the norm since the inauguration of the Constitution.[15]The lack of transparency in the system of appointments and the absence of any defined criteria for selections to the higher judiciary had become quite evident by the ac-

13 Id.
14 Law Commission of India, 'Reform of Judicial Administration' (14th Report 1958) 34.
15 Granville Austin, *Working a Democratic Constitution: The Indian Experience* (1999) 125.

tions of the Government in the period of 1970s where appointments to the Judiciary were made with the intention of having 'committed' judges who would, in all probability, uphold the policies of the Government.The power of the executive, due to its periodic misuses, gradually slipped[16] from its hands and the Judiciary came to exercise substantive influence in the process. Ultimately, the consultee member in the Constitutional setup virtually got veto power in the process by the birth of the 'Collegium System'.

The History of Collegium Systemin India

The collegium system, which appoints judges to the nation's constitutional courts, has its genesis in, and continued basis resting on three landmark cases, popularly known as "*Three Judges Cases*". The collegium came into being through interpretations of pertinent constitutional provisions by the Supreme Court in the Judges Cases which are discussed as follows:

First Judges Case (supremacy of executive)

In *S P Gupta v. Union of India*[17], the Supreme Court by a majority judgment held that the concept of primacy of the Chief Justice of India was not really to be found in the Constitution. It held that the proposal for appointment to a High Court can emanate from any of the constitutional functionaries mentioned in Article 217 and not necessarily from the Chief Justice of the High Court. The Constitution Bench also held that the term "consultation" used in Articles 124 and 217 was not "concurrence" — meaning that although the President will consult these functionaries, his decision was not bound to be in concurrence with all of them. The judgment tilted the balance of power in appointments of judges of High Courts in favour of the executive. This situation prevailed for the next 12 years.

16 *Three Judges Cases*
17 *AIR* 11977SC2328

Second Judges Case

In *The Supreme Court Advocates-on-Record Association v. Union of India*[18], a nine-judge Constitution Bench overruled the decision in *S P Gupta* and devised a specific procedure called 'Collegium System' for the appointment and transfer of judges in the higher judiciary. Underlining that the top court must act in "protecting the integrity and guarding the independence of the judiciary", the majority verdict accorded primacy to the CJI in matters of appointment and transfers while also ruling that the the term "consultation" would not diminish the primary role of the CJI in judicial appointments."The role of the CJI is primal in nature because this being a topic within the judicial family, the executive cannot have an equal say in the matter. Here the word 'consultation' would shrink in a mini form. Should the executive have an equal role and be in divergence of many a proposal, germs of indiscipline would grow in the judiciary," it held.
Ushering in the collegium system, the court said that the recommendation should be made by the CJI in consultation with his two seniormost colleagues, and that such recommendation should normally be given effect to by the executive. It added that although it was open to the executive to ask the collegium to reconsider the matter if it had an objection to the name recommended, if, on reconsideration, the collegium reiterated the recommendation, the executive was bound to make the appointment.
Third Judges Case

In 1998, President K R Narayanan issued a Presidential Reference[19] to the Supreme Court over the meaning of the term "consultation" under Article 143 of the Constitution (advisory jurisdiction). The question was whether "consultation" required consultation with a number of judges in forming the CJI's opinion, or whether the sole opinion of CJI could by itself constitute a "consultation". In response, the Supreme Court laid down 9 guidelines for the functioning of the coram for appointments and

18 (1993) 4 SCC 441
19 AIR 1999 SC 1, (1998) 7SCC739

transfers — this has come to be the present form of the collegium, and has been prevalent ever since. This opinion laid down thatthe recommendation should be made by the CJI and his four seniormost colleagues, instead of two. It also held that Supreme Court judges who hailed from the High Court for which the proposed name came, should also be consulted. It was also held that even if two judges gave an adverse opinion, the CJI should not send the recommendation to the government.

Over the course of the three cases, the court evolved the principle of judicial independence to mean that no other branch of the state - including the legislature and the executive - would have any say in the appointment of judges. The court then created the collegium system, which has been in use since the judgment in the Second Judges Case was issued in 1993. It overturned the S P Gupta judgment, saying "the role of the CJI is primal in nature because this being a topic within the judicial family, the executive cannot have an equal say in the matter. Thus it would not be wrong to say that "The collegium system is a system under which appointments and transfers of judges are decided by a forum of the Chief Justice of India and the four senior-most judges of the Supreme Court". There is no mention of the collegium either in the original Constitution of India or in successive amendments. The creation of the collegium system was viewed as controversial by legal scholars and jurists.[20] Critics argue that the system is non-transparent, since it does not involve any official mechanism or secretariat. It is seen as a closed-door affair with no prescribed norms regarding eligibility criteria or even the selection procedure. There is no public knowledge of how and when a collegium meets, and how it takes its decisions. Lawyers too are usually in the dark on whether their names have been considered for elevation as a judge.[21]

20 https://en.wikipedia.org/wiki/Three_Judges_CasesVisited on 15th January2017.

21 http://indianexpress.com/article/explained/collegium-system-supreme-court-how-judges-are-appointed-and-transferred-the-debate-around-it-4375719/Visited on 3rd April 2017.

Justice Krishna Iyer once lamented[22] that in India, the Judiciary is 'hand-picked confidentially in dark room operations, secret bargains and mutual adjustments.' Since the Judiciary also happens to be an institution of democracy, it is manifestly expected that the selection to the positions of such authority and of utmost impartiality must be transparent and accountable and 'should not be by a mysterious method confined to a few *pro tem* humans in high office.'[23] The former Attorney General of India, Goolam E. Vahanvati has observed that,[24] "nobody can deny the problems that exist. Some outstanding judges were left out of promotions for reasons which may not have been explained and were, in some cases, highly doubtful. Equally, some undeserving candidates sneaked in. There is also general acknowledgement of the lack of transparency." He goes on to observe and lament how some talented individuals could find only a late entry into the Supreme Court 'for reasons which appeared to be based on personal prejudices and predilections' (of members of the Collegium).[25]

It has been reported that the Collegium System has resulted in a "*complete dereliction of norms of transparency in the functioning and accountability for choices made by the Collegium. No published criteria are followed by the collegiums for choosing judges, little is known about short-listing procedures and no reasons are communicated for its decisions.*"[26]It is true that a lack of transparency in the working of the Collegium has failed in giving theConstitutional Courts 'men of high erudition'.

Justice A.P. Shah, chairman of the Law Commission of India has time and again registered his distaste for the opaque conduct of the Collegium Sys-

22 V R Krishna Iyer, *The Higher Judiciary: Appointments and Disappointments*, *in* ESSAYS ON HUMAN RIGHTS, JUSTICE & DEMOCRATIC VALUES 96 (2004).
23 JEROME FRANK , COURT ON TRIAL (1973).
24 Goolam E Vahanvati, *Judiciary at a Cross Roads*, THE TIMES OF INDIA, Aug 22, 2014.
25 At one point of time, Executive was responsible for creating walls of secrecy around the process and even now the evil has not been remedied; the game spoiler now happens to be the Collegium System.
26 ArghyaSenguta, *Reform Judicial Appointments,* TIMES OF INDIA, New Delhi, July 1, 2014.

tem, holding that appointments to the Higher Judiciary lacked transparency. He once remarked in an interview to a television channel, that "the Collegium System is so opaque that even if someone wants to speak out, he cannot do it having come from the same system." He further opined that the "Collegium System has completely failed; judges are appointed on unknown criteria….favourites get appointed and the rest are left out". Justice Shah pointed out that the Collegium had gone ahead to appoint a Judge at the age of sixty when the 'criteria' clearly says that any appointment to Higher Judiciary has to be below the age of fifty five.[27]

National Judicial Appointments Commission

With so much to understand from this collegium system, the emergence of the National Judicial Appointments Commission (NJAC) took place. It was a proposed body which would have been responsible for the appointment and transfer of judges to the higher judiciary in India.

The NDA government has tried twice, unsuccessfully both times, to replace the collegium system with a National Judicial Appointments Commission (NJAC). The BJP-led government of 1998-2003 had appointed the Justice M N Venkatachaliah Commission to opine whether there was need to change the collegium system. The Commission favoured change, and prescribed an NJAC consisting of the CJI and two seniormost judges, the Law Minister, and an eminent person from the public, to be chosen by the President in consultation with the CJI. The NDA 2 regime had NJAC as one of its priorities, and the constitutional amendment and NJAC Act were cleared swiftly.The NDA government's decision to replace the collegium system which has been in place since 1993, has left the legal fraternity somewhat divided. A few members of the fraternity firmly believe the collegium system is "unconstitutional and anti-democratic" where judges are appointed through "secret soundings and cronyism" while others say that the government wants to "interfere" in the independence of

27 *Collegium System Failed; Law Panel Chief*, THE TIMES OF INDIA, New Delhi, August 26, 2014.

the judiciary and it needs to be resisted.

The Commission was established by amending the Constitution of India through the ninety-ninth constitution amendment[28]passed by the LokSabha on 13 August 2014 and by the RajyaSabha on 14 August 2014. By virtue of this amendment, Articles 124 A[29],124 B[30] and 124 C[31] were added to the Constitution to make the NJAC valid. Articles 124 A and B define the NJAC, its members and their duties, while Article 124 C empowers Parliament to make laws in the future to regulate the procedure for the appointment of judges. The National Judicial Appointments Commission Act, 2014, was also passed by the Parliament of India to regulate the functions of the National Judicial Appointments Commission.The collegium comprises the Chief Justice of India, four senior most judges of

28 The Constitution (Ninety-Ninth Amendment) Act, 2014

29 "124A. (1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:––

(*a*) the Chief Justice of India, Chairperson, *ex officio*;

(*b*) two other senior Judges of the Supreme Court next to the Chief Justice of India –– Members, *ex officio*;

(*c*) the Union Minister in charge of Law and Justice––Member, *ex officio*;

(*d*) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People –– Members:

Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women:

Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination.

(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.

30 124B. It shall be the duty of the National Judicial Appointments Commission to—

(*a*) recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;

(*b*) recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and

(*c*) ensure that the person recommended is of ability and integrity.

31 124C. Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it.".

the Supreme Court and the chief justice of a particular high court and its two senior most judges. The NJAC, which was brought into existence after inserting a new article (Article 124A) in the Constitution, consists of the Chief Justice of India as ex-officio chairperson, two other senior judges of the Supreme Court, the Union Minister of Law and Justice and two eminent persons to be nominated by a committee consisting the Chief Justice of India, the Prime Minister, the Leader of Opposition in the LokSabha or where there is no such Leader of Opposition, then the Leader of the single largest Opposition party in Lok Sabha. The eminent persons shall be nominated for a period of three years and shall not be eligible for re-nomination. The NJAC recommended that senior-most judge of the Supreme Court for appointment as Chief Justice of India should be appointed on the basis of knowledge one possess rather than the age. The NJAC also recommended that Supreme Court Judges shall be appointed on the basis of their ability, merit and other criteria specified in the regulations.

The commission laid down its own procedures for appointment but it not be kept away from issues. The validity of the Constitutional (Ninety-Ninth Amendment) Act, 2014 and the NJAC Act, 2014 were challenged by certain lawyers, lawyer associations and groups before the Supreme Court of India through a clutch of Writ Petitions, arguing that the law undermined the independence of the judiciary, and the basic structure of the Constitution. In a collective order, on 16 October, 2015 the Supreme Court struck down the NJAC Act, 2014 which was meant to replace the two-decade old collegium system of judges appointing judges in higher judiciary. The five-judge Constitutional Bench sealed the fate of the proposed system with a 4:1 majority verdict holding that the judge's appointments shall continue to be made by the collegium system in which the CJI will have "the last word". "There is no question of accepting an alternative procedure, which does not ensure primacy of the judiciary in the matter of selection and appointment of judges to the higher judiciary," said the majority opinion. Justice J Chelameswar wrote a dissenting verdict, criticising the collegium system by holding that "proceedings of the collegium were absolutely opaque and inaccessible both to public and history, barring occasional

leaks".[32]The Court declared that NJAC is interfering with the autonomy of the judiciary by the executive which amounts to tampering of the basic structure of the constitution which parliament is not empowered to change. However Supreme Court has acknowledged that the collegial system of appointing judges is lacking transparency and credibility which would be rectified/improved by the Judiciary.[33]

The collegium has been making recommendations for appointments and transfer of judges. However, the 2015 ruling, in the end, had also paved the way for a new Memorandum of Procedure (MoP) to guide future appointments so that concerns regarding lack of eligibility criteria and transparency could be redressed. The Bench had asked the government to draft a new MoP after consultation with the CJI. But more than a year later, the MoP is still to be finalised owing to lack of consensus on several fronts between the judiciary and the government.[34]

Justice VN Khare, former Chief Justice of India, says there is nothing bad with the existing system but accepts that there is scope for its improvement."There is nothing bad with the collegium system. It is, in fact, superior to the NJAC in many ways. It will also be unfair to say that it is not transparent. But yes, it can be further improved by making it more transparent. One or two persons nominated by the President can be included in the selection committee". He strictly says there should be "no say of politicians in the appointment of judges because usually, the government is the main opponent in the people's cases and there is chances abuse of executive powers".[35]

32 http://indianexpress.com/article/explained/collegium-system-supreme-court-how-judges-are-appointed-and-transferred-the-debate-around-it-4375719/ visited 3rd April 2017.
33 https://en.wikipedia.org/wiki/Three_Judges_Cases visited on 15th January 2017.
34 *Supra* note 35
35 http://www.firstpost.com/india/collegium-system-not-perfect-superior-njac-says-former-cji-2242812.html visited on 15th March 2017.

Justice A.P. Shah has categorically remarked[36] that "we don't need a reactionary move setting up a Judicial Appointments Commission merely for the sake of it, for that would achieve nothing. We need a well thought out and consultative process of selection with identified norms and criterion… Choosing Judges based on undisclosed criterion, in largely undisclosed criterion, reflects an increasing democratic deficit and must be abandoned." It has been appropriately observed and suggested by Justice Ruma Pal[37]and Arghya Sengupta that the exercise of power by the body must be accompanied with reasons to be publicly disclosed, holding that "transparency, a key leitmotif of the reform of the appointment process, demands such disclosures."[38]

Conclusion

Independence of judiciary is a very important aspect of the democratic system in India which cannot be left at the irresponsible hands to decide the fate of Indian Citizenary neither their faith in judiciary could be played with , just because of a war of supremacy between executive and judiciary. The whole collegium system and the NJAC that is discussed in this paper aims at one common thing that is a better system for appointment of judges.Prior to 1993, the executive alone had the over-riding power to make the appointments in consultation with the judiciary. Post 1993, the experience of two decades is that the system made by the judiciary proved to be no less worse than what was prevalent in the pre-collegium days. The article highlighted a particular fact that is changes are inevitable and it is always good to accept the changes which are for good. People believe in evolution of the system but with the passage of time it becomes redundant. "When the executive-controlled system failed, the collegium came in. When collegium is now under shadow, the system tried to jump to the NJAC. For a very long time the Collegium system has worked and at the same time given rise to

36 A.P. Shah, *Appointments in the Higher Judiciary must be based on merit and reflect social diversity*, *available at* http://www.judicialreform.in/forums/showthread.php?tid=971.

37 Former Judge of the Supreme Court of India.

38 THE TIMES OF INDIA, New Delhi, 17th August, 2014

a number of controversies because of the opaqueness in their functioning and biased or politically motivated actions. While the NJAC could enhance the accountability and transparency of the appointment process, a decision upholding the NJAC would weaken judicial independence. Therefore, there is a need to work upon the exact functional criteria for the selection of Judges and also bring the same in public domain viz., number of judgments delivered, jurisprudential significance of the judgments delivered, the personal and judicial integrity of the Judges; analysis of members of the Bar also needs to be conducted on tangible parameters viz. number of appearances in matters, appearances at the final stages of hearing, their personal integrity, etc., in order to reach to a logical conclusion.

A conceptually sound understanding, which sees judicial independence as a value leading to impartial and effective adjudication, to be optimally balanced with mutual checks and balances, is thus necessary for the appointment process to operate in a practically effective manner, relevant to the current circumstances.The process of selection needs to be manned by a body which must 'exchange view(s), openly where all possible candidates are considered, using the inherent, confidential enquiries and with definite criteria rooted in the social values and functional capabilities, which the Constitution implies. The practice of maintaining secrecy about proposed names for judge-ship has to be done away with; the prospective names may be publicized to facilitate an opportunity to the stakeholders to analyse their worth and this may remove corrupt politicking in the process. The need of the hour is to ensure transparency in the judicial appointments so as to strengthen the trust and confidence of the people in the Judiciary and to place it 'beyond suspicion.' It is safe to conclude that it is time for overhauling the entire process of judicial appointments with a view to convey to the masses, who repose an extreme degree of faith and entertain great reverence in the institution that the system is completely transparent and the accountability to the public at large, is maintained.

A Conceptual Study of Plea-Bargaining under Criminal Justice System: Indian Perspective

Umer Rashid Bhat*

Abstract

Plea bargaining has assumed an important role in present day criminal justice system. the article elaborates the idea of plea-bargaining its evolution and utility to adjudication of criminal cases in a comparative perspective. The strides made by U.S legal system in this domain have been elaborated. Despite initial reluctance of Indian judiciary to adopt this doctrine, legislature took a leading role in induction of this idea into Indian corpus juris. The author makes a strong case for use of this mode of adjudication of criminal cases in view of the fact that traditional ways have been unable to cope up with ever expanding number of criminal litigations. The deficiencies which still exist in the law relating to plea-bargaining have been highlighted so that essential remedial actions are taken through further refinement of the law related to it.

Key Words: Plea-bargains, prosecutorial tool, corpus-juris, charge bargaining, fact bargaining

Introduction

Plea bargains are legal transactions, in which a defendant pleads guilty to a lesser charge or to the original charge in exchange for leniency in punishment. From time immemorial one of the primary functions of the state has been to maintain law and order and ensure justice to its subjects. This function has remained unchanged even when the state has evolved from

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police state to a welfare state. Delay caused by prolonged pre trial process and backlog of cases resulting in denial of justice, is a serious infirmity of the judicial system[1]. One of the methods for avoiding delay and enabling speedy settlement is plea bargaining. With the introduction of sections 265 A to 265 L to the Code of Criminal Procedure 1973 in 2005[2] the legislature officially inducted this concept into Indian *corpus juris*. One of the purposes of incorporating it within criminal procedure is to curb the problems of delay and huge backlog of cases. According to *Black`s Law Dictionary* plea bargaining is a process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court`s approval. It usually involves the defendants' pleading guilty to a lesser offense or to only one or some of the counts of a multi count indictment in return for a lighter sentence than that possible for graver charge.[3]

History of Plea Bargaining

Though origin of this concept is attributed to US yet its traces can be found in ancient legal systems in the practice of accepting blood money and relieving the culprit from being executed in lieu of a financial liability. The concept has undergone refinement over the ages to become a prominent feature of present day American Criminal Justice System. It would be wrong to assume that concept of plea bargaining found favor of courts only in recent past, in fact it was used in USA in 19th century itself. The Bill of Rights makes no mention of the practice when establishing the fair trial principle by 6th amendment but the constitutionality of plea bargaining has been constantly upheld. In year 1969, James Earl Ray pleaded guilty for assassinating Martin Luther King Jr. to avoid execution

1 In *Hussainara khatoon (iii) v. State of Bihar* AIR 1979 SC 1360 it was observed, speedy trial is the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice

2 Criminal Law Amendment Act, 2005 inserted chapter XXIA expressly dealing with concept of plea bargaining w.e.f 5-7-2006

3 Retrieved from, Criminallaw.uslegal.com/plea-bargaining/ (accessed on 16-11-2015)

he finally got an imprisonment of 90 years. In US almost 90% criminal cases end with guilty pleas. The American Supreme Court has upheld it as conforming to the due process requirement, court has insisted that accused pleading guilty must be counseled about his constitutional and legal rights, the plea must be voluntary and with full knowledge, it should be free from inducement.[4] The 3 types of plea bargaining practiced in the West are as follows:

- Charge Bargaining
- Sentence Bargaining
- Fact Bargaining

Charge bargain takes place when prosecution allows a defendant to plead guilty to a lesser charge or to only some of the charges framed against him, it gives opportunity to the accused to negotiate with the prosecution and reduce the number of charges that may have been framed against him.

In *sentence bargain* the accused is told in advance what his sentence will be if he pleads guilty. A sentence bargain may allow the prosecutor to obtain a conviction in a most serious charge while assuring a defendant an acceptable sentence.

In *fact bargaining* the accused accepts certain facts which eliminates need for its proof by the prosecution, in return for a lesser punishment.

Advantages of Plea Bargaining

The advantages of Plea Bargaining are multifold. First it avoids the uncertainty of criminal trial, and minimizes the risk of undesirable result for either side,[5] secondly it enables speedy disposal of cases and reduces the case load of the judiciary. In view of the fact that right to speedy trial is recognized as a fundamental right, the plea-bargaining system makes meaningful contribution to human rights as well[6]. Another benefit which

4 *Moore v. Michigan, 1957 355 US 155*
5 142nd Report of Law Commission,1991
6 Law & Social Transformation, P Ishwara Bhat, Eastern Book Company (2012) at p.827

the defendant gets is that they can save huge amount of money which they might otherwise spent on litigation. It always takes more time to bring a case to trial than to negotiate and handle a plea-bargain, it also reduces the work load of prosecutors.[7] Apart from these benefits it takes care of the interests of victims by compensating them and sparing them from the requirement of deposing before the courts.[8]

Plea-Bargaining in USA

In USA it constitutes a significant part of criminal justice system, and it is widely practiced. It started as prosecutorial tool and assumed importance to such an extent that American criminal justice system would cease to function without plea-bargaining. In *Brady v. United States*[9] court upheld the constitutional validity of plea-bargaining and asserted that the practice benefitted both the parties, moreover guilty plea suggested some hope for success in rehabilitation.

In *Santobello* case[10] Chief Justice Berger while upholding the validity of plea bargaining observed, "the disposition of criminal charges by agreement between prosecutor and the accused, sometimes loosely called as plea- bargaining is an essential component of administration of justice, it is not only the essential part of the process but a highly desirable part for many reasons." In a case titled as *Bordenkircher v. Hayes*[11] court by 5:4 majority upheld the validity of Plea-Bargaining. Thus American supreme court`s approach has been positive and consistent regarding the constitutionality of the practice, however academic opinion is critical about it on the grounds that this practice provides arbitrary discretion to the prosecution & scope for bargaining in offences against women and drug offences. In response to the critics some states in US have passed laws

7 For more details See, http://www.legalservicesindia.com/articles/plea_bar.htm&ei accessed on (16-11-2015)

8 Justice A.K. Sikri, "Reforming Criminal Justice System: can plea-Bargaining Be the Answer?"(2007) Nyaya Deep at p.77

9 (1970) 397 US 742

10 *Santobello* v. *New York*, (1971) 404 US 257.

11 (1978) 434 US 357

restricting or even prohibiting plea- bargaining in certain serious or violent crimes[12]

Plea – Bargaining in India

The Law Commission of India in its 142 report[13] outlined the scheme of plea bargaining in India and its importance in the speedy disposal of cases. The Commission recommended that there is a need to adopt this practice with adequate safeguards without affecting the crime control function of the state. It also recommended that this practice shall not be applicable to the offences punishable with death penalty or with imprisonment of more than 7 years. However, Law Commission also gave due consideration to reservations with respect to introduction of this practice, such as illiteracy, pressure on innocent may result in their conviction, crime rate may go up, poor may become the ultimate victims and criminals may escape with impunity. The 154th Report of the Commission reiterated the need of legislative measures to reduce the delay in disposal of criminal trials. The 177th Report of the Commission 2001 also sought to incorporate the concept of plea-bargaining as suggested by previous reports.[14]Malimath Committee Report[15]stated that plea-bargaining should be introduced for speedy disposal of cases and expediting the delivery of justice. On the basis of these recommendations plea- bargaining was introduced in Indian Criminal Justice system by Criminal Law Amendment Act of 2005. (Chapter XXI A Sections 265A-265L)

Indian Judiciary on Plea-Bargaining

In India plea bargaining was never allowed by the Indian judiciary prior to 2005 amendment and has on various occasions rejected this concept de-

12 Law & Social Transformation in India, Malik & Raval, Allahabad Law Agency, 3rd edition (2012) at p.375

13 142nd report of Law Commission (1991) http://lawcommissionofindia.nic.in/101-169/Report142.pdf (accessed on 16-11-2015)

14 Retrieved from, http://lawcommissionofindia.nic.in/177rptp.pdf (accessed on 19-11-2015)

15 The committee on the reforms of the Criminal Justice System headed by Justice V.S Malimath (March 2003) Vol. 1,2003

spite the recommendations made by Law Commission of India. The earliest case in which the Apex Court dealt with the concept of plea bargaining was *Madanlal Ramachandra Daga v. State of Maharashtra*[16] wherein it was observed, that it is very wrong for a court to enter into a Bargain of this character. Offences should be tried and punished according to the guilt of accused. If the court thinks that leniency can be shown on the facts of the case it may impose a lighter sentence.

In *Muralidhar Meghraj v. State of Maharashtra*[17] the court considered the conduct of magistrate in giving lesser punishment on account of plea bargaining as highly objectionable especially in the context of socio economic offences like food adulteration involving health of the community. Justice Krishna Iyer observed, the negotiated settlement of criminal cases especially in dangerous economic crimes and food offences intrudes society`s interest by opposing society's decision expressed through pre determined legislative fixation of minimum sentence and by subtly subverting the mandate of law.

In yet another case the Apex Court observed, whenever there is an admission of guilt on the basis of plea bargaining or otherwise, the evaluation of evidence by the court is likely to become a little superficial and the court may be disposed to refer to the evidence not critically with a view to asses its credibility but mechanically as a matter of formality in support of the admission of the guilt. The entire approach of the court to the assessment of the evidence would be likely to be different when there is admission of guilt by the accused.[18]

The constitutional validity of plea bargaining came into question in *Kasambhai case*[19] in which the Apex Court observed that the procedure of plea bargaining is unfair unreasonable and unjust hence violative of the new activist dimension of Article 21 of the constitution unfolded in

16 AIR 1968 SC 1267
17 AIR 1976 SC 1929
18 *Ganeshmal Jashraj* v. *Government of Gujarat*, AIR 1980 SC 264
19 *Kasambhai Abdul Rehmanbhai Sheikh* v. *State of Gujarat,* AIR 1980 SC 854

Maneka Gandhi`s case.[20] It would have the effect of polluting the pure fount of justice, because it might induce innocent accused to plead guilty to suffer a lighter sentence rather than to go through a long and arduous criminal trial. So the conviction of the accused based on the plea of guilt entered by him as a result of plea bargaining must be considered unconstitutional and illegal.

In *State of U.P v. Chandrika*[21], the Apex Court held that it is settled law that on the basis of plea bargaining court cannot dispose of the criminal cases. The court has to decide it on the merits, if the accused pleads guilty appropriate sentence is required to be implemented. Mere acceptance of guilt should not be a ground for reduction of sentence, nor can the accused bargain with the court that as he is pleading guilty sentence be reduced.

Despite these pronouncements the concept of plea bargaining was incorporated into the legal system by Criminal Law Amendment Act of 2005. After the amendment this concept has found recognition in Indian Courts as the court, are left with no option but to interpret law and not make laws. The reason for this positive approach towards plea bargaining may be inability of courts to render justice otherwise on account of lengthy procedures compounded by insufficient number of judges to adjudicate cases. In a way it is a confession of inadequacy of the present judicial forums to cope up with increased number of litigations along with the cumbersome procedures through which all those associated have to undergo until the case gets resolved.

While upholding the sanctity of plea bargaining Gujarat High Court observed that the very objective of this law is to provide cheap and expeditious justice by resolution of disputes including, the trial of criminal cases and considering the present realistic profile of the pendency and delay in administration of law and justice, fundamental reforms are inevitable. It can thus be said that it is really a measure and redressal towards a new

20 *Maneka Gandhi* v. *U.O.I*, AIR 1978 SC 597

21 AIR 2000 SC 164

dimension in the realm of judicial reforms.[22]

Summary of the provisions pertaining to Plea- Bargaining (Chapter XXI A sections 265A-265L)

Sec.265 A lays down the applicability of Plea bargaining. This chapter is applicable to offences punishable with imprisonment of less than seven years. It excludes offences against women, socio economic offences and offences against children below fourteen years of age. Sub- section(2) confers power on the central government to determine the offences affecting socio economic conditions of the country ad notify the same for the purpose of sub section (1).

Sec.265 B permits the accused to file an application for plea bargaining in the court where case is pending. The application is to be accompanied by an affidavit sworn by the accused stating that he has voluntarily preferred plea bargain, after understanding the nature and extent of punishment provided under the law for the offence. The application can be moved by an accused who has not been previously convicted by any court for the same offence. The applicant will be examined in camera by the court to ensure that the application has been voluntarily made. If the court is satisfied that application is voluntarily made then it will ask the parties to work out mutually satisfactory disposition of the case.

Under sec.265 C the court shall provide notice to the concerned parties and also ensure that the process of working out satisfactory disposition of the case is voluntary and that both the parties participate in the process.

Under sec. 265 D the court has to prepare a report if mutual disposition of the case is worked out and such report shall be signed by the presiding officer of the court and the parties. If no satisfactory disposition is worked out the court will proceed with the case from the stage wherein application was entertained.

22 *State of Gujarat* v. *Natwar Harchanji Thakor* (2005) Cr.L.J. 2957

Under sec.265 E the court shall dispose of the case in accordance with the disposition arrived at between the parties. The court shall award compensation to the victim in accordance with the disposition. The parties are to be heard on the quantum of punishment or releasing of the accused on probation good conduct or after admonition under section 360 of CrPC 1973 or under the provisions of Probation of Offenders Act 1958. In case the minimum punishment has been provided for the offence, the accused may be sentenced to one–half of such minimum punishment. The accused shall be sentenced to one fourth of the punishment in case the offence committed is not covered under Sec.360 or Probation of Offenders Act 1958.

Judgment delivered by the court under Sec.265 F is final & no appeal shall lie against such judgment, however it can be challenged under Articles 226 and 227 of the Constitution before the High Court and article 136 of constitution before the Supreme Court by filing a Special Leave Petition (265 G)

Under sec 265 H the court shall have for the provisions of this chapter all the powers vested in respect of bail, trial of offences and other matters relating to disposal of a case.

Section 265 I provides for the period of detention undergone by the accused to be set off against the sentence of imprisonment

Section 265 J gives over riding effect to the provisions of this chapter in case there is dispute with other provisions.

Section 265 K provides that the statements or facts stated by the accused in an application of plea bargaining shall not be used for any other purpose except for the purpose of this chapter.

Section 265 L makes the chapter non applicable to a Juvenile or child under section 2(k) of Juvenile Justice Act 2000.

Criticism against Plea Bargaining

The concept of plea bargaining though effective in covering up the inadequacies of the courts in dealing with each and every case that comes before them, it also carries limitations which creates a suspicion in its

working. It has been criticized on several grounds[23]:

Involvement of victim in plea bargaining process would invite corruption Involving police in the process is subjected to criticism. India which is well known for custodial torture and pressures exerted by police, there is every possibility of innocent defendants to plead guilty to escape from police torture and harassment.

The failure to provide for an independent judicial authority for evaluating plea bargaining applications is held as a glaring error. The court`s examination of the accused in camera as opposed to in open court, may lead to public cynicism and distrust for the plea bargaining system.

If the guilty plea application of the accused is rejected then the accused would face great hardship to prove himself innocent.

By involving the court in plea bargaining process, the court's impartiality is impugned.

The plea bargaining provision may also have dramatic side effects in cases involving state officers accused of human rights abuse. For instance an Indian police officer accused of torturing a person in custody may be punished under sections 323,324 or 330 of the IPC. The punishments for these offences are within the limits of new law on plea bargaining. This means that this law may allow torturers to escape with lighter penalties, despite the fact that their offences fall in the gravest categories under international law.

Asian Human Rights Commission[24] has opined that plea bargaining will not solve the delay in India`s courts, and is instead likely to dramatically increase the number of cases where innocent find themselves imprisoned. This so called measure to speed up justice will only speed up miscarriages of justice.

Plea bargaining may lead to poor police investigation and cases may not be given enough time and proper attention and for this reason case may

23 Ms. C Harini, A Unique Remedy to Reduce Backlog in Indian Courts, Retrieved from, www.manupatrafast.com (accessed on 16-11-2015)

24 For Details See, www.ahrchk.net/statements/mainfile.php/2006staements/637 (accessed on 16-11-2015)

not be prepared well. The investigating agency may instead of discharging their functions rely upon plea bargaining.

Conceptually the idea of plea-bargaining in context of human rights abuses strikes at the root of the idea of inalienability of human rights. Right to life is an inherent and inalienable right along with all its dimensions and manifestations. It includes protection against torture inhuman and degrading treatment and right to dignity as well. If police officials accused of torture and inhuman & degrading treatment are allowed to go for plea bargaining as is possible under the existing law the provisions relating to plea bargaining open a door for alienation of inalienable rights.

Conclusions & Suggestions

The concept of plea bargaining has been introduced rather cautiously by the law makers. They have limited the applicability to large extent and also restricted its scope. The basis for its incorporation is to provide speedy disposal of cases but in the Indian context where, illiteracy and lack of awareness of human rights pose a great difficulty, the practice needs to be followed with great caution. Since it incorporates the idea of victim compensation it provides justice to the victims and security against the abuse. Instead of its multiple advantages some critics argue that it undermines the public confidence in criminal justice system. Plea bargaining is undoubtedly a disputed concept few people have welcomed it while others have abandoned it. But perhaps we have no other choice but to adopt this technique especially when more than 3 crore cases are pending throughout the country. Plea bargaining is the ray of hope to ensure speedy justice but at the same time it happens to be a double edged sword which needs to be used with proper caution to serve an effective and efficient alternative remedy and not a device to shield human rights abuses.

A time frame should be stipulated for working out a mutually satisfactory disposition of the case which is not provided under the present law.

A provision making the probation officers and jail superintendents duty bound to conduct sessions in prisons informing the under trial prisoners of such a benefits which can be availed by them should be incorporated

within the statutes.

Transparency is the basic ingredient for public confidence, so it would be proper to have the examination of the accused in the open court rather than in camera.

The involvement of police in disposition process of plea bargaining should be limited, it shall not assist either party in the satisfactory disposition process of plea bargain.

The applicability of the chapter should not be merely based on the number of years of punishment for a particular offence but it should also consider the severity of the crime.

The court after ascertaining the willingness of the victim for plea bargaining process should exclude him from disposition process as his participation may lead to corruption and bargaining over the amount of compensation. The court or public prosecutor or the counsel of the victim as the case may be should work on behalf of the victim to ensure his desires in disposition process are fulfilled.

The cases of custodial torture and killings should be excluded from the scope of plea bargaining.

Uniform Civil Code: Kashmir Perspective

Dr. Sheikh Showkat Hussain*

Abstract

Throughout its history India has been regulated by diverse personal laws. The position however assumed altogether different direction once a provision asking the state to formulate a Uniform Civil Code was included within the directive principle of state policy. There is a consistent discourse going on across India about abrogation of different personal laws and enactment of Uniform Civil Code. The situation has become alarming on account of ascendance of those forces to power which support Uniform Civil Code. The article is an attempt to explore the position and status of Muslim law in Jammu & Kashmir and ascertainment of the fact as to what extent enactment of Uniform Civil Code in India will have impact upon J&K in view of its special constitutional position.

Key words: Shariat, Qazi, Mufti, Mir-Adil, Khulafa-i-Rashideen, Kubarawi silsila, Qadri silsila

Uniform Civil Code: An Overview

Article 44 of the Indian constitution states that the "state shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India". Under this Article Indian State is under an obligation to pursue for enforcement of a Uniform Civil Code throughout India. Being placed in part IV of the constitution, this provision can't be enforced by courts

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on their own[1]. The Article was incorporated into the constitution of India despite the fact that Indian National Congress had been continuously promising protection of personal laws prior to Indian independence[2]. Muslim members of the Constituent Assembly opposed induction of this Article into the Constitution. Ismail Saheb, Muslim League member of the Assembly even suggested an amendment making "right of any citizen to follow personal law of the group or community to which he belongs or professes to belong "immune from regulating powers granted to state under clause (2) of Article 25. This point of view could not find receptiveness among framers of the constitution simply because the voice of Muslim members had lost its effectiveness on account of depletion of their numbers as a result of partition of India. Most of the Muslim members had migrated to Pakistan and those left behind became target of ridicule and hate within and outside the Assembly[3]. It was made clear to them that different personal laws are tolerated as a matter of expediency and can't be perpetuated. Supreme Court of India too relying on *Reynold v. United States*[4] made it clear in *State of Bombay v. Narsu Appa Mali*[5] and *Srinivasa Aiyar V. Saraswathi Ammal*[6] cases that personal laws can't be beyond legislative powers of the state. An important step towards formulation of a Uniform Civil Code was taken through enactment of Special Marriage Act, 1954 and Indian Succession Act. Both these legislations remain optional for individuals while different personal laws continue to operate. Supreme Court however has been continuously persuading central government to initiate the process of enacting the code. Chief Justice of India YV. Chandrachud said in the *Shah Bano v. Mohammad Ahmad Khan*[7] (maintenance) case in 1985 that "A common civil code will help the cause of national integration by removing disparate loyalties to law having con-

1 Art.37
2 Karachi Resolution, Encyclopaedia of Indian National Congress P.196.
3 CAD,Vol,VII,540-543
4 98 U.S .145 (1878)
5 AIR 1952 Bom. 84
6 AIR 1952 Mad. 193
7 1985 AIR 945

flicting ideologies," Justice Kuldip Singh observed in *Sarla Mudgal case*[8] "It appears that…the rulers of the day are not in a mood to retrieve Article 44 from the cold storage where it is lying since 1949," The mere presence of Article 44 and observations of the Supreme Court persuading the Union of India to undertake legislative measures for making this Article a reality have created a sense of insecurity among Muslims about future of their personal laws. The problem has been further compounded through the propaganda launched by Hindu extremist groups against diverse personal laws. The law is portrayed as an instrument of increasing Muslim population by allowing Muslims to go for polygamy. The propaganda is unfounded as number of non-Muslims going for polygamy remains more than Muslims. Furthermore the possibility of procreation of more children remains remote in view of the fact that there is less number of females as compared to males in every community of India irrespective of religion. There is Possibility of females producing more children in case they get married to different males as compared to a scenario where four of them are married to a single male.

Muslims organised themselves under the banner of Muslim Personal Law Board and blocked attempts of the state to create a compulsory Uniform Civil Code. Their position remains that India, being a secular country guarantees its minorities the right to follow their own religion, culture and customs under Article 29 and implementation of a Uniform Civil Code will violate these rights.

On account of its special position and status Jammu & Kashmir has remained immune to this phenomenon. On the contrary Muslim law in the state of Jammu and Kashmir continued to flourish and was relieved of un-Islamic customs as a result of legislative enactments in recent past.

Historical Background of Muslim Law in Jammu & Kashmir

The application of Muslim Law in Jammu and Kashmir started with advent of Islam in Kashmir valley. Though Muslims had been coming to val-

8 1995 AIR 1531

ley from the times of the *khulafa-i-rashidien* as travellers, as traders and as preachers their presence however, was felt late as compared to other parts of the sub-continent. There were several reasons for it, main being their insignificant number. Those outside Muslims who succeeded in surmounting the hardship of reach the valley on account of inaccessibility of its terrain and in-hospitability of routes and reached here were very small in number. These routes too remained closed for eight to nine months of the year because of snow.

The presence of Islam was however felt in Kashmir valley on conversion of Ranchan, a Buddhist ruler at the hands of Hanafi Saint, Sharafud-din Bulbul Shah (R.A)[9]. The conversion of the ruler to Islam triggered a massive wave of religio-cultural transformation which resulted in acceptance of Islam by over-whelming majority of the Kashmiri population. The process reached to its climax on coming of Syed Ali Hamadani Iran (R.A) to Kashmir. Syed Ali Hamadani (R.A) had a profound impact upon socio-economic life of the region. A saint, a scholar, an architect and an industrialist belonged to *Kubrawi Silsila* of *Tasawuf* and was an adherent of *Shafi* School of Islamic jurisprudence. On finding that his predecessors who brought Islam to Kashmir were *Hanafis*, he did not divulge his identity as an adherent of the Shafi School nor did he propagate jurisprudential concepts associated with this school lest the newly converted population gets confused and reverts back to its previous faith.

Islam to Syed Ali Hamadani was a complete code of life which had to prevail as statecraft and as a social order. He wrote several books the most prominent among these is *Zakhirat-ul-Malook*, a book on Islamic Polity which was supposed to be the guide for Muslim sultans in governance of the political and legal system. This treatise is the first classical book on Islamic state-craft written within the sub-continent. The book remained primary guide for administration and adjudication during Sultanate period of Kashmir along with other books on Fiqh Proper e.g Hidayah. Sultan

9 *Tarikh-e-Hassan (Tarik Aulia-e-Kashmir), Sheikh Mohammad Usman and Sons Srinagar , pp 31-32.*

Sikandar played a vital role in enforcement of Shariat and eradication of pre-Islamic practices[10].

Application of Muslim Law in Kashmir during Sultanate & Mughal Period

Judicial system during sultanate period comprised of three segments namely *Qadha, Mir adel* and *Iftah. Qazi* was the ultimate authority of adjudication of *shariat* over Muslims. Petty issues not covered by *Hudood* Laws were taken care of by *Mir Adel* who also remained authority to decide on matters pertaining to non-Muslims if they approached him[11]. The third institution, *iftah* a unique feature of Islamic system also got firmly established during the period of Sultans. Muftis are not supposed to be judges but the jurist consults from whom people are supposed to seek guidance on various issues covered by *shariat* and settle these issues on their own in light of the juristic opinion pronounced by *Mufti*. This is the Islamic mode of alternate dispute resolution which has been and continues to be in operation among Muslims across the world up to this day. Execution of Judgement of a *Qazi* remained job of the state which made it sure that the judgements are enforced. The opinion expressed by a Mufti didn't have coercive power of the state at its disposal for the purpose of enforcement. *Qazis* used to be powerful and invoked a lot of respect from the people. This gave rise to a tussle between *chief Qazi* Musa and Noor Bakshi rulers that created a lot of hostility between Chak dynasty and Sunni majority of the valley. This hostility culminated in execution of *Qazi* Musa by ruthless Chak ruler. Kashmiris rebelled against the dynasty under the leadership of Sheikh Mukhdoom Hamza and Sheikh Yaqoob Sarfi and invited Akbar to invade Kashmir in 1586?[12]. During Mughal era the system created during the sultanate period continued and flourished.

10 G.M.D Sufi, *Kashir* Capital Publishing House Daryaganj New Delhi 1996, pp 66.
11 Hasan Mohibul, Kashmir Under Sultans, Ali Mohammad and Sons, Srinagar (2nd addition reprint 2005)
12 Deedh mari, *Waqiyati Kashmir, Ali Mohammad and sons publications, pp 203-204* .

Apart from Hidaya, Futwa-i-Alamgiri also started to be used by judges and muftis. The end of Mughal rule led to a chaotic condition. Kashmir became a battle ground for influence between decadent Mughal rule and emerging Durani dynasty of Afghanistan. The local Hindu officials associated with Mughal administration took advantage of this situation and one Sukh Jiwan Mal took over reins of power and created a huge problem for the institution associated with Muslim rule[13]. Muslims again tried to reverse this situation by inviting Durani rulers of Afghanistan to rescue them(1753). Afghan rule did not remain stable because of frequent change of governors and rebellious tendencies among these governors towards their kings at Kabul. In absence of any supervision, these governors administered Kashmir in whimsical and autocratic ways. Afghan presence had impact upon social life of Kashmir in so many ways both positively and negatively. In the domain of *Tasawuf* it led to revival *of Reshi silsila* and propagation of *Qadri Silsila*. In pursuit of social reform Afghans established the institution of Mirwaiz but unlike Mughals and Sultans they failed to establish a systematic adjudicating and administrative set up.

Muslim law in the Modern Era

Post Afghan era Kashmir was ruled by Sikhs (1819-1846) and Dogras (1846-1947). During both these periods Kashmir experienced a complete decline of Islamic adjudicating system. The *Qazis and Muftis* remained there but lack of support from administration made these institutions weak and ineffective. *Shariat* was practiced but it was often over shadowed by customs which varied from one place to another, from one segment of population to another. It was during the reign of Maharaja Pratap Singh that an effort to consolidate laws and customs was undertaken under the influence of British India. In 1872 Sri Pratap Laws Consolidation Regulation was formally proclaimed[14]. This regulation endorsed applicability of Muslim law over Muslims in personal affairs pertaining to marriage, dower, divorce, adoption, inheritance, wakf,

13 Fouq, *Tarik-i-kashmir, Chinar Publishing House, pp 630-635*

14 Justice Hakim Imtiyaz, Muslim laws and customs, Srinagar Law Journal Publications, pp 50.

wills etc. The *Shariat* however could only be applied in absence of custom. Sri Pratap laws Consolidation Regulation was formally given the shape of an Act in 1920[15]. It is obvious that Judges could have recourse to Shariat only in absence of the custom on a particular point of law. The customs were vague, diverse and often in conflict with *Shariat*. Apart from *Dukhtari khananasheen* women could not inherit from their ancestral property. Same way adoption though in conflict with Muslim Law was also recognised as a custom. Similar chaotic condition was rectified in British India to some extent by Shariat Act of 1937. Autocratic rulers of Kashmir were not receptive to a similar legislation in Kashmir. Another legislation, Dissolution of Muslim Marriages Act of 1940 however led to enactment of a similar legislation in Jammu & Kashmir in 1942. Focus of post partition legislations in the state remained socio-economic transformation and empowerment of politically sensitive population. Jammu and Kashmir High Court taking note of this situation asked the state to rectify this situation through legislation in *Mohammad Akbar Bhat v. Mohamad Akhoon*[16] and *Yaqoob Laway v. Gulla*[17] Personal laws however never remained a priority of rulers. It was the Government of Ghulam Nabi Azad which addressed this issue and came up with Jammu and Kashmir Shariat Act, 2007[18]. This legislation gave precedence to *Shariat* over custom thus abrogating legitimacy of so many un-Islamic practices within Muslim personal laws. The biggest beneficiary of the legislation remained women who now became inheritors of property in accordance with the shares allocated to them by *shariat*. This is an improvement over Muslim Law as it prevails in India. Muslim Personal Law Shariat Application Act, 1937 does not apply to agricultural lands, Charities & Charitable institutions other than wakfs. This is a position similar to states of Kerala & Andhra Pradesh which have extended applicability of Shariat to agricultural lands as well. Islamic Fiqh now remains law of the land for Muslims pertaining to matters mentioned within the Act.

15 Justice Hakim Imtiyaz, ibid, pp 647-648.
16 1971 JKLR 537, AIR, 1972 J&K 105
17 2004(II)SLJ (761)
18 Shariat Act, 2007

Legislative Powers of Indian Parliament pertaining to Muslim Law in Jammu and Kashmir

The partition of the subcontinent converted Kashmir into a battle ground between newly created dominions of India & Pakistan. Maharaja Hari Singh who had refused to nominate any member to the Indian Constituent Assembly and was reluctant to join either of the new dominions was finally compelled to join India under duress. He however, made it clear in his "*Instrument of Accession that: "Nothing in this instrument shall be deemed to commit me in any way to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangements with government of India under any such future constitution."* [19]

By refusing to nominate members to the Constituent Assembly of India and having made it clear that the instrument of accession is not a license for extending Indian Constitution to Jammu and Kashmir Maharaja Hari Singh created a handicap for the Indian Union in context of applicability of its constitution and laws to the state. The leadership which succeeded the Maharaja managed nomination of Sheikh Mohamad Abdullah, Maulana Masoodi, Mirza Afzal Beigh and Motiram Baigra to the Constituent Assembly of India. Once nominations to the Assembly were made from the state the position taken by the Maharaja got diluted and New Delhi used this opportunity for creation of a corridor for extension of the Indian constitutional provisions to the state in the form of Article 370.

Article 370 provides that the relation of Jammu and Kashmir State with the Union of India was not to be regulated by Article 238. Article 238 pertained to Part B states i.e. the princely states which had acceded to India. Jammu and Kashmir was thus placed on a different position than any other princely state. Since the princely states have been assimilated within the Union, Article 238 has been abrogated now. Article 370 further provides that the lawmaking authority of the Union will remain confined to only those matters which are mentioned within the "Instrument of Accession" and those matters within the Union List and the Concurrent

19 Instrument of Accession of Jammu and Kashmir with India (Clause 7)

List which are designated as the matters specified as matters within the Instrument of Accession through presidential orders and other matters which he may specify through these orders with the concurrence of the government of the state''.

The government of the state for the purpose of this Article has been specified within the explanations of the Article itself. The explanation reads that *'' Government of the state means the person ....recognised by the president as the Maharaja acting on the advice of the Council of Ministers. Concurrence of the government of the state referred to in Paragraph (ii) of Sub-clause (1) or in the second proviso to Sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing that Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.*

It is obvious that the Indian constitution applies to the state of Jammu & Kashmir in a limited way as the state has its own constitution. Directive Principles of State Policy in the Indian Constitution do not apply to Jammu and Kashmir. There is a provision pertaining to Uniform Civil Code within directive principles of the state policy provided under Part IV of the Indian constitution (Article 44). Indian Union has been put under an obligation through this provision to pursue for enactment of a Uniform Civil Code. In order to enable centre and the states to legislate on affairs pertaining to personal laws the subject has been kept within list 3 (concurrent list of 7th schedule [entry 5]). Because of Article 44 of the Indian constitution Muslims of India always remain apprehensive about future of Muslim Personal law. Muslims of India have been consistently opposing Uniform Civil Code as they perceive it to be a betrayal of the promises made to them during the freedom struggle by Indian national leaders and also an encroachment of their identity and religious freedom guaranteed under the Art. 25 and Art. 29 of the Indian Constitution.

Conclusion

Constitutional position of Jammu and Kashmir is different as compared to rest of the Indian States. Part fourth of Indian Constitution along with Art. 44 do not apply to the state of Jammu and Kashmir. The state

of Jammu and Kashmir has its own set of directive principles provided within its constitution. They are at variance with the directive principles provided within part fourth of Indian constitution. There is no mention of the Uniform Civil Code within the directive principles provided under the state constitution. Indian state is thus under no obligation to enact a Uniform Civil Code for Jammu and Kashmir the way it is in relation to other states. Even if it wishes to enact such a code for Jammu and Kashmir it does not have legislative competence to do the same. Personal laws have been listed within concurrent list (list 3rd of 7th schedule). Most of the entries within this schedule do not apply to Jammu and Kashmir. If Indian parliament enacts a Uniform Civil Code the code cannot apply to state of Jammu and Kashmir on its own. Like other legislations it has to seek endorsement from the state before its applicability within Jammu and Kashmir. Art.370 thus remains the biggest shield against any encroachments within the personal laws of Jammu and Kashmir. Struggle for the preservation of Muslim personal law assumes an altogether different meaning within Jammu & Kashmir. It is preservation of special status of Jammu and Kashmir and not the personal law in itself which remains concern of people of Jammu and Kashmir. It is probably because of this reason that the Muslim Personal Law Board and other such bodies for ensuring the continuity of Muslim Personal Law within India do not find receptiveness in Jammu and Kashmir as compared to those forums which aspire for maintenance of the separate identity of the state.

Judicial Review of Parliamentary Privileges in India

Farah Deeba*

Abstract

The bone of contention between the Legislature and the Courts is often whether Parliamentary Privileges are immune from judicial scrutiny or not and in many cases it has raised issues of great constitutional importance. The role of the present article is to examine the role of the Indian courts in Privilege matters.

Key Words: Parliamentary Privileges, Judicial Review, Role of Courts in India.

Introduction:

Indian history of Parliamentary Privileges starts mainly from the British period. The Government of India Act[1], for the first time provided a qualified privilege of freedom of speech to the House of Legislatures. In addition to freedom of speech, immunity from liability for publication of any matter in the official proceedings was also granted under the Government of India Act, 1919. By an Amendment in the Civil Procedure Code in 1925, members of legislature were exempted from arrest or de-

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1 Government of India Act, 1919

tention under civil process during meetings of the legislature or of any of its committees for 14 days before and after such meeting. By a similar, amendment in the Criminal Procedure Code, members were exempted from serving as jurors or assessors[2]'

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

1. *Subject to the provisions of the Act and to the rules and standing orders regulating the procedure of the Federal Legislature/there shall be freedom of speech in the legislature and no member of the legislature shall be liable to any proceeding to any court in respect of anything said or any vote given by him in the legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either chamber of legislature of any report, paper, votes or proceedings.*
2. *In other respects, the privileges of members of the chambers shall be such as may from time to time be defined by Act of the Federal Legislature and until so defined, shall be such as were immediately before the establishment of federalism enjoyed by members of the Indian Legislature.*
3. *The provisions of the sub-sections (1) & (2) of this Section shall apply in relation to persons who by virtue of this act have the right to speak in and otherwise take part in the proceedings of the chamber as they apply in relation to members of the legislature.*

On the coming into force of the Indian Independence Act 1947 orders were passed by the Governor General in the exercise of powers conferred on him by clause 1 (c) of section 9 of the Act of 1947 to amend the Govt. of India Act 1935. First of all, Act of 1947 declared clauses (3) & (4) of section 28 to make equal the immunities of the members of the House of

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

Indian Legislature with those of the members of the House of Commons of United Kingdom; though the full powers and privileges of the House of Commons as a body, were not vested in the legislature as a body, which had placed fetters on the law making powers of the central legislature of its privileges[3]

When India became free and the new constitution commenced, these privileges were expressly conferred on the union legislature under article 105 and on state legislatures under article 194 of the constitution of India.

Article 105 reads as:

1. *Subject to the provisions of this constitution and to the rules and standing orders regulating the procedure of parliament, there shall be freedom of speech in parliament.*
2. *No member of parliament, shall be liable to any proceedings in any court in respect of anything said or any vote given by him in parliament or any committee thereof and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament, of any report, paper, votes or proceedings.*
3. *In other respects, the power, privileges and immunities of each House of Parliament and members of the committee of each House shall be such as may be from time to time be defined by parliament by law, and until so defined shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the constitution (44th Amendment) Act, 1978.*[4]
4. *The provisions of clause (1), (2) and (3) shall apply in relation to persons who by virtue of this constitution have the right to speak and otherwise take part in the proceedings of a House of Parliament or any committee thereof as they apply in relation to members of parliament.*

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

4 Amended by 44th Amendment Act, 1978.

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

Clause (1) and (2) of Article 105 relate to the freedom of speech and expression of members of parliament and the right of publication of parliamentary proceedings. With regard to other matters there is no specific provisions in the Article but it is provided that provision may be made by law by parliament and until then the privileges shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the constitution (44th Amendment) Act, 1978.

Role of Indian Courts in Matters Involving Parliamentary Privileges:

Parliament has not passed any law defining its privileges, and the constitution specifically grants only a few privileges. Therefore, the main the question, which arises, is whether the privilege claimed by the House is one, which was enjoyed by the House of Commons on January 26, 1950. The matter was put in the right perspective by the Supreme Court in *Search Light case I*[5], on the one hand, the court decided the general question whether a breach of privilege occurs when a newspaper prints a report on a member's speech including the portions ordered to be expunged by the Speaker. The court answered the question in the affirmative. But, on the other hand, when the question arose whether the expunged portion had been printed by the newspaper or not, the court refused to express any opinion on this controversy saying that "*it must be left to the House itself to determine whether there has, in fact been any breach of its privilege*".

Subsequently, in the *Keshav Singh case*[6], the U.P. Legislative Assembly claimed an absolute power to commit a person for its contempt and a general warrant

5 M.S.M. Sharma v. Sinha (I); AIR 1959 SC 395.
6 AIR 1965 SC 745

issued by it to be conclusive and free from judicial scrutiny.

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

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

The judges moved petition under Article 226 in the High Court asserting that the resolution of the House was unconstitutional and violated the provisions of Article 211[7] and in ordering release of Keshav Singh on the habeas corpus petition, the judges were exercising their jurisdiction and authority vested in them as judges of the High Court under Article 226.

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7 **Article 211: Restriction on Discussion in the Legislature:**
No discussion shall take place in the legislature of a state with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his Duties-

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

A full bench consisting of all the 28 judges of the High Court ordered stay of the implementation of the resolution of the House till the disposal of the said petition.

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

At this stage, the president of India referred the matter to the Supreme Court for its advisory opinion under Article 143[8]. By a Majority of 6 to 1, the court held that the two judges had not committed contempt of the legislature by issuing the bail order. The judges had jurisdiction and competence to entertain Keshav Singh's petition and to pass the orders as they did. The Assembly was not competent to direct the custody and production before itself of the advocate and the judges. The Keynote of the court's opinion is the advocacy of harmonious functioning of the three wings of the democratic state, viz., legislature, executive and the Judiciary. The Court emphasized that these three organs must function "*neither in antinomy nor in a spirit of hostility, but rationally and harmoniously*". Only a harmonious working of the three constituents of the democratic

8 **Article 143: Power of President to Consult Supreme Court-**

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

state will help the peaceful development, growth and stabilization of the democratic way of life in this country. The existence of a fearless and independent judiciary being the basic foundation of the constitutional structure in India, no legislature has power to take action under Article 194(3) or 105(3) against a judge for its contempt alleged to have been committed by the judge in the discharge of his duties[9].

Further the court also held that the right of the citizens to move the judicature and the right of the advocates to assist that must remain uncontrolled by Article 105(3) or Article 194(3). It is necessary to do so for enforcing the fundamental rights and for sustaining the rule of law in the country. Therefore, a House could not pass a resolution for committing a high court for contempt[10].

Further the court rejected the contention of the Assembly that it had absolute power to commit a person for its contempt and a general warrant issued by it would be conclusive and free from judicial scrutiny. The court declared that the House of Commons enjoyed the privilege to commit a person for contempt by a non-justifiable general warrant, as a superior court of record in the land and not as a legislature. Therefore, parliament and the state legislatures in India, which have never been courts, cannot claim such a privilege[11].

It is submitted that even if the House of commons has this privilege as a legislative organ, parliament and the state legislatures in India cannot still claim it because of the existence of the fundamental rights and the doctrine of judicial review, particularly, Article 32[12]; which not only em-

9 AIR 1965 SC. 746.

10 Ibid at 746.

11 Ibid at page 748.

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

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

powers the supreme court but imposes a duty on it to enforce fundamental rights, and Article 226 which empowers the High Court to enforce these rights. Thus, a court can examine an un-speaking warrant of the House to ascertain whether contempt had in fact been committed. The legislative order punishing a person for its contempt is not conclusive. The court can go into it[13].

The *Keshav Singh*[14] case represents the high-water mark of legislative - judiciary conflict in a privilege matter in India. The relationship between the two institutions was brought to a very critical point. However, the Supreme Court's opinion in Keshav Singh seeks to achieve two objectives -

> ***First*** *and foremost it seeks to maintain judicial integrity and independence, for if a House were to claim a right to question the conduct of a judge, then judicial independence would be seriously compromised; the constitutional provisions safeguarding judicial independence largely diluted and the rule of law neutralized. The constitution has sought to preserve the integrity of the judiciary, and by no stretch of imagination could this be compromised in any way. The Supreme Court has sought to promote this value through the Keshav Singh pronouncement.*
>
> ***Secondly,*** *the court, seeks to concede to the House quite a large power to commit for its contempt or breach of its privileges for, even though the judiciary can scrutinize legislative committal for its contempt, in actual practice, this would not amount to much as the courts could interfere with the legisla-*

3. Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
4. The right guaranteed by this Article shall not be suspended except as otherwise provided for by this constitution.

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

14 Supra n 6

tive order only in very extreme situations[15].

As the law relating to legislative privileges stands today, a House has power to decide whether or not its contempt has been committed; courts would not interfere with its internal working, or when it imposes a punishment short of imprisonment; in case of imprisonment, courts would interfere only in case of malafides or perversity on the whole, powers of the House are so broad as to even enable it to enforce its own views regarding its privileges. The courts have exhibited an extreme reluctance to interfere with the proceedings of a House in privilege issues. The review power claimed by the Supreme Court in *Keshav Singh* is extremely restrictive and it would be extremely difficult in practice to get much of a relief from the courts in case of committal by a House for its contempt[16].

In the Keshav Singh case, the Allahabad High Court Considering the petition on merits, after the Supreme Court's opinion threw it out and refused to interfere with the judgment of the House. The High Court rejected the arguments that the fact found by the Assembly against the petitioner did not amount to contempt of the Assembly. The Court refused to go into the question of the "Correctness, propriety or legality of the commitment." The court observed:

> *"This court cannot, in a petition under Article 226 of the constitution, sit in appeal over the decision of the legislative assembly committing the petitioner, for its contempt. The legislative Assembly is the master of its own procedure and is the sole judge of the question whether its contempt has been committed or not."*[17]

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

15 Ibid at p. 106-107

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

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

Judicial Decisions in Various Cases on Privilege Matters in India:
Lets us examine the judicial decisions involving various situations in which the claim of protection under the Parliamentary Privileges was in issue before the Courts in India.

A) Preventive Detention:
The privileges of freedom from arrest is limited to civil causes and has not been allowed to interfere in the administration of criminal justice. The preventive detention partakes more of a criminal than of a civil character. The Preventive Detention Act only allows persons to be detained who are dangerous or are likely to be dangerous to the State. It is difficult to contend that an order of preventive detention is of a civil character. They are orders made when persons are suspected of serious criminal activities directed at the welfare of the state and of the community. It is true that such orders are made when criminal charges possibly could not be established, but the basis of the orders are a suspicion of nefarious and criminal or treasonable activities. Such a reasoning was espoused in cases viz; *Pillalamarri Venkateshwarht*[18]; *Ansumali Mazumdar and Other v. The State of West Bengal and Others*[19]; *K Ananda Nambiar v. Chief Secretary to Government of Madras*[20]*; In Ansumali Majumdar v. State of west Bengal*[21].

B) Members Right To Attend The Session Of The House While Under Arrest Or Detention:
The issue was whether a member of a Legislative Assembly arrested and detained under due process of law can have a privilege to attend session of the Assembly arose in the case titled *Kunjan Nadar v. The State of Travancore-Cochin*[22]. There is no statutory provision granting the privilege or immunity invoked by the petitioner and it is clear from May's Parliamen-

18 AIR 1951 Madras 269.
19 AIR 1952, Calcutta 632.
20 AIR 1966 SC 657.
21 AIR 1952 Cal. 632 SB.
22 AIR 1955, Travancore-Cochin 154

tary Practice[23] that the privilege of freedom from arrest is not claimed in respect of criminal offences or statutory detention and that the said freedom is limited to Civil causes, and has not been allowed to interfere with the administration of criminal Justice or emergency legislation.

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

In the case titled *Homi D. Mistry v. Nafisul Hasan, Speaker Uttar Pradesh legislative Assembly*[24]. In this case Blitz, a weekly news-magazine of Bombay, publish in its issue dated the 29th September, 1951, a news item under the caption: "*Speaker vetoes discussion on Biltz in Assembly*".

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

In pursuance of the said warrant, Shri Mistry was arrested in Bombay on the 11th March, 1952, taken to Lucknow and kept in custody till he was released on the 18th March, 1952 in pursuance of the judgment of the Supreme Court delivered on the same date on a habeas corpus petition filed in this behalf on the ground that Shri Mistry was not produced before a Magistrate within 24 hours of his arrest contravened the provisions of Article 22(2) of the Constitution and therefore Shri Mistry was entitled to his release.[25]

Immediately after his release another notice, was served on Shri Mistry, in which the Speaker required him to present himself at the Bar of the

23 (Fifteenth Edition, 1950) p. 78.
24 ILR 1957 Bombay 218
25 See Supreme Court Judgment dated. 18-3-52 in G.K Reddy v. Nafis ul Hasan and the State of Uttar Pradesh.

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

Subsequently, in 1952 Shri Mistry filed a civil suit in the Bombay High Court against Shri Nafisul Hasan, the then Speaker of Uttar Pradesh Vidhan Sabha, the State of U.P., the Commissioner of Police for the Greater Bombay area who aided in the arrest and detention of the plaintiff and, the State of Bombay, claiming damages for wrongful arrest and detention. The acting Chief Justice Coyajee of the Bombay High Court, in his judgment delivered on the 15th November 1956, dismissed the suit and decided that the immunity is an absolute one and officers are protected even if the warrant is wrongly executed by others.[26]"

D. Power of Courts to Issue writs on Legislatures -

The question whether a court of law has the power to issue a writ against a legislative body preventing it from passing a legislation was in issue in *Hem Chandra Sengupta & Others v. Speaker, Legislative Assembly of West Bengal and others*[27].

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

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

The High Court of Calcutta in their judgment delivered on 17th April 1956 *inter alia* held that in such matters and within their allotted spheres,

26 ILR, 1957, Bombay 219.
27 AIR 1956 Calcutta 378.

they are supreme and cannot be called into account by the Courts of the land. The court cannot at this stage be called upon to interfere as no law has been passed and not even a Bill has been initiated.

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

The question whether a court of law can take cognizance of a complaint against the Speaker of a Legislative Assembly on the ground that action taken by him under Rules of Procedure and Conduct of Business of the Legislative Assembly was discriminatory and violative of Fundamental Rights was in issue in the case *R. Sudarsana Babu v. Sate of Kerala and others*[28].

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

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

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

> *"I am not disturbed by the forebodings of a possible confrontation between the court and the legislature, the confrontation if any) is between Babu and the legislature, the former asserting some constitutional rights and the latter declining to recognize the same. Under our federal scheme, it is the duty of the court to police the*

28 ILR (Kerala) 1983, 661.

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

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

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

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

Thereafter, Shri Tej Kiran Jain and others who claimed to be admires of Shankaracharya filed a suit titled *Tej Kiran Jain and Others v. N. Sanjiva Reddy and others*[29] in the High Court of Delhi for recovery of Rs. 26,000 as damages against Shri N. Sanjiva Reddy[30], Speaker, Fourth Lok Sabha, Shri Narendra Kumar Salve, Shri B. Shanfaranand, Shri S.M. Banerjee and Shri

29 AIR 1970 SC, 1573.
30 He reigned from the office of the Speaker on 19-7-1969.

Y.B. Chavhan, members, it was alleged by the plaintiffs that during the course of the discussion on the calling attention motion certain remarks were made by the defendants which were defamatory and calculated to lower the dignity of the Shankaracharya.

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

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

G. Criminal Abuse of Constitutional Privileges

The question of criminal abuse of the legislative privileges was in issue in the case titled *P.V. N. Narsimma Rao Vs State (Popularly Known as JMM Bribery Case)*[31]. In 1991 election to the Lok Sabha, Congress (I) Party re-

31 1998 4 SCC 626.

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

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

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

The decision of the majority, it is submitted with respect, is in serious discord with the letter, the ideals, and aspirations of the Constitution

while the minority opinion is in harmony with them. The decision in the JMM bribery case, it is submitted in all humility, required immediate correction by a competent Bench of the Hon'ble Supreme Court. Fortunately, the legal position was reversed in a subsequent decision in *Raja Rampal Vs Hon'ble Speaker Lok Sabha and Ors (Popularly called CASH FOR QUERY CASE)*.[32]

In *Raja Rampal Vs Hon'ble Speaker Lok Sabha and Ors (CASH FOR QUERY CASE)*[33] a private channel had telecast a programme on 12-12-2005 based on sting operations conducted by it depicting 10 MPs of the House of People (Lok Sabha and one of the Council of States (Rajya Sabha) accepting money, directly or through middlemen, as consideration for raising certain questions in the house or for otherwise espousing certain causes for those offering the lucre. Another private channel telecast a program on 19-12-2005 alleging improper conduct of another MP of Rajya Sabha in relation to the implementation of the Member of Parliament Local Area Development Scheme ("MPLAD Scheme"). This incident was also referred to a committee.

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

It was the contention of the petitioners, *inter alia*, that the impugned action on the part of each House of Parliament expelling them from

32 Raja Rampal Vs Hon'ble Speaker Lok Sabha and Ors (2007) 3 SCC 184.
33 Ibid.

the membership suffered from the vice of *mala fides* as the decision had already been taken to expel them even before examination of the evidence. In this context they referred, *inter alia*, to the declaration on the part of the Hon'ble Speaker, Lok Sabha on the floor of the House on 12-12-2005 that "nobody would be spared". The contention was that the inquiries were a sham and the matter was approached with a predetermined disposition, against all the basic canons of fair play and natural justice.

The questions that arose before the Supreme Court were:

1. *Does the Supreme Court, within the constitutional scheme, have the jurisdiction to decide the content and scope of powers, privileges and immunities of the legislatures and its Members?*
2. *If the first question is answered in the affirmative, can it be found that the powers and privileges of the legislatures in India, in particular with reference to Article 105, include the power of expulsion of its Members?*
3. *In the event of such power of expulsion being found, does the Supreme Court have the jurisdiction to interfere in the exercise of the said power or privilege conferred on Parliament and its Members or committees and, if so, is this jurisdiction circumscribed by certain limits? In other words if the power of expulsion exists, is it subject to Judicial Review and if so, the scope of such Judicial Review.*

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

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

Conclusion:

Therefore to conclude, we may say that whenever a question arises whether a particular Parliamentary Privilege exists or not, it is for the courts to give a definitive answer by finding out whether the House of Commons

had enjoyed the same on January 26th, 1950. But when the question arises whether a recognized and established Privilege of the House has been breached or not, it is for the house to decide the question. The Courts do not interfere with such decision of the House except in the rare case of *malafides* etc.

Conceptual Perspective of Reservation And Its Impact On Unaided Educational Institutions.

Nosheen Ismail*

Abstract

The paper is entitled "Conceptual perspective of reservation and its impact on unaided educational institutions." It explains the meaning of words "Reservation" and "Affirmative Action". It tries to analyse various rulings of Supreme Court regarding reservation in unaided educational institutions. An attempt is made to prove that reservation is no doubt good, as far as it is a method of appropriate positive discrimination for the benefit of the downtrodden and economically backward sections of the society but when it tends to harm the society and ensures privileges for some at the cost of others, it should be done away with as soon as possible. It is proposed that less rigorous reservations should be imposed on unaided educational institutions.

Key words

Reservation, Equality, Justice, Affirmative action, Class inequality, Positive discrimination.

Introduction

Reservation of seats in educational institutions is a means to increase representation of hitherto under-represented caste groups and thereby improve diversity on campus. Seats in educational institutions and jobs are reserved based on a variety of criteria. The quota system sets aside a proportion of all possible positions for members of a specific group.

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Those not belonging to the designated communities can compete only for the remaining positions, while members of the designated communities can compete for all positions (reserved and open). For example, when 2 out of 10 clerical positions in railways are reserved for ex-servicemen, those who have served in the Army can compete both in the General Category as well as in the specific quota.

From the earliest times to which the idea of justice can be traced equality has been at its centre. Injustice, according to Aristotle, arises when equals are treated unequally and also when unequals are treated equally. Professor Hart calls this precept as 'a central element in the idea of justice'[1]. But this precept to "treat like cases alike and different cases differently" is yet incomplete as it lays down no standard for determining the likeness or differences and therefore, any characteristics of indivisuals may be picked up to differentiate between them. In view of the experience in the past as to how men have been differentiated arbitrarily for different characteristics, it has been recognised that the characteristic or criterion for differentiating must be relevant to the object or the goods to be distributed and that no characteristics beyond one's control, such as race, caste, colour, sex, etc., can be relevant criteria for differentiating between indivisuals.

Analysing Rawls theory of justice Dworkin reaches the conclusion that "justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice.[2]He goes on to say: "Rawls most basic assumption is not that men have a right to certain liberties that Locke or Mill thought important, but that they have a

1 H.L.A Hart, *The concept of law*,155(1961). He says: justice is traditionally thought of as maintaining or resorting a balance or proportion, and its leading precept is often formulated as "treat like cases alike", though we need to add to the later, 'and treat different cases differently'. And further" treat like cases alike and different cases differently is central element in the idea of justice".

2 R Dworkin, Taking Rights Seriously, p 182(1977)

right to equal respect and concern in the design of political institutions."[3] Thus according to Dworkin, "right to equal concern and respect" is most fundamental of all rights. This right according to Rawls "is owed to human beings as moral persons, and flows from the moral personality that distinguishes humans from animals.[4] Thus human beings already possessed this right when they agreed on the two principles enunciated by Rawls. This right is more abstract than the standard conceptions of equality that distinguish different political theories. It permits arguments that this more basic right requires one or another of these conceptions as a derivative right or goal.

Any arrangement for the allocation of social positions and goods should thus 1`proceed on the basic assumption that everyone has a right to equal concern and respect. Any arrangement that pays unequal respect or shows unequal concern towards any one, violates this basic right of all. Reservation is not specific to India but exists in various systems of the world. In U.S theoritical justification for reservation was elaborated by John Rawls in his book "A Theory of Justice".

John Rawls and a Liberal Distributive Theory of Justice

Upon the basis of his argument from the position of rationally self interested actors in the original position Rawls sets out two principles of justice[5].

The first is that:

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

The second is that:

Social and economic inequalities are to be arranged so that they are both a) To the greatest benefit of the least advantaged, consistent with the just savings principle, and

3 ibid

4 J Rawls , *A Theory of justice,*511(1972) quoted in R Dworkin

5 *A Theory of Justice* p.302

b) Attached to offices and positions open to all under conditions of fair equality of opportunity.

These principles are then lexically ordered in application, so that the first principle that of liberty, always has priority and liberty may only be curtailed in order to defend liberties. The first principle will always have priority over the second, but the second is always prior to' efficiency' maximisation of advantage and fair opportunity is prior to the difference principle (i.e the acceptance of inequality)

Two things are immediately apparent about this scheme first the priority given to liberty and secondly the fact that, subject to certain basic caveats, it is accepted that society will contain significant inequalities as between the circumstances of its members. The priority of liberty is explained by Rawls as an inevitable consequence of the rational self interest of his original actors. Although they know that certain goods will be desirable to all, they do not know what their own circumstances or particular pre directions will be. It would thus be rational to maximize liberty because this will be the route to the maximization of their own ultimate attainment, whatever their actual situation may turn out to be. Rawls argues that the value of liberty is proportional to the ability of individuals and groups to advance their goals within the system concerned[6]. Even those least enabled will, however value liberty as affording the best chance for self improvement.

The acceptance of inequality, the "difference principle", also relates to the supposed rational self interest of the original actors. One might imagine that if the actors know nothing of their actual social situation they might opt for equality on the basis that they would then at least be no worse off than anyone else. Rawls excludes this possibility by denying that the original actors are motivated by comparisons with other or, in particular, by envy. They aim indivisually for the best

6 *A Theory of justice* p 204

for themselves and therefore seek to maximize their own potential position whilst, in the light of their cautious psychology building in a safety net in case they are in fact in a situation of disadvantage. In other words they are high jumpers who nonetheless ensure that a safety net is provided. Rawls would seem here to be considering primarily material benefit i.e wealth but it may also be added that the general aspirations of real people vary considerably, and equality in the sense of sameness might indeed conflict with the self interest of the original actors. liberty is equal and so is fair equality of opportunity in competition for jobs, but this does not mean that Rawls therefore urges positive discrimination as a means of redressing past social injustice. The argument is rather for bolstering opportunity through the operation of the maximum principle of maximizing the position of the least benefitted.

It is interesting to note that Rawls also argues that the principles of justice which he advances and, in particular, the priority of liberty, only become operative beyond a certain basic stage of social development. His essential argument is that in the course of the development of a society, as basic needs are more and more effectively satisfied, the emphasis will shift from such needs to concerns with liberties as their exercise becomes viable with improving material conditions[7]. Prior to this point, when basic material needs are not being met, Rawls suggests that equality would in general be preferred. This can be argued to be a somewhat curious proposition. If liberty is preferred, as a "total basic system", because it affords the best protected route to maximization of position, it would seem highly relevant to people denied even essential needs. Liberty and with it justice, seem to loose credibility if they become luxuries to be enjoyed only beyond a certain point of affluence.

7 *A Theory of justice* p542

Affirmative Action In United States

People often equate reservation in India to the positive discrimination or affirmative action policies in the USA. There is a fundamental difference between reservation and affirmative action while the majority white people bestow certain rights and privileges to the minority black people, it is the reverse in the case of the reservation system in India where majority people belonging to the lower castes demand reservation in jobs and education from the minority people who form the ruling elites of the country. While giving benefits to the black people under affirmative action programmes the white, who form majority population of the USA, are free from any fear that minority black people can erode their dominant position by using posts and positions that they get under affirmative action programme. But the situation is quite reverse in the case of India where the minority upper caste ruling class people are fearful of the majority people from the lower castes who will corrode their dominant positions by getting reservations in education and jobs.

Affirmative action in the United States began as a tool to address the persisting inequalities for African Americans in the 1960s. This specific term was first used to describe US government policy in 1961. Directed to all government contracting agencies, President John.F.Kennedy's Executive order 10925 mandated "affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."[8]

Four years later President Lyndon B Johnson elaborated on the importance of affirmative action to achieving true freedom for African Americans:

> **"**Nothing is more freighted with meaning for our own destiny than the revolution of the Negro American...In far too many ways American Negroes have been another nation: deprived of freedom, crippled by hatred, the doors of opportunity closed

8 Executive order 10925.establihing the Presidents Committee on Equal Employment Opportunity.

> to hope...But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair...This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result...To this end equal opportunity is essential, but not enough"[9].

After describing the specific historical context of American affirmative action, President Johnson outlined the basic social science view that supports such policies:

> **"**Men and women of all races are born with the same range of abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family that you live with, and the neighborhood you live in--by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man."

As the social science explaining impact of such 'unseen forces' has developed, affirmative action has widened in scope. In 1967, President Johnson amended a previous executive order on equal employment opportunity to expressly mention "discrimination on account of sex" as well.[10]

9 Commencement address at Howard University. Lyndon banes Johnson Presidential library and Meusium 1965.

10 Executive order 11375. ammending Executive Order no.11246 relating to equal employment opportunity.

One of the United States' first major applications of affirmative action the Philadelphia plan, was enacted by the Nixon administration in 1969. The Revised Philadelphia Plan was controversial for its use of strict quotas and timetables to combat the institutionalized discrimination in the hiring practices of Philadelphia's skilled trade unions.
The concept and application of affirmative action has developed since its inception, though its motivation remains the same.

Arguments in favor of affirmative action

President Kennedy stated in Executive Order 10925 that "discrimination because of race, creed, color, or national origin is contrary to the Philadelph Constitutional principles and policies of the United States"; that "it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts"; that "it is the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons within the Government"; and that "it is in the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower".[11]
Some individual American states also have orders that prohibit discrimination and outline affirmative action requirements with regard to race, creed, color, religion, sexual orientation, national origin, gender, age, and disability status.
Proponents of affirmative action argue that by nature the system is not only race based, but also class and gender based. To eliminate two of its key components would undermine the purpose of the entire system. The African American Policy Forum (AAPF) believes that the class based argument

11 John.F.Kennedy (march 6 1961)Executive order 10925

is based on the idea that non-poor minorities do not experience racial and gender based discrimination. The AAPF believes that "Race-conscious affirmative action remains necessary to address race-based obstacles that block the path to success of countless people of color of all classes". The group goes on to say that affirmative action is responsible for creating the African American middle class, so it does not make sense to say that the system only benefits the middle and upper classes[12].

A study conducted at the University of Chicago in 2003 found that people with "black-sounding" names such as Lakisha and Jamal are 50 percent less likely to be interviewed for a job compared to people with "white-sounding" names such as Emily or Greg.[13]

A recent study by Deirdre Bowen tested many of the arguments used by the anti-affirmative action camp. Her research showed that minority students experience greater hostility, and internal and external stigma in schools located in states that ban affirmative action—not the schools where students may have benefited from affirmative action admissions.[14]

Arguments against affirmative action

Affirmative action has been the subject of numerous court cases, where it is often contested on constitutional grounds. Some states specifically prohibit affirmative action, such as California (Proposition 209), Washington (Initiative 200), Michigan (Michigan Civil Rights Initiative), and Nebraska (Nebraska Civil Rights Initiative).

Class inequality

The controversy surrounding affirmative action's effectiveness is based on the idea of class inequality. Opponents of racial affirmative action argue that the program actually benefits middle- and upper-class African

12 Myths about affirmative action: a special series on a public policy under siege.(African American Policy Forum Retrieved 2008-03-03)

13 Stephanie Chen (May 26 2010) does your name shape your destiny. CNN

14 Deirdre Bowen ,"Brilliant Disguise" an empirical analysis of a social experiment banning affirmative action. Indiana Law Journal Vol. 05, Issu-4 Article 1

Americans and Hispanic Americans at the expense of lower class European Americans and Asian Americans. This argument supports the idea of solely class-based affirmative action. America's poor is disproportionately made up of people of color, so class-based affirmative action would disproportionately help people of color. This would eliminate the need for race-based affirmative action as well as reducing any disproportionate benefits for middle and upper class people of color.[15]

A 2005 study by Princeton sociologists Thomas J. Espenshade and Chang Y. Chung compared the effects of affirmative action on racial and special groups at three highly selective private research universities. The data from the study represent admissions disadvantage and advantage in terms of SAT points (on the old 1600-point scale):

- Blacks: +230
- Hispanics: +185
- Asians: –50
- Recruited athletes: +200
- Legacies (children of alumni): +160

College Acceptance Rates (2005)			
	Overall Acceptance Rate	**Black Acceptance Rate**	**% Difference**
Harvard	10.0%	16.7%	6%
MIT	15.9%	31.6%	15.75%
Brown	16.6%	26.3%	9.7%
Penn	21.2%	30.1%	8.9%
Georgetown	22.0%	30.7%	8.7%

In 2009, Princeton sociologist Thomas Espenshade and researcher Alexandria Walton Radford, in their book 'No Longer Separate, Not Yet Equal',

15 *Hurst .C. Social Inequality forms Causes and Consequences sixth edition 2007,374-377*

examined data on students applying to college in 1997 and calculated that Asian-Americans needed nearly perfect SAT scores of 1550 to have the same chance of being accepted at a top private university as whites who scored 1410 and African-Americans who got 1100. Whites were three times, Hispanics six times, and blacks more than 15 times as likely to be accepted at a US university as Asian-Americans. These results were after controlling for grades, scores, family background (legacy status) and athletic status (whether or not the student was a recruited athlete).[16]

Discrimination

Some opponents of affirmative action, like Ward Connerly, call it reverse discrimination, saying affirmative action requires the very discrimination it is seeking to eliminate. According to these opponents, this contradiction makes affirmative action counter-productive. Other opponents say affirmative action causes unprepared applicants to be accepted in highly demanding educational institutions or jobs which result in eventual failure.[17] Other opponents say that affirmative action lowers the bar, and so denies those who strive for excellence on their own merit and the sense of real achievement.[18] Some argue that affirmative action itself has some merit when it is targeted to true causes of social deprivation such as poverty, but that race-, ethnicity- or gender-based affirmative action is misguided.[19]

Some opponents[20] further claim that affirmative action has undesirable side-effects and that it fails to achieve its goals. They argue that it hinders reconciliation, replaces old wrongs with new wrongs, undermines the achievements of minorities, and encourages groups to identify themselves as disadvantaged, even if they are not.[21] It may increase racial ten-

16 Competitive disadvantage, The Boston Globe. Boston . com
17 See, for example, Richard Sander's study of affirmative action in Law School, bar exam and eventual performance at law firms
18 See, for example, Clarence Thomas' "My Grandfather's Son: A Memoir"
19 Nearer to overcoming, The economist may 8 2008
20 American civil rights institute
21 Cultural whiplash .unforseen consequences of Americas crusade against racial discrimina-

sion and benefit the more privileged people within minority groups at the expense of the disenfranchised within majority groups (such as lower-class whites). There has recently been a strong push among American states to ban racial or gender preferences in university admissions, in reaction to the controversial and unprecedented decision in *Grutter v. Bollinger*[22]. In 2006, nearly 60% of Michigan voters decided to ban affirmative action in university admissions. Michigan joined California, Florida, Texas, and Washington in banning the use of race or sex in admissions considerations.[23] Some opponents believe, among other things, that affirmative action devalues the accomplishments of people who belong to a group it's supposed to help, therefore making affirmative action counter-productive.

Indian Thinkers on Reservation

Dr Bhim Rao Ambedkar, the great social revolutionary, wrote of reservation as, 'the reservation demanded by the servile classes are really controls over the power of the governing classes…the reservations do no more than correlate the constitution to the social institutions of the country in order to prevent political power to fall into the hands of the governing class." He wrote at another place,

"Whenever the servile classes ask for reservations in the Legislatures, in the Executive and in public services, the governing class raises the cry of 'nationalism in danger'. People are told that if we are to achieve national freedom, we must maintain national unity, that all questions regarding reservations in the Legislatures, Executives and the public services are inimical to national unity and therefore for anyone interested in national freedom it is a sin to stand out for such reservations and create dissensions. That is the attitude of the governing class'.[24]

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22 2003 Douthat Ross(june 15 2009) "Affirmative Action"The Newyork Times.

23 Affirmative action draws a challenge ,The national law journal 2008

24 'What Congress And Gandhi Have Done To The Untouchables: A Plea To The Foreigner'.

Mahatma Gandhi said,

"It is against the fundamental principles of humanity, it is against the dictates of reason that a man should, by reason of birth, be denied or given extra privileges" [25]

Justice PB Sawant says,

"The right to equality without the capacity and the means to avail of the benefits equally is a cruel joke practiced on the deprived sections of the society. It widens the social and economic inequalities progressively with the haves making use of the guaranteed right to amass the fruits of progress, and the have-nots remaining where they are. The exceptions (to the right to equality law) enable the State to make the deprived capable of availing of the benefits which otherwise they would not be able to do. It is to give effect to the principle of equality that the exceptions become mandatory in any unequal society such as ours which intends to become egalitarian." To treat two unequals equally causes as much injustice as to treat two equals unequally. The jurisprudence of equality therefore requires that those below are leveled up to those above.[26]

As justice K S Hegde, former judge of the Supreme Court of India put it

"One of the greatest drawbacks in our social system is the existence of caste system dividing the society according to status and rank. Whatever might have been the origin of the caste system, it has given rise to various gradations in the society. Which, in its turn, has resulted in social inequality and discrimination. The caste system and consequent discrimination are not compatible with a democratic society .These social gradations have created economic and educational disparities. The caste system among the hindus has its repercussions to an extent on other religious groups also. With a view to remove these gradations in our national

25 Reservation Policy: An Old Wine In a New Bottle, by Sidharth Chechani.
26 .The Constitution Equality And Reservation: P.B Sawant, Mainstream,june 14,2003.

life and to reshape our society on democratic lines, the constitution directed the state under Article 46 to promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Schedule Castes and Schedule Tribes, and shall protect them from social injustices and all forms of exploitation".[27]

As H G Balakrishna puts it

"Backwardness was neither their own creation nor their choice. Caged in the pigeonholes of castecism, socially exploited and deprived of equal opportunity and encouragement, these backward classes of citizens who are backward masses in India today, who have suffered through centuries socially, educationally, and economically without a fair or reasonable and equitable share in the administration of the government, have been gaining consciousness of late which will lead to an upsurge if their interests are ignored".[28]

Indian Constitution and Reservation

The concept of reservation was enshrined in the Constitution to allow the so-called deprived classes to come at par with the so-called privileged ones. The Constitution of India allows this kind of positive discrimination in order to bring about equality of opportunity and status in the society. The founding fathers had never intended Reservation to be a temporary phenomenon. Reservations to the underprivileged were to be extended until they were uplifted socially and stabilized economically. They were of the view that the educational backwardness of certain classes of citizens was also due to historical reasons. In the traditional India some castes and classes were denied education under Brahmmanical supermacy. The Brahmmanical supermacy was put to an end with secularised and formal-

27 .Justice K S Hegde, Presidential speech at the jurists' Seminar On Backward Classes, Bangalore, September 1973.

28 . Speech delivered at the jurists' Seminar On Backward Classes, Bangalore, September 1973.

ised system of education introduced during the British period. But even this change benefitted to higher status castes more than the lower castes. The reason was that the castes were merged with occupational status and thus many lower castes were induced to persue traditionally low occupation for which education was not necessary. And even when attempts were made by lower castes to achieve upward mobility through education, such attempts were thwarted by the higher castes on whom the lives of many agricultural and servant castes depended. In some cases where the low caste children attended the schools they were ill treated and discriminated against by the high caste teachers. Reservations with the view of helping the deprived classes to gain a better footing and avail equal benefits of an independent and free nation was introduced in the system.

States authority to create reservations in private educational institutions

In the field of education the policy of reservation in government education institutions and government aided institutions were in prevalence prior to Independence which even continued after insertion of cl (4) in Article 15 which enables the state to make special provisions for the protection of the interests of the backward classes of citizens. But when the government sought to impose reservation in private educational institution and private unaided educational institution the matter went to Supreme Court. The policy of reservation cannot be insisted on unaided private educational institutions because clause (3) and (4) of Article 15 provide exception to the general rule under Article 15 (1). A special provision either for women and children in terms of clause (3) or for the advancement of socially backward classes of citizens or SC's or ST's in terms of clause (4) must be made by the state in terms of a legislation or executive order. The said provisions cannot be extended by way of imposition of restriction or regulation so as to impair the right of a citizen under Article 19(1)(g)) or Article 30 thereof. Although reasonable restriction can be imposed in exercise of such rights in terms of constitutional scheme, the state cannot impose its own duties and obligations upon a

citizen. Further clauses (3) and (4) are only enabling provisions. Executive policy in the state cannot be thrust upon the citizens without any valid legislation.

The Supreme Court in the following cases examined the issue in great detail.

In *TMA Pai Foundation & Ors v. State Of karnataka (2002) 8 SCC 481,* an 11-judge bench of the Supreme Court held that a private unaided educational institution has a fundamental right under Article 19(1)(g) with respect to the establishment and administration of educational institutions.[29]

Disagreements relating to the ratio of the case led to the constitution of a five-judge bench in *Islamic Academy of Education v. State of Karnataka (2003) 6 SCC 697:AIR SC 3724* entrusted with the task of clarifying the judgment in *TMA Pai Foundation*. Where it was submitted that the majority Judgment clarified that Article 30 had been enacted not for the purposes of giving any special right or privileges to the minority educational institutions, but to ensure that the minorities had equal rights with the majority. It was submitted that minority educational institutions cannot claim any higher or better rights than those enjoyed by the non-minority educational institutions. Subsequently, a seven-judge bench was constituted in *P.A Inamdar v. State of Maharashtra (2005) 6 SCC 537at p 538* to assess the clarification in *Islamic Academy of Education* and confirm the Ratio in *TMA Pai Foundation*. *P.A. Inamdar* made it abundantly clear that the law as per *TMA Pai Foundation* was that "neither can the policy of reservation be enforced by the State nor can any quota or percentage of admissions be carved out to be appropriated by the state in a minority or non-minority unaided educational institution".

Thus after these decisions the Supreme Court seized the State's right to impose its reservation policy on the private institutions. This critical situation created frustration among the reserved category candidates and

29 Decided by Lahoti CJI in *P.A Inamdar* v. *state of Maharashtra*(2005) 6 SCC 537 at p538

legislatures. Because of this very situation the parliament had to enact law about reservation in private educational institutions.

In order to lessen the frustration among the reserved category candidates the Parliament introduced an amendment, the Constitution (93rd Amendment) Act, 2005 in Art. 15 and inserted an additional clause (5) in the same article which runs as follows:

"Noting in this Article or in sub clause (g) of clause (1) of Art. 19 shall prevent from making any special provision by law, for the advancement of any socially and educationally backward classes of citizens or for the SCs or STs in so far as such special provisions related to their admission to educational institutions including aided or unaided by the state other than the minority educational institutions referred to in clause (1) of Art. 30." [30]

Validity of 15(5): Private Unaided institutions

Hence, under Article 15(5) the State was enabled to regulate admission in private unaided institutions, something they were unable to do after the decision in *TMA Pai Foundation* and the subsequent cases clarifying it.

In order to bring into reality the provision of Article 15(5) the Parliament enacted Central Educational Institutions Act, 2005. Only one of the aspects of Article 15(5) is covered by the legislature in the Central Educational Institutions Act, while Article 15 (5) does apply to private unaided institutions. The Supreme Court was confronted with the validity of the amendment as well as the Act of 2005 in *Ashok Kumar Thakur v Union of India*[31]. However, the majority of the Court declined to pronounce on the question whether the application of Article 15(5) to private unaided institutions violated the basic structure of the Constitution. As no private unaided educational institution was arrayed as a petitioner in *A K Thakur*, four out of five judges found that a decision on this issue was unnecessary and would be properly made when appropriate parties

30 Art.15(5) of Indian Constitution
31 2008(5)SCALE 1(2008)6S CC 1

were before it[32]. Justice Bhandari, however, chose to delve into the issue. In an elaborate justification for doing so, he acknowledged that no unaided institution had filed a petition. Yet he noted that as the best counsels in the country had appeared in the case he concluded that a brief from an unaided institution would have contributed little to the arguments already before the Court. Since the question of unaided institutions was likely to arise in the future, it was best, according to justice Bhandari, to resolve it now rather than go through the "entire exercise de novo"[33]. In light of these "extraordinary facts", justice Bhandari examined the validity of Article 15(5) with respect to private unaided institutions and held that an imposition of reservation of this sort would violate Article 19(1)(g) and thus the basic structure doctrine, and observed:

"Imposing reservation on unaided institutions violates the basic structure by obliterating citizens' 19(1)(g) right to carry on an occupation. Unaided entities, whether they are educational institutions or private corporations, cannot be regulated out of existence when they are providing a public service like education. That is what reservation would do. That is an unreasonable restriction. When you do not take a single paisa of public money, you cannot be subjected to such restriction. The 93rdAmendment's reference to unaided institutions must be severed".[34]Thus he severed the 2005 Amendment's reference to unaided institutions,[35] also on the basis of Fundamental Right to carry on business, occupation and profession because the government may suspend Articles 14 and 19 rights in order to implement an emergency[36] but not otherwise and hence unreasonable restriction upon this such right is not permissible under the Constitution as he observed:

"Freedom under Article 19 belongs to individual citizens. Article 19(1)(g) provides that "all citizens shall have the right to practice any profession,

32 Ibid at para 79(Balakrishnan CJ)at para 138
33 Ibid at para 133
34 Ibid at para 132
35 Ibid at para 178
36 See Art.358 &359

or to carry on any occupation, trade or business." The reference to "all citizens" means that each and every individual citizen possesses Article 19 rights. For the impugned legislation to fall, it need not touch every sphere of society. If even one individual's freedom has been curtailed, this Court is duty bound to entertain his or her claim. It is he or she who possesses the Article 19(1)(g) right to carry on an occupation."[37]

Two important issues arise out of Justice Bhandari's examination. First, is the majority's decision to avoid pronouncing on the application to private unaided educational institutions a political move? Secondly, does justice Bhandari's conclusion on the validity of Article 15(5) as it applies to private unaided institutions represent a correct application of the basic structure doctrine? We will address each of these in turn.

While some commentators[38] have expressed surprise at the majority's approach, generally courts may legitimately limit their decision to resolving particular disputes before them particularly in Constitutional cases. However, the state action being challenged in this case is the amendment introducing Article 15(5) and the CEI Act. As the constitutionality of Article 15(5) is under review, the Court was called upon to pronounce on the scope of its application to private unaided educational institutions. To that extent, this was a proper issue for the Court to decide in *A K Thakur*. Moreover, the Supreme Court is often found to be going beyond the issues in dispute in a particular case, and clubbing similar cases in a manner, that allows it to pronounce on constitutional issues generally and not confine itself to the facts of the case before it.[39]

In the light of this track record and the nature of legal challenge before it, the refusal to address the full scope of Article 15(5) is defensible only if it initiates a new rule of court discipline which will be followed in all cases hereafter.

37 Para 169

38 P.B Mehta,'it's a landmark' Indian Express, April 11 2008

39 Sudhir krishnaswamy and Madhav khosla(2008) reading *A.K Thakur* v. *UOI*: Legal effect and significance,Economic and political weekly,july 19 pp 53-60

Justice Bhandari's application of basic structure review to the scope of Article 15(5) could not bind any future bench that will be called upon to decide this question. However, as it is the first view expressed by the Court on the question, it is likely that the Court will look to affirm or distinguish this view in future cases.

However, justice Bhandari's analysis in *A K Thakur* finds that Article 15(5) would violate Article 19(1)(g) which guarantees to all citizens the right to carry out any business or profession. It is not clear from the opinion, the extent to which Article 19(1)(g) has a bearing on the basic features of the Constitution and why Article 15(5) must comply with Article 19(1)(g) to be upheld by the Court. We had noted earlier that the Supreme Court has held in *TMA Pai* that Article 19(1)(g) prevents the state from creating reservation quotas in private unaided educational institutions.

However, this proposition of law would need to be revised in the light of the introduction of Article 15(5). Hence, in order to hold reservation quotas in private unaided educational institutions unconstitutional the Court will need to find a new constitutional basis for this proposition: one that rests on the basic features of the Constitution such as equality. Hence, it seems that justice Bhandari's conclusion on the constitutional validity of Article 15(5) as it applies to private unaided educational institutions is though supported by adequate reasons subject to a revisit by a future bench of the Supreme Court.[40]

Conclusion

The Constitution of India provides special safeguards in the favor of deprived classes with a view to maintain proper balance of equilibrium and to serve as an effective instrument of social engineering. A duty has been caste on the state to strive hard to promote the welfare of the people by securing and protecting as effectively as it may a social order, in which justice, social, economic and political, shall inform all the institutions of

40 Ibid at p 56

the national life. Further, the state has been put under a constitutional obligation to promote with special care the educational and economic interest of the weaker section of the people.

The imparting of education is the duty of the state but unfortunately it has failed in keeping pace with the changing conditions of the country. It has been suggested that in the 1960's and 1970's, non governmental entities began to make inroads into professional and technical education and the state was not able to meet this increased demand for such education. The changing economic scenario in the country after 1991 resulted in the philosophy that the state cannot have a monopoly in matters of education which in turn reduced the pressure on the state educational institutions and also led to the increased importance of private unaided educational institutions in the Indian education sector.

The court has arrived at modus Vivendi in the past which has acted as a tiebreaker in resolving convoluted questions of constitutional law. In this exercise, the court while upholding the constitutionality of Art 15 (5) might accept a modus Vivendi to impose less rigorous reservations on unaided private educational institutions.

The court being the final arbiter on the interpretation of the constitution and on the extent of reservation, must ensure that positive discrimination does not result in reverse discrimination.

Protection of Rights of Senior Citizens: How far does the Maintenance and Welfare of Parents and Senior Citizens Act of 2007 address the problem

Insha Hamid*

Abstract

There has been a steady rise in the population of older persons in India, because of an appreciable increase in the life expectancy. But with the increase in population the traditional norms and status of the senior citizens have deteriorated. The result of withering of the joint family system, industrialization, globalization etc is that a large number of parents are not being maintained by their children, as was the normal old social practice. Consequently, the elders are now exposed to emotional neglect and to lack of physical and financial support. They are facing a lot of problems in the absence of adequate social security. Keeping in view these facts, to ensure that the children perform their moral obligation towards their parents and to eliminate the agony and sufferings of this vulnerable section of society, legislation for the welfare of the Parents and Senior Citizens has been enacted and titled as The Maintenance and Welfare of Parents and Senior Citizens Act, 2007.

Keywords: welfare, senior citizens, children, legislation.

Background:

Socio-cultural scenario: In the traditional Indian system elderly persons were respected and they had a great decision making power in the

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family. Children felt duty bound to serve and respect the elderly and to contribute to the family resources[1]. Children sought the counsel of elders for making major decisions and placed family resources at the disposal of elders for prudent handling. During the last century this socio economic and value system has slowly eroded. More and more couples are working full time, families have become smaller and nuclear, migration and consumerism have become the order of the day[2]. At the same time, life expectancy of the elderly has gone up. All these factors cause pressures on families resulting in abuse, neglect and abandonment of the elderly. While most elderly are well looked after, many suffer from poverty, loneliness, neglect, abuse and abandonment and find it difficult to mobilise resources for their most basic needs as their children are either unable or unwilling to maintain them. Problem of widows[3], widowers and the childless elderly is even more acute.[4]

International Efforts to Protect Senior Citizens Rights

The question of ageing was first debated at the United Nations in 1948 at the initiative of Argentina. The issue was again raised by Malta in 1969. In 1971 the General Assembly asked the Secretary-General to prepare a comprehensive report on the elderly and to suggest guidelines for the national and international action. In 1978, the General Assembly decided to hold a World Conference on the Ageing. Accordingly, the World Assembly on Ageing was held in Vienna from July 26 to August 6, 1982 wherein an International Plan of Action on Ageing was adopted. The overall goal of the Plan was to strengthen the ability of individual countries to deal effectively with the ageing in their population, keeping in mind the special concerns and needs of the elderly. The Plan attempted to promote

1 http://ncw.nic.in/PDFFiles/olderpersonMaintenancebill.pdf
2 Goswami I. Ageing in India, Sociological Issues.Presented in Indian Sociological Congress. 2003
3 Punia D, Sharma ML. Family life of rural aged women in ML Sharma and TM Dak (edited), Aging in India. New Delhi: Ajantha Publications; 1987. p. 145-51
4 Dr indira Jai Prakash, *Ageing in india*

understanding of the social, economic and cultural implications of ageing and of related humanitarian and developmental issues. The International Plan of Action on Ageing was adopted by the General Assembly in 1982 and the Assembly in subsequent years called on governments to continue to implement its principles and recommendations. The Assembly urged the Secretary-General to continue his efforts to ensure that follow-up action to the Plan is carried out effectively[5].

i. In 1992, the U.N. General Assembly adopted the proclamation to observe the year 1999 as he International Year of the Older Persons.
ii. The U.N. General Assembly has declared "Ist October" as the International Day for the Elderly, later rechristened as the International Day of the Older Persons.
iii. The U.N. General Assembly on December 16, 1991 adopted 18 principles which are organized into 5 clusters, namely-independence, participation, care, self-fulfillment, and dignity of the older persons. These principles provide a broad framework for action on ageing. Some of the Principles are as follows:
    a. Older Persons should have the opportunity to work and determine when to leave the work force.
    b. Older Persons should remain integrated in society and participate actively in the formulation of policies which affect their well-being.
    c. Older Persons should have access to health care to help them maintain the optimum level of physical, mental and emotional well-being.
    d. Older Persons should be able to pursue opportunities for the full development of their potential and have access to educational, cultural, spiritual and recreational resources of society.
    e. Older Persons should be able to live in dignity and security and

5 Sandra Huenchuan and Luis Rodríguez-Piñero *Ageing and the protection of human rights: current situation and outlook,* March 2011

should be free from exploitation and mental and physical abuse[6]

National Efforts: To Protect Senior Citizens Rights

All Indian citizens are entitled to fundamental rights guaranteed to them by the Indian Constitution. Senior citizens are no exception. They are also entitled to fundamental rights to life and personal liberty, freedom of speech and equality before law but these rights are often difficult for them to achieve for variety of reasons like (health issues, sickness, unemployment and social exclusion)[7]. So there are various provisions and remedies available for senior citizens,which they can avail.

II) Constitutional Provisions:

In the Constitution of India, entry 24 in list III of schedule VII deals with the Welfare of Labour, including conditions of work, provident funds, liability for workmen's compensation, invalidity and old age pension and maternity benefits. Further, Item number 9 of the State List and item 20, 23 and 24 of Concurrent List relates to old age pension, social security and social insurance, and economic and social planning. Article 41of Directive Principles of State Policy has particular relevance to Old Age Social Security. According to this Article, "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 in other cases of undeserved want. Art. 46, Promotion of educational and economic interests of ..... and other weaker sections: The State shall promote with special care the educational and economic interests of the weaker sections of the people..... and shall protect them from social injustice and all forms of exploitation. However, these provision are included in the Chapter IV i.e., Directive Principles of the Indian Constitution. The Directive Principles, as stat-

6 http://www.un.org/en/development/devagenda/ageing.shtml

7 Maintenance & Welfare Of Parents & Senior Citizens Act, 2007,help age India, http://www.helpageindiaprogramme.org/

ed in Article 37, are not enforceable by any court of law. But Directive Principles impose positive obligations on the state, i.e., what it should do. The Directive Principles have been declared to be fundamental in the governance of the country and the state has been placed under an obligation to apply them in making laws. The courts however cannot enforce a Directive Principle as it does not create any justiciable right in favour of any individual[8].

(II) Legal Protections:

Personal Laws: The moral duty to maintain parents is recognized by all people. However, so far as law is concerned, the position and extent of such liability varies from community to community.

(a) Under Hindu Laws: The statutory provision for maintenance of parents under Hindu personal law is contained in Section 20 of the Hindu Adoption and Maintenance Act, 1956. This Act is the first personal law statute in India, which imposes an obligation on the children to maintain their parents. As is evident from the wording of the section, the obligation to maintain parents is not confined to sons only; the daughters also have an equal duty towards parents. It is important to note that only those parents who are financially unable to maintain themselves from any source, are entitled to seek maintenance under this Act.[9]

(b) UnderMuslim Law: Under the Muslim law also children have a duty to maintain their aged parents. According to Mulla,

i. Children in easy circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves.
ii. A son in stressed circumstances is bound to maintain his mother, if the mother is poor, though she may not

8 Prof.Jain M.P, *Indian constitutional Law,* Fifth Edition 2009
9 *ibid*

be infirm.

iii. A son, although poor, is earning something, is bound to support his father who earns nothing. According to the Muslim law, both sons and daughters have a duty to maintain their parents under the Muslim law. The obligation, however, is dependent on their having the means to do so[10].

(c) Under Christian and Parsi Law: The Christians and Parsis have no personal laws providing for maintenance for the parents. Parents who wish to seek maintenance have to apply under provisions of the Criminal Procedure Code.[11]

(d) Under the Code of Criminal Procedure (Cr.P.C): The Cr.P.C 1973 is a secular law and governs persons belonging to all religions and communities. Daughters, including married daughters, also have a duty to maintain their parents. The provision for maintenance of parents under the code was introduced for the first time in Section 125(1) of the Code of Criminal Procedure in 1973. As per the Code if any person having sufficient means neglects or refuses to maintain his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his father or mother, at a monthly rate as the Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct.[12]

III) Government welfare Policies and Schemes for Older Persons:

Over the years, the government has launched various schemes and poli-

10 TahirMahmood,*The Muslim Law of India* , Third Edition (New Version) 2002.

11 B.M.Gandhi, *Hindu Law,* Third edition 2008.

12 Singh RK. Rights of Senior Citizens: Need of the Hour. Legal Service India.com Available from: thhttp://www.legalserviceindia.com/article/l170-Rights-Of-Senior-Citizen.html [Last cited on 2015 Sept 6].

cies for older persons. These schemes and policies are meant to promote the health, well-being and independence of senior citizens around the country. Some of these programmes have been enumerated below:

National Policy for Older Persons: The central government came out with the National Policy for Older Persons in 1999 to promote the health, safety, social security and well being of senior citizens in India. The Policy recognizes a person aged 60 years and above as a senior citizen. This policy strives to encourage families to take care of their older family members. It also enables and supports voluntary and non-governmental organizations to supplement the care provided by the family and provide care and protection to vulnerable elderly people. The policy has identified a number of areas of intervention, financial security, healthcare and nutrition, shelter, education, welfare, protection of life and properly etc.[13]. The main objective of this policy is to make older people fully independent citizens by;

1. Construction of old age homes and day care centres for every 3-4 districts,
2. (ii) Establishment of resource centres and re-employment bureaus for people above 60 years,
3. Concessional rail/air fares for travel within and between cities, i.e.,30% discount in train and 50% in Indian Airlines[14]. Enacting legislation for ensuring compulsory geriatric care in all the public hospitals.

National Policy for Older Persons has resulted in the launch of new schemes such as :-

1. Strengthening of primary health care system to enable it to meet the

13 *The National Policy for Older Persons: Critical Issues in Implementation*, S IrudayaRajan, U S Mishra

14 National portal of india, http://india.gov.in/people-groups/life-cycle/senior-citizens/defence-personnel

health care needs of older persons

2. Training and orientation to medical and paramedical personnel in health care of the elderly.[15]
3. Promotion of the concept of healthy ageing.[16]
4. Assistance to societies for production and distribution of material on geriatric care. [17]
5. Provision of separate queues and reservation of beds for elderly patients in hospitals[18].
6. Extended coverage under the AnapurnaScheme with emphasis on provision of food at subsidized rates for the benefit of older persons especially the destitute and marginalized sections[19].
7. Setting up of a pension fund for ensuring security for those persons who have been serving in the unorganized sector,[20]
8. The Ministry of Justice and Empowerment has announced regarding the setting up of a National Council for Older Person, called Age Well Foundation. It will seek opinion of the aged groups on measures to make life easier for them[21].
9. Attempts to sensitise school children to live and work with the elderly. Setting up of a round the clock help line and discouraging social ostracism of the older persons are being taken up.
10. The government policy encourages a prompt settlement of pension, provident fund (PF), gratuity, etc. in order to save the superannuat-

15 OLDER PERSONS (MAINTENANCE, CARE AND PROTECTION) BILL, 2005, http://ncw.nic.in/PDFFiles/olderpersonMaintenancebill.pdf

16 Ibid.

17 *The National Policy for Older Persons: Critical Issues in Implementation*, S IrudayaRajan, U S Mishra

18 National Policy on Older Persons, social welfare department, government of NCT Delhi.

19 This scheme was started by the government in 1999–2000 to provide food to senior citizens who cannot take care of themselves and are not under the National Old Age Pension Scheme (NOAPS), and who have no one to take care of . This scheme would provide 10 kg of free food grains a month for the eligible senior citizens.

20 http://www.pensionersportal.gov.in/SeniorCitizenCorner.asp

21 NATIONAL POLICY ON OLDER PERSONS, Minstry of Social Justice and Empowerment Government of India, http://socialjustice.nic.in/hindi/pdf/npopcomplete.pdf

ed persons from any hardships. It also encourages to make the taxation policies elder sensitive[22].

11. The policy also accords high priority to their health care needs[23].
12. Life Insurance Corporation of India (LIC) has also been providing several scheme for the benefit of aged persons, i.e.,JeevanDharaYojana, JeevanAkshayYojana, Senior Citizen Unit Yojana, Medical Insurance Yojana.
13. Former Prime Minister A.B.Bajpai also launched 'AnnapuranaYojana' for the benefit of aged persons. Under this yojana unattended aged persons are being given 10 kg food for every month.
14. It is proposed to allot 10 percent of the houses constructed under government schemes for the urban and rural lower income segments to the older persons on easy loan. The layout of the housing colonies will respond to the needs and life styles of the elderly so that there is no physical barrier to their mobility; they are allotted ground floor; and their social interaction with older society members exists.[24]

Despite all these attempts, there is need to impress upon the elderly about the need to adjust to the changing circumstances in life and try to live harmoniously with the younger generation as for as possible.[25]

The Maintenance and Welfare of Parents and Senior Citizen Act, 2007

Legislative Framework

The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 was enacted in December 2007, to ensure need based maintenance for parents and senior citizens and their welfare. The Act provides for:-

★ Maintenance of Parents/ senior citizens by children/ relatives made

22 Supra 19
23 Ibid.
24 http://india.gov.in/people-groups/life-cycle/senior-citizens/defence-personnel
25 Know your Rights series: Elder People © 2011, National Human Rights Commission, India , http://nhrc.nic.in/Documents/Publications/KYR%20Elderly%20English%20Final.pdf

obligatory and justifiable through Tribunals[26]

- ★ Revocation of transfer of property by senior citizens in case of negligence by relatives [27]
- ★ Penal provision for abandonment of senior citizens[28]
- ★ Establishment of Old Age Homes for Indigent Senior Citizens[29]
- ★ Adequate medical facilities and security for Senior Citizens[30]
- ★ Framing of Rules under the Act;
- ★ Appointment of Maintenance Officers;[31]
- ★ Constituting Maintenance and Appellate Tribunals.[32]

The Act was enacted on 31s1 December 2007. It accords prime responsibility for the maintenance of parents on their children, grand children or even relatives who may possibly inherit the property of a Senior Citizen. It also calls upon the State to provide facilities for poor and destitute older persons

Mechanism of operation of the Act/ Procedure under the Act

- Parents who are unable to maintain themselves through their own earnings or out of their own property may apply for maintenance from their adult children. This maintenance includes the provision of proper food, shelter, clothing and medical treatment[33]
- Parents include biological, adoptive and step mothers and fathers, whether senior citizens or not.[34]
- A childless Senior Citizen who is sixty years and above, can also claim maintenance from relatives who are in possession of or are likely to inherit their property[35].

26 Sec 4 of the Act.
27 Sec 23 of the Act.
28 Chapter VI sec 24, sec 25
29 Sec 19
30 Sec 20
31 Sec 18
32 Sec 15
33 Sec 4
34 Sec 2(d)
35 Sec 4 (4)

- This application for maintenance may be made by Senior Citizens themselves or they may authorize a person or voluntary organization to do so. The Tribunal may also take action on its own.[36]
- Tribunals on receiving these applications may hold an enquiry or order the children/relatives to pay an interim monthly allowance for the maintenance of their Parents or Senior Citizen.[37]
- If the Tribunal is satisfied that children or relatives have neglected or refused to take care of their parents or Senior Citizen, it shall order them to provide a monthly maintenance amount, up to a maximum of ` 10,000 per month[38].
- The State Government is required to set up one or more tribunals in every sub-division. It shall also set up Appellate Tribunals in every district to hear the appeals of Senior Citizens against the decision of the Tribunals[39].
- No legal practitioner is required or permitted for this process[40].
- Erring persons are punishable with imprisonment up to three months or a fine of up to rupees five thousand or with both[41].
- State Governments should set up at least one Old Age Home for every 150 beneficiaries in a district. These homes are to provide Senior Citizens with minimum facilities such as food, clothing and recreational activities[42].
- All Government hospitals or those funded by the Government must provide beds for Senior Citizens as far as possible. Also, special queues to access medical facilities should be arranged for them[43]

36 Sec 5
37 Sec 5 (3)
38 Sec 9
39 Sec 15
40 Sec 17
41 Sec 24
42 Sec 19
43 Sec 20

Legislative drawbacks

The legislature has taken adequate care to safeguard the rights of the elderly to the optimum under this Act yet, there lie a few grey areas. The following are some of the demerits which can obstruct the functioning of the Act:

1. The Act provides that the children of a senior citizen have the obligation to maintain a senior citizen to the extent that he "may lead a normal life"[44]. The Act does not define what consists of a 'normal life.' However, the maximum compensation or maintenance allowance is Rs 10,000, which is not sufficient for people living in cities.
2. Imposing liability on a person who happens to be a relative of the senior citizen, on the ground that he will inherit the property of the senior citizen, is illogical and unreasonable because the senior citizen may sell his property to any third party before his death and there is no guarantee that the relative will definitely inherit the property of the senior citizen. The relative may not be interested in inheriting the property of such senior citizen. As wills are changeable, it is unclear as how one would determine who would inherit the property after death.
3. Complete exclusion of the professional lawyers[45] from the purview of the Tribunal simply defies logic and reasoning.
4. The exclusion of the jurisdiction of civil courts is not justified[46], because Tribunals are not manned by legally qualified or experienced persons.
5. Only parents may appeal against the decision of the Tribunal[47]. The rights of appeal is denied to the child which the principles of natural justice. There are always two sides of a coin which has to be seen before deciding. Child who has provided whatever possible from her/his side to the parents but still has unsatisfied parents is not protect-

44 Sec 4(2)
45 Sec 17
46 Sec 27
47 Sec 16

ed under this Act. Such parents can make use of the Act to extract more from the child. Threat of punishment can provide maintenance but not family life which is the real goal and necessary for senior citizens and for parents to lead a life of security, care and dignity.

6. The big issue is whether parents will like to take their children to the Tribunal to obtain a maintenance or allowance from them under various social pressures. A better approach may be to design a social security system, including financial security such as pension schemes and reverse mortgages that enable the elderly to live a dignified life.
7. This Act is silent in case of transfer of property to children. There should be some responsibility on parents not to prepare any will in favour of third party

Conclusion :

In spite of aforesaid special arrangements for the old age persons the position of elderly persons is not happier and it is because of our social approach toward them in the present scenario. It is a well known fact that though facilities are provided but there is no mechanism to check whether they have been availing the facilities or are unable to avail the same. The present approach towards old age person is required to be changed. In reality certain strategies and approaches at different levels of policy making, planning and programming shall have to be adopted or altered in order to harness this vast human resource for promoting their involvement and participation in the main stream of socio-economic development process at a larger scale. This participation must result in an end to their social isolation and increase in their general satisfaction with their life. Any attempt to secure the help of the old age in offering their service to the nation must simultaneously ensure some sort of package of services aimed at arranging for them a better quality of life and a well-designed social security network for the senior citizen.

Gender Based Violence: An Analysis

Sadaf Sareen Khan*

Abstract

Gender Violence in India is intended as an indicative rather than an exhaustive account of violence on the basis of gender identity. Gender violence is not merely a 'crime;' it is a deep-rooted social sickness. It is wrong to think some practices have disappeared from our society. Under-age girls and boys are still forced to marry. Dowry deaths have hardly ended but are rather spreading across the country. It is important to call a spade a spade. The classification of killing by caste panchayats popularly and proudly called as honour killings uncovers this violence as an expression of community power through the lives of women. The incidences of rape are increasing in alarming proportions. Sexual harassment of women at workplace, female foeticide and domestic victimization of women are not uncommon.

Key Words: Gender violence, Domestic violence, Dowry death, Honor killings, Marital rape, Sexual Harassment, Forced Marriage.

Introduction:

Today, woman is the most powerless and marginalized section of the society. Increasing incidents of violence against women like rape, dowry deaths, foeticide, wife beating, marital rape etc. are all indicative of the pitiable and miserable condition of women in Indian society. Woman is treated as an inferior member even in her own family. She is always at the receiving end. Working women are considered to enjoy some freedom and position in the society but they are also not free from their family roles

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as a result they face role conflict. The life of an average Indian woman is a long battle against deprivation and discrimination.

The gender difference in India rises from three sources, i.e, difference in economic roles and potential power of men and women, cultural transactions restricting the movement and autonomy of women and marriage and family practices. Women in Indian society have been the victims of humiliation, torture and exploitation for ages.

Violence against women is often seen as an assault against her physical body but more importantly it is a negation of her integrity and personhood. Violence against women may be criminal, i.e, rape, abduction, murder etc. it may be domestic like dowry deaths, wife beating, marital rape, sexual abuse, maltreatment etc. it may also be social like compelling wife or daughter-in-law to commit female foeticide, forcing a young widow to commit sati, pressing daughter-in-law for dowry etc.

Sex ratio in India is also in favour of males, i.e, 1000 males per 940 females as per 2011 census. Female literacy has always been lagging behind the male literacy. According to the 2011 census, the male literacy rate is 82.10% while as it is only 65.50% so far as females are concerned. In the recent times, many attempts have been made in the form of legislations to raise the status of women and to give them a significant and honorable position both socially and politically in order to make them an important element of the society. Unfortunately, these attempts have proved to be half-hearted and have failed to bring about the desired change in attitude.

Violence against women:

The global campaign for elimination of gender based violence in the recent years indicates the enormity as well as the seriousness of the atrocities committed against women. Unfortunately crime against women and their exploitation has multiplied many folds in recent years in spite of number

of laws to protect and safeguard their interest.[1] This is evident from the fact that rape takes place once in every 29 minutes, sexual harassment in every 53 minutes, molestation in every 15 minutes, cruelty by husband or relatives every 9 minutes and dowry death every 77 minutes.[2]
Although women may be victim of any crimes such as, Murder, Cheating, Theft, Robbery, etc, but the crimes which are directed specifically against women are characterized as crime against women which form the core of gender based violence.

Pre-Natal Sex Determination:

The protection of law to human life also extends to an unborn child in mother's womb. Female foeticide or sex selection abortion is the elimination of the female foetus in the womb itself.[3] However, prior to the elimination the sex of the foetus has to be determined and it is done by methods like aminocentesis, chorion villus biopsy and now by most popular technique of ultrasonography. Once the sex of the foetus is determined, if it is a female foetus, it is aborted. This has resulted in decrease in the female sex ratio. Over the last decade, the rate of decline appears to have slowed down, but what began as an urban phenomenon has spread to rural areas.[4]
The Parliament has responded to this alarming situation by enacting the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. The PNDT law is a prohibitory and regulatory statute. It seeks to put in place a mechanism which prohibits sex selection while preventing misuse of pre-natal diagnostic techniques. The PNDT Act was amended and renamed Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PCPNDT). The amendment was necessitated by the fact that the PNDT Act covered only post conception techniques such as sex determination through USG and aminiocente-

1 K.D.Gaur, The Indian Penal Code, 2009, p. 637.
2 A.S.Anand, Justice for Women: Concerns and Expressions, 2002, p. 1-3.
3 Hilal Ahmad, Heena Basharat, Law and Society, 2013, p. 100.
4 24th January 2012, The Hindu.

sis. Pre-conception Gender Selection (PGS) was outside the ambit if the Act in which the genetic material is manipulated to select the sex of the baby. This technological advancement necessitated the change in law and therefore, the PNDT Act was amended to meet the change. Though stringent laws are being made but the practice of female foeticide continues unabatedly even today.

In *Vinod Sure and Another V. Union of India*,[5] the petitioners, a married couple challenged the constitutional validity of the PCPNDT Act on the ground that it violated Article 21 of the Constitution. The SC held that the right to life and personal liberty cannot be expanded to mean that it includes the liberty to determine the sex of a child which may come into existence.

Forced or Child Marriage:

UNICEF defines child marriage as marriage before the age of 18. In India, the legal age for marriage is 18 for a girl and 21 for a boy. It's usually a young girl who is married to a much older man, though there are many cases where both the boy and the girl are below the legal age. In a forced marriage, the boy or girl or both are married without consent or against his or her will. Most often, it is the female (rather than the male) who is forced into marriage for reasons ranging from maintaining family honour to joining families to expand business interests.

According to UNICEF's State of the World's Children 2009 report, South Asia has the highest prevalence of child marriage in the world with 49% of women aged 20-24 married before they were 18 years old. In India, 47% of women in that same age group were married before 18, with 56% in rural areas. The report also says 40% of the world's child marriages take place in India and that about 10% of boys are below the legal age at the time of marriage.

In December 2008, Women and Child Development Minister, Renuka Chowdhury told the Rajya Sabha that 78 such cases were reported that

5 2005 Cri LJ 3408.

year, three of which were recorded in Rajasthan. She also agreed that "scores of child marriages are taking place unhindered in India". According to the Department of Women and Child Development's National Plan of Action for Children 2005, a goal had been set to eliminate child marriage completely by 2010. It remains to be seen whether the goal has been achieved, of which the chances are bleak.

Dowry death:

Giving of dowry in the marriage of a daughter is an age old practice in India perhaps because she had no right to inherit the parental property after her marriage under old Hindu Law. The transfer of money, goods and services from bride and her family to groom and his family is known as dowry. Dowry system in India is deep rooted. It is a social evil and is also called a social virus.[6] Of late, the greed for acquiring more and more property in the form of dowry has reached a stage when married women are subjected to physical and mental torture by the husband or her in-laws for non-fulfilment of the demand of dowry. Many a time this torture leads to unnatural death of the married woman or she is compelled by circumstances to commit suicide.[7]

The Supreme Court in the case of *Gurdeep V. State of Punjab*,[8] observed that dowry death as an offence was introduced in the IPC as Section 304-B by the Criminal Law Amendment Act, 1986. The essentials of dowry death are;

i. Death of woman should be caused by burns or bodily injury or otherwise than under normal circumstances.
ii. Death should have occurred within seven years of marriage.
iii. The woman must have been subjected to cruelty or harassment by her husband or any relative of her husband.

6 Shailendra Kumar Awasthi and Uma Shanker Lal, Law Relating to Dowry Prohibition Act,1961; Wande Teays, The Bride Burning: The Dowry Problem in India, Journal of Feminist Studies in religion, Vol. 7, 1991, p. 29

7 N.V.Paranjape, Criminology nad Penology with Victimology, 2014, p.221.

8 (2013) 10 SCC 395.

iv. Cruelty or harassment should be for or in connection with the demand for dowry.
v. Despite the Dowry Prohibition Act, 1961 and its amendment of 1987 providing for stringent punishment, the menace of dowry and dowry deaths persists unabated.

Marital Rape:

Rape is an offence worse than murder as it is an assassination of a woman's dignity. Of late a specific form of rape called as marital rape is being recognized as a heinous crime in the western world. Marital rape occurs when a woman's body is outraged regardless of her consent and willingness. However, women in Indian social set up do not make it an issue of complaint because it is against social norms as it is considered acceptable for men to force their wives to have sex as and when they wish.[9]

The term 'marital rape' may be defined as "unwanted intercourse by a man on his wife obtained by force, threat of force or physical violence or when she is unable to give her consent for it." The term 'unwanted intercourse' refers to all sorts of penetration whether vaginal, anal or oral, penetrated against the wife's will or without her consent. Marital rape is different from physical and sexual violence. It is a betrayal of trust. The affected woman feels betrayed, humiliated and above all, very confused. Marital rape, though a scar on the face of a civilized society, has not been criminalized in India. Although Indian law recognizes domestic violence against women as an offence but it is mainly confined to physical harm or torture rather than the sexual abuse of wife. However, the provisions of Section 376-A[10] IPC provide protection to wives against marital rape by their husbands during judicial separation.

9 Debdutta Das: Marital Rape : The Assasination of Women's Dignity (The Indian Police Journal, Vol. LVII No. 2, 2010).

10 Section 376-A of IPC provides that sexual intercourse with one's own wife without her consent under a decree of separation, while she is living separately under any usage or custom, is punishable with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

The Supreme Court in *State of Maharashtra V. Madhukar Narayan*,[11] has observed that in the context of Article 21 even a woman of easy virtue is entitled to privacy and that no one can invade her privacy as and when he likes.

Domestic Violence:

The role of women in India is confined to that of a daughter, housewife and mother. Unfortunately women are not safe even within the four walls of their homes. Housewives are subjected to physical and psychological harassment irrespective of their economic status, religion, caste and creed. The worst aspect of violence against women is that what it receives from social sanctity. Neighbours, authorities and even the police hesitate to intervene in the cases of domestic violence because they feel it is a very private domain. Even women themselves are reluctant to raise and report the issues relating to domestic violence.

The need for protection of women against domestic violence necessarily emerged as a human rights issue and a serious threat to social development. The United Nations Committee on Elimination of All Forms of Discrimination Against Women (CEDAW), in its general recommendations (1989) had recommended that state parties should protect women against violence of any kind especially that occurring within the family.

In order to protect the rights of women who are victims of violence of any kind occurring within the family and to provide for matters connected therewith or incidental thereto, the Parliament enacted the Protection of Women From Domestic Violence Act, 2005 (PWDVA) which came into effect from 26th October, 2006.[12]

Domestic violence[13] under the Act includes actual abuse or the threat of

11 AIR 1991 SC 207.

12 The Act consists of 37 sections spread over five chapters.

13 Domestic violence as a human rights issue was deliberated in Vienna Accord of 1994 and Beijing Platform of Action in 1995.

abuse whether physical, sexual, verbal, emotional or economic.
Harassment by way of unlawful dowry demands to the women or her relatives would also be covered under this definition. This abuse of power may exist in the form of violence between members of household, usually spouses, an assault or other violent act. It may be in the form of physical, emotional, sexual or psychological abuse against women.[14]
Undoubtedly, PWDVA is a comprehensive law which addresses almost all issues relating to women. It is a progressive legislation as it extends legal protection to women in the household on domestic relationships which are not restricted to marital context alone but also extends to adoption, joint family and even recognizes violence in living relationships as well.
However, with a view to preventing further damage to marital harmony and social stability, there is need to amend the Act on the following lines:[15]

i. Act should be made gender neutral and equal protection should be extended to men and women against physical, emotional, verbal and economic abuse.
ii. Like any other law, this law should also be based on presumption of innocence until the guilt is proved.
iii. The Act attempts to legalise living relationships thereby violating laws against polygamy and also disregarding the rights of a legally wedded wife.

In short, the Act should be more benign, sensible and gender neutral providing legal protection to both men and women.

Honor Killings:

An honour killing or crime is presumed to be committed to salvage the 'honour' of a clan, community or family that has somehow been 'violated'. Usually the violation occurs through the actions of a woman in the

14 Preeti Mishra: Domestic Violence Against Women: Legal Control and Judicial Response (2006), p.51.
15 Ritika Banerjee: Domestic Violence Act – Sociological Perspective, March 2010.

community choosing a husband, lover or boyfriend, against her family's wishes. Honour, however, can be perceived to be breached in other ways: if a meal is not served on time, if a woman is raped, if she is seen talking to a man, if she refuses to marry a man chosen for her, if she chooses to marry a man of another or "lower caste".

The 'crime' of falling in love or marrying a Dalit is often seen as a 'crime' against the whole village and punishment is usually extracted on this basis. In a majority of cases, the woman is punished, either with death or some form of physical violence or humiliation. But in many others, especially where the man belongs to a lower caste, he is either killed or severely punished with his entire family. For instance, a young Dalit man from Tirunelveli district in Tamil Nadu, Sivaji, was murdered for having married a girl from an upper caste, allegedly by his wife ' s family. His wife S Lakshmi, who was seven months pregnant at the time, was forced to watch as her older brother and others from her village tried to choke her husband and then dragged him away. His body was later discovered near-by, hacked to death. With her baby boy in tow, Lakshmi was seen running from pillar to post, seeking justice with little success.[16]

The most prominent areas where honour killings occur in India are Northern regions. Honour killings are especially seen in Punjab, Haryana, Bihar, Uttar Pradesh, Rajasthan, Jharkhand, Himachal Pradesh and Madhya Pradesh. Honour killings have notably increased in some Indian states which has led to the Supreme Court of India, in June 2010, issuing notices to both the Central Government and some State Governments to take preventive measures against honour killings.

Honour killings can be very violent. For instance, in June 2012, a father chopped off his 20 year old daughter's head with sword upon hearing that she was dating a man who he did not approve of. Honour killings can also be openly supported by both local villagers and neighbouring villagers. This was the case in September 2013, when a young couple in Haryana

16 Prajnya Report, 16 Days Campaign Against Gender Violence, 2009.

who married after having a love affair was brutally murdered with the support of the local community in the name of community honour.
In one more incident, Shanker, a 22 year old Dalit, who married Kausalya, a high-caste Hindu, was hacked to death by hired killers in Tirupur, Tamil Nadu, on Sunday March 13, 2016 in a suspected case of honour killing.
One of the many problems with bringing perpetrators of such crimes to justice is that the crimes are often instigated by adult members of a community but actually committed by teenage boys in the family so as to incur a lighter sentence. In many cases the women in the family including mothers, mother-in-law and sisters also participate. In other cases, such as the incident in the Jind district of Haryana that garnered national attention in July 2009, 21-year-old Ved Pal who was accompanied by at least 15 policemen and a court warrant officer was ambushed by villagers, mainly his wife Sonia's family members, and lynched. His 'crime' was to have married Sonia against the community's wishes as they both belonged to the same gotra and were therefore, seen to be 'brother and sister'. The accompanying policemen and officer fled the scene. Pal's body was displayed by the villagers in public that night. The police, while not helpless, often prefer to turn a blind eye to the workings of local caste panchayats or leaders of the community as the case may be. This is partly because of an innate patriarchal belief in the notion of honour and a woman's chastity and partly because of a reluctance to rock the applecart or in this case, delicate village caste dynamics. Deaths are often shrouded in secrecy and then made to look like suicides or accidents. In other cases, even first information reports are not registered by the police. Often, when cases are registered by Dalits, they are not even recorded.[17]

Sexual Harassment of Women at Workplace:

For the emancipation and equal status of women in the society it was felt necessary that she needed to be educated and for equal economic status

17 Prajnya Report, 16 Days Campaign Against Gender Violence, 2009.

and financial independence she deserves equal opportunity to employment. But when she finally broke the barriers on her freedom and moved out she was not safe. One of the evils of modern society is the sexual harassment of women particularly the working women by their male counterparts at work places.[18]

Sexual harassment at workplace is generally classified into two distinct types,i.e, 'quid pro quo' means seeking sexual favours or advances in exchange for work benefits and it occurs when consent to sexually explicit behavior or speech is made a condition for employment or refusal to comply with a request is met with retaliatory action such as, dismissal, demotion, difficult work conditions, and the other is, 'hostile working environment' which is more pervasive form of sexual harassment involving work conditions or behavior that make the work environment hostile for the women. Certain sexist remarks, display of pornography or sexist/obscene graffiti, physical contact, brushing against female employees are also some examples of hostile work environment.[19]

In the context of sexual harassment at workplace, the Supreme Court of India in the landmark judgment in *Vishakha V. State of Rajasthan*,[20] laid down guidelines to remedy the legislative vacuum on this issue. It defined sexual harassment. As a result if this judgment any woman employee who is subjected to sexual harassment of any kind can take recourse to initiating criminal proceedings, disciplinary action and also seek compensation from the guilty employer or other person responsible for the sexual harassment.

As per Vishakha norms, the following constitute an act of sexual harassment at workplace;

I. Physical contact or advances.
II. Demand or request for sexual favours.
III. Sexually colored remarks.

18 Srivastava S. S., Criminolgy, Penology and Victimology, 2012.
19 www.priacash.org
20 AIR 1997 SC 3011.

IV. Showing pornography against the will of woman.
V. Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

In order to prevent such cases (offences), the Supreme Court suggested that;

i. Management of government offices, agencies, departments, BPO's, MNC's, corporate and/or co-operative organizations should set up 'internal complaints committee' to deal with complaints of sexual harassment of women.
ii. The committee should be headed by a senior female employee.
iii. During enquiry, the aggrieved woman may be transferred or granted leave.
iv. If allegations are proved, it will be treated as misconduct and the offender may be asked to pay compensation to the aggrieved woman.

It is gratifying to note that the broad guidelines laid down in *Vishakha's* case by the Apex Court were applied by Bombay HC in 1998 in the case of *Mrs. Shehnaz Sani* who was working as a ground hostess in Saudi Arabian Airlines of Bombay and was sexually harassed by her employer. The Court directed the employer of Mrs. Sani to reinstate her back with wages of 13 years, during which she was rendered unemployed due to wrongful termination of her services by her boss. This judgment has certainly set a new trend in the protection of human rights and dignity of working women in India.[21]

The Supreme Court in *Apparel Export Council V. A. K. Chopra,*[22] emphasized that in cases involving violation of human rights, the Court should be alive to the International Conventions and apply the same in deciding cases, particularly those relating to the violation of the right to gender equality and the right to life and liberty including sexual abuse of women

21 N.V.Paranjape, Criminology and Penology with Victimology, 2014, p.218.
22 AIR 1999 SC 625, 1999 (1) SCC 759.

at the work place.

In the said case, the delinquent superior officer was found guilty of molesting and of having tried to assault physically a female subordinate employee. The Departmental Inquiry found him guilty and he was sacked. But the Delhi High Court ordered his reinstatement holding that he only attempted to molest her. However, the SC took exception to the High Court's order. Finding the Court's approach tough and uncompromising, the accused pleaded that he was repentant and was ready to go to the victim's house and tender unqualified apology for his misbehavior. The accused, A. K. Chopra also filed an appeal against the order of the Supreme Court. Rejecting the appeal, the SC in this case held, "Sympathy in such cases is uncalled for and mercy is misplaced as it is bound to have a demoralizing effect on working women." The court, therefore, upheld the removal of the accused from the services and the appeal was dismissed.

Following the *Vishakha* guidelines, the Parliament has enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 which has come into force w.e.f. Dec 9, 2013.

After 15 years of *Apparel Council Case*, once again tendering of apology to the assaulted victim of sexual harassment claiming the act as 'lapse of judgment' was turned down as a valid ground for excuse in the *Tehelka Editor Case*. In the Tehelka Case Tehelka Editor-in-Chief, Tarun Tejpal on 19th Nov. 2013 allegedly committed a sexual assault on his junior colleague during ThinkFest Event in Goa. The next day he offered an apology. Rejecting his apology outright, the victim maintained that she had no consent in the act and she was subjected to sexual assault. The trial of the accused was taken up by the Goa Court and a case under Section 376 has been registered against him.

Yet another sensational case of sexual harassment of women at workplace which hit the newspapers and media during December 2013 relates to a lady interim of the National University of Judicial Services (NUJS), Kolkata who recently accused a retired Supreme Court Justice A.K. Ganguly of sexual harassment in a Delhi hotel on 25th of November, 2012 while she went to assist him as a junior intern lawyer. On the complaint of the

girl, the Supreme Court of India set up a three-judge[23] panel to look into the matter. The Supreme Court has, however, closed the matter holding that it had no administrative jurisdiction over a retired judge. However, the Supreme Court by an order of 17th July, 2013 ordered setting up of a committee to probe sexual harassment in Court premises and Advocates/ Judges chamber after some women lawyers had moved the Court citing sexual harassment of the young law graduate intern of NUJS, Kolkata.

Conclusion:

Gender inequalities throughout the world are among the most all-pervasive forms of inequality. Gender equality concerns each and every member of the society and forms the very basis of a just society and hence, the issue of 'gender justice' is of enormous magnitude. Swami Vivekananda had aptly remarked:

"*Just as a bird could not fly with one wing, a nation would not march forward if the women are left behind.*"

But as a fact, neglect of women is a fact as old as human history. For centuries women have been oppressed and suppressed, the only difference being in the forms that suppression and oppression have taken. While traditional crimes against women are on rise, new crimes are being added to the list. In patriarchal societies women are often desired by men, but seldom as their daughters. Women are perceived as a burden- socially as well as financially.

In the constitution of India a bundle of special rights and protections are afforded to women to emancipate and uplift them. The Parliament of India has also tried to fill the vacuum by passing different legislations concerning different issues related to women and the Judiciary has also been playing an active role in this regard so that the status of women is elevated but nothing much has been achieved. The bitter realities concern-

23 Panel comprised of Justices R.M. Lodha, H. L. Dattu and Ranjana P. Desai.

ing the life of an average woman in India is enough to indicate the plight of women. The laws though passed and stringent punishments provided in case of contravention but the implementation of laws has been a sad story. The objective of the law gets defeated due to lacunae in the law and lack of proper implementation.

Even though the law is a powerful instrument of change yet law alone cannot root out the issues of gender violence. The girls are devalued not only because of economic factors but also because of socio-cultural considerations. It is, therefore, essential that these socio-cultural factors be tackled by changing the thought process through awareness, mass appeal and social action. Much in this regard can be done by media and social welfare organizations. Once the mind set of people changes the implementation of laws would become possible and the women would achieve her place as an important member of society.

Medical Negligence in India: A Legal Perspective

Dr. Mudasir Bhat*

Abstract:

Medical profession is as old as the human race. This profession has immensely helped the mankind. However, fast commercialisation of this profession has become a great threat to it. Increased marketing in health sector creates the fertile ground for illegal trade practices in this profession. Due to the high impact of commercialisation, ethical and self regulatory standards have been declined, which results in illegal practices alien to the medical profession. Presently such illegal practices or negligent acts on the part of medical professionals are on rise. Medical negligence creates an interface between law and medicine. In such situations, legal standards enter into the arena of medicine to check the proper discharge of obligation, duty of care and skill. Reformatory changes are requirement of time to undo the malpractices of medical professionals.

Key Words: Medical Profession, Medical Negligence, Doctor-Patient relation, informed consent.

Introduction

Sovereignty, definite territory, population and recognition are various constituents of a nation. Population, i.e., human race is the biggest asset of any nation. A healthy mankind is completely proportionate to the fu-

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ture of the nation.[1] However, human body is prone to ailments. Different kinds of ailments take birth with the birth of the human being. Man's search to find remedies and devices to restore health is as old as the existence of mankind. Initially, man regarded death and disease as natural phenomena. Man accepted common maladies as part of his existence and administered such herbal remedies as available. However, in the course of time, man realised that diseases and illness could be cured by human efforts. Emergence of human societies created a new adaptive strategy that forced on man a major concern with the prevention and treatment of disease. This complex system of curing ailments and diseases is called as 'medical profession'.[2] With the development of this profession not only has practice of medicine graduated but relationship of Doctor and Patient has slowly shifted to a professional one.[3]

Medical Negligence: Origin, Nature and Conceptual Dimensions

Medical profession is as old as the existence of human race. *Ayurveda*[4] is the traditional Indian health care system. This system originated in India long back in *pre-vedic* period.

Rigveda and *Atharva-veda* have references on health and diseases. An-

1 Shweta Thakur, Vikram Singh Jaswal, Medical Negligence in India, Regal Publications, New Delhi, (2013), p.1.

2 K.P.S. Mahalwar, *Medical Negligence and the Law*, Deep and Deep Publications, New Delhi, (1991), p.1.

3 *Supra* note 1.

4 Ayurveda or Ayurvedic medicine is a system of Hindu traditional medicine of Vedic tradition, is native to the Indian subcontinent, and is a form of alternative medicine. The oldest known Ayurvedic texts are the Susrutha Samhita and the Charaka Samhita. These Classical Sanskrit texts are among the foundational and formally compiled works of Ayurveda. By the medieval period, Ayurvedic practitioners developed a number of medicinal preparations and surgical procedures for the treatment of various ailments. Practices that are derived from Ayurvedic medicine are regarded as part of complementary and alternative medicine, and along with Siddha Medicine and Traditional Chinese medicine, forms the basis for systems medicine. There is no scientific evidence for the effectiveness of Ayurvedic medicine for the treatment of any disease. Concerns have been raised about Ayurvedic products; for example, peer-reviewed studies have shown that up to 20% of Ayurvedic U.S. and Indian-manufactured patent medicines sold through the internet contained toxic levels of heavy metals such as lead, mercury and arsenic. Available at: http://en.wikipedia.org/wiki/Ayurveda, (Accessed on 29.10.2014).

other branch of traditional medicine is *Unani* or *Yunani* system[5]. The Delhi *Sultans*, the *Khiljis*, the *Tuglaqs* and *Mughal* Emperors provided state patronage to scholars of unani medicines, this period is regarded as the golden period of *unani* medicine. Another smaller group of traditional practitioners in India is *Siddha* School. It has originated in Tamil culture of Southern India. This system of medicine is also known as *Agarthyar* system. History of Medical Services in British India date back to 1600, when the first medical officer arrived in India along with British East India Company's first fleet as ship's surgeon. A medical department was established in Bengal as far back as 1764 for rendering medical services to troops and servants of company. This system gave rise to modern system of medicine in India.[6]

Since the origin of mankind, actions of man have always been subject to faults, carelessness or negligence, whatever may be the nomenclature, negligence exists in every walk of life. Ancient literature like *Vyavaharakalpatranu, Vivada Ratnakar* speak on law relating to negligence. Applying *ubi jus ibi remedium* (where there is a right, there is a remedy), it can be said that law is made to deal with wrongs done or to get the wrongs redressed. Availability of remedy for the wrong is the evidence of the existence or occurrence of wrongful actions of society. The concept

5 Unani Medicine or Yunani Medicine is a form of traditional medicine practiced in middle-east & south-Asian countries. It refers to a tradition of Graeco-Arabic medicine, which is based on the teachings of Greek physician Hippocrates and Roman physician Galen, and developed into an elaborate medical system in middle age era by Arabian and Persian physicians, such as Rhazes (al-Razi), Avicenna (Ibn Sena), Al-Zahrawi, and Ibn Nafis. Unani medicine is based on the concept of the four humours: Phlegm (Balgham), Blood (Dam), Yellow bile (Safra) and Black bile (Sauda). The time of origin is thus dated at circa 1025 AD, when Avicenna wrote The Canon of Medicine in Persia. While he was primarily influenced by Greek and Islamic medicine, he was also influenced by the Indian medical teachings of Sushruta and Charaka. Unani medicine first arrived in India around 12th or 13th century with establishment of Delhi Sultanate (1206–1527) and Islamic rule over North India and subsequently flourished under Mughal Empire. Alauddin Khilji had several eminent Unani physicians (Hakims) in his royal courts. In the coming years this royal patronage meant development of Unani practice in India, but also of Unani literature with the aid of Indian Ayurvedic physicians. Available at: http://en.wikipedia.org/wiki/Unani, (Accessed on 29.10.2014).

6 *Supra* note 1 at 7.

of negligence in its present form is not of Indian origin but is patterned on English law, where negligence is a separate tort.[7]The law as such does not define medical or professional negligence as a form of conduct that should be set apart from the conduct of any other member of society offering a service. In the strict legal sense, no distinction is drawn between the negligence of a doctor and plumber.[8] Medical negligence being off shoot of negligence creates anxiety to go deep into the origin of concept and its subsequent development.

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.[9] In other words, negligence is simply neglect of some care which we are bound to exercise towards somebody. It is something less than misconduct. Medical negligence is simply a neglect of some care which a doctor is bound to exercise towards his patient. Medical negligence is a particular type of negligence, i.e., professional negligence. In this type of negligence special skill is required by the wrongdoer, i.e. the professional is one who professes to have some special skill and knowledge. Medical negligence is not different in law from any other type of negligence. The basis of liability of professional negligence is negligence. In general, there are three meanings of medical negligence, i.e.

a. A state of mind which is opposite to intention;
b. Careless conduct; and
c. The breach of duty to take care imposed by common or statute law.[10]

In the first place, negligence is state of mind. Intention is also a state of mind but there is a difference between the two. An act is said to be intentional when it is done purposefully to cause injury or to attain some

7 *Supra* note 2 at 21.
8 Lily Srivastava, *Law and Medicine,* Universal Law Publishing, (2010), p.36.
9 *Bhalchandra* v. *State of Maharashtra,* AIR 1968 SC 1319.
10 *Supra* note 1 at 16.

object, while negligence as a state of mind comes into operation when it is desired to accomplish something but with , carelessness or indifference.[11]

In order to establish the liability of medical negligence, it must be shown that:

a. The doctor has a duty to take care towards the patient;
b. The doctor was in a breach of that duty; and
c. The patient has suffered damage as a result of the breach of that duty.[12]

Jurists have attempted to classify negligence in many ways. The classical attempt is to classify negligence, objectively or subjectively. The objective theory defines negligence as carelessness in approach, an act of commission, resulting in injury. The subjective theory defines negligence as a mental attitude of undue indifference resulting in injury. Classification has been also been attempted taking into consideration the acts constituting negligence, which could be Malfeasance (e.g., administering contraindicated medication), Misfeasance (e.g., bathing a patient in scalding hot water), Nonfeasance (e.g., failing to order diagnostic tests or prescribe medications that should have been ordered or prescribed under the circumstances). Negligence has many forms and descriptions. These have been employed to classify negligence, e.g., active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, passive negligence, wilful or reckless negligence, administrative negligence or negligence *per se*.[13]

In the law of medical negligence, amongst the professionals, doctors are treated as a class apart. There have been innumerable judicial pronouncements all around the world, as well as statutory instruments which seek to protect doctors and give them preferential treatment. The degree of skill and care required by a medical practitioner is thus stated

11 *Supra* note 2 at 23.
12 *Supra* note 1 at 18.
13 Module III and Module IV for law professionals, Institute of Medicine and Law, Mumbai, p.5.

in Halsbury's Laws of England: "The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor 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, even though a body of adverse opinion also existed among medical men".[14]

Doctors owe to their patients a duty in tort as well as in contract. It existed of such a professional man that he should show a fair, reasonable and competent degree of standard of care in discharging his duty of care. The liability of medical professionals towards their patients is compendiously stated in *R v. Bateman*[15]as follows: "If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward....The law requires a fair and reasonable standard of care and competence. This standard must be reached in all the matters above mentioned. If the patient's death has been caused by the defendant's indolence or carelessness, it will not avail to show that he had sufficient knowledge; nor will it avail to prove that he was diligent in attendance, if the patient has been killed by his gross ignorance and unskilfulness... As regards cases where incompetence is alleged, it is only necessary to say that the unqualified practitioners cannot claim to

14 Halsbury's Laws of England, Fourth Edition, Volume 30, paragraph 35.
15 (1925) All ER Rep 45: 41 TLR 557: 28 Cox CC 33.

be measured by any standard than that which is applied to a qualified man. As regards cases of alleged recklessness, juries are likely to distinguish between the qualified and the unqualified man. There may be recklessness in undertaking the treatment and recklessness in the conduct of it. It is no doubt, conceivable that a qualified man may be held liable for recklessness undertaking a case which he knew, or should have known, to be beyond his powers, or for making his patient the subject of reckless experiment. Such cases are likely to be rare..."

The Supreme Court in *Jacob Mathew case*[16], has very emphatically, specified three considerations, which any forum trying the issue of medical negligence in any jurisdiction must keep in mind. These are:

i. that legal and disciplinary procedures should be properly founded on firm, moral and scientific grounds;
ii. that patients will be better served if the real causes of harm are properly identified and appropriately acted upon; and
iii. that many incidents involve a contribution from more than one person, and the tendency is to blame the last identifiable element in the chain of causation.

Qualified and Unqualified Doctors

While dealing with medical negligence, especially in the Indian context, a very relevant question arises, whether there is any difference in the penal liability cast between a qualified and unqualified medical professional. In principle there is no distinction in relation to their ability for manslaughter between a qualified or registered or unregistered practitioner. Any person who professes or deals with the life or health of others is bound to use competent skill and sufficient attention.[17]

Thus though theoretically both may invite penal consequences, for their wrongful acts, in case of unqualified medical professionals, the act of prescribing medicine or undertaking treatment, is *per se* rash and neg-

16 *Jacob Mathew* v. *State of Punjab*, AIR 2005 SC 3180.
17 Halsbury's Laws of England, Fourth Edition, Volume 30, paragraph 42.

ligent and if it causes death punishable under section 304A of the Indian Penal Code. The principle could be further extended to doctors who do not prescribe or undertake treatment in the branch of medicine in which they are qualified but in some other branch. In practice, not only could an unqualified doctor be held criminally liable but also even a qualified homeopath or naturopath prescribing allopathic medicine or vice versa, could be held liable for negligence.[18]

What is not negligence?

The concept of negligence, its applicability, especially in medical context, can be known with clarity, by knowing situations and acts that do not constitute medical negligence. In other words, patients claim may be encountered with certain defences available to the practitioners in law. These defences negate the liability or to be more precise they justify the acts causing injury.[19] The following do not constitute medical negligence:-

i. Standard of care- A doctor is liable only if his degree of care falls below a reasonable standard. It is not required that he should use the highest degrees of skill. Even deviation from normal professional practices is not necessarily evidence of negligence.
ii. Honest mistakes, errors of judgements, accidents- The standard of care which the law requires do not insurance against accidents, errors of judgement or mistakes.
iii. Inherent risks- Certain risks are inherent in all treatments and a doctor cannot be liable for negligence, if any such risk actually takes place.
iv. Unexpected results- No doctor guarantees result for medicine. Medicine after all is an imperfect science.
v. Difference of opinion- The doctor may opt for a line of treatment, even if it is considered appropriate only by a respectable minority of doctors practising in that speciality.[20]

18 *Supra* note 13 at 7.
19 *Supra* note 2 at 160.
20 *Supra* note 13 at 8.

Duties of Medical Professionals

Duties and obligations of medical professionals towards patients are enlisted in ordinary laws of the land and various Codes of Medical Ethics and Declarations.[21] Some of such duties are herein under:

- Standard of care
- providing information to the patient
- consent for treatment, and
- emergency care

Doctrine of Standard of Care

Medical practitioner has an obligation to use standard of care and skill which is expected of reasonable competent doctor of the same speciality acting in same manner or similar circumstances. A doctor is bound to have a minimum threshold of knowledge and skill and ought to exercise the same with due care and diligence. The standard of care has many aspects. In practice, it means that the doctor must take reasonable care for the well being of the patient in all aspects of the medical context in which the doctor is involved. This includes consultation or visits, giving advice, maintaining confidentiality, taking informed consent, referring patient to the specialist etc. In *Bolams Case*[22] McNair J. Stated that:

"A doctor is not 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."

McNair J. went on to comment on situations where there is difference in medical opinion:

"Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view"

This direction has become known as *Bolam's* test and has been adopted by

21 Jagdish Singh and Vishwa Bhushan, *Medical Negligence and Compensation,* Bharat Law Publications, (2007), p.2.

22 *Bolam* v. *Friern Hospital Management committee* [1957] 2 All E.R. 118 at 122.

the House of Lords as the Standard of care for treatment, diagnosis, and disclosure of information.[23]

The classical statement of law in *Bolam's*[24] case has been accepted and established the standard of care both of professional men generally and medical practitioner in particular. It has been invariably cited with approval before courts in India and applied to as a touchstone to test the pleas of medical negligence.[25]

The position in the English courts has now changed. The decision in *Bolitho* Case[26] suggests that court should adopt a more interventionist stance in assessing expert evidence and in setting the standard of care. On such approach towards a more objective measure in determining the legal standard of care could be through the useful of clinical guidelines. The *Bolam's* test has been followed for a long time in India, the principle being used and applied in cases like *Suresh Gupta*[27]and *Samira Kolhi*[28]. But the question that still remains is whether there has been a shift from this principle to the principle that has evolved in common law and is substantiated in the *Bolitho* case[29]. The House of Lords ruling in *Bolitho* signalled shift away from *Bolam*. It has been no longer enough for the standard of care proclaimed by a defendant doctor to be endorsed by a responsible body of peers. In minority judgement comments in Bolitho, it has been emphasized that the word 'responsible' in the traditional formulation of the *Bolam's* test meant that responsible practice is that which withstands the scrutiny of "logical analysis" from a judicial perspective.[30]

The *Bolitho* test has been mentioned in the Supreme Court of India only on two occasions. It has been stated in *Samira Kohli's* case[31],

23 Shaun D. Pattison, *Medical Law and Ethics*, Thomson Reuters, (2013), p. 79.
24 [1957] 2 All E.R. 118 at 122.
25 K.Kannan, *Medicine and Law*, Oxford University Press, (2014), p. 300.
26 *Bolitho v. City and Hackney Health Authority,* [1997] 4 All ER 771.
27 *Suresh Gupta v. Govt. of NCT of Delhi,* (2004) 6 SCC 422.
28 *Samira Kohli v. Dr. Prabha Manchanda,* AIR 2008 SC 1385.
29 *Supra* note 26.
30 *Supra* note 5 at 43.
31 *Supra* note 28.

where the court clearly pointed out that, "A beginning has been made.... in *Bolitho's* case and *Pearce's* Case. We have however consciously preferred the real consent concept evolved in *Bolam's* and *Samira Kohli's* case.[32]

However, Supreme Court of India has redefined medical negligence to include overdose of medicines, not informing patients about the side effects of drugs, not taking extra care in case of diseases having high mortality rate and hospitals not providing amenities that are fundamental for the patients.[33]

Doctrine of *Res Ipsa Loquitor* and Medical Negligence

The doctrine of *res ipsa loquitor*[34] is very much applicable in cases if medical negligence before the Consumer Disputes Redressal Agencies. The fact that the medical act was performed so negligently that the inference of negligence is the only inference that can be drawn will force the court to hold doctors liable. In such cases, the patient has to simply show the result of the negligent act and nothing more. For example, if a doctor leaves forceps inside the body of a patient. The patient simply has to show x-ray or other investigation reports to shift the burden on doctor. In such cases court will presume medical negligence unless the doctor is able to bring clear, cogent and concise evidence to discharge the burden of proof which had shifted on him.

Legal Remedies for Medical Negligence under Various Legislative Provisions

Right to health care in India has been recognised since early times. The Constitution of India, which is law of the land does not expressly provide about the right to health. However, fundamental rights and di-

32 *Supra* note 30.
33 *Supra* note 5 at 44.
34 Common law doctrine of *res ipsa loquitur* means 'the thing itself speaks'. It is a doctrine that states that the elements of duty of care and breach can sometimes be inferred from the very nature of an accident or other outcome, even without direct evidence of how any defendant behaved.

rective principles of state policy have a direct bearing on the health care of its citizens. Article 14 guarantees right to equality, that means all citizens should have equal access to health care system of country free from any recklessness or negligence. Similarly, Article 21 guarantees right to life and personal liberty which includes right to live with human dignity. Supreme Court of India while making liberal interpretation of this Article expanded to bring within its fold the right to health care.[35] Article 19 of the Constitution of India guarantees freedom of profession, trade or business. However, Article 19(2) puts restriction on carrying on any trade which is dangerous or immoral. This means any medical professional who is rendering medical services negligently can be prohibited from practicing his profession.[36]

Apart from fundamental rights, directive principles of state policy have direct bearing on the health care system of the country. Article 39(e) directs the state, that it shall in particular, direct its policy towards securing health of workers. More importantly Article 47 of the Constitution of India provides that it is the duty of the State to raise the level of nutrition and the standard of living and to improve the public health. This means State is under obligation to check the malpractices and negligent acts of medical professionals.

Under the penal law of the country i.e., Indian Penal Code, medical negligence does not create any distinct offence. However, there are various provisions of the Code which one way or the other deal with the cases of negligent acts of medical professionals. For instance, if any medical practitioner adulterates any drug or medical preparation he shall be punished under section 274 of the IPC.[37] Similarly, under section 284 of

35 *V.P.Langara v. Union of India,* AIR 1987 SC 994.

36 *Supra* note 1 at 43.

37 Section 274 of the IPC provides that whoever adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for, any medicinal purpose, as if it had not undergone such adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or

the IPC if a medical practitioner hurts or injures any person with any poisonous substance, he shall be punished for that. Section 287 provides that if any medical practitioner does any rash or negligent act with any machinery with endangers human life, he shall be punished. Most important is Section 304A of the IPC. It provides punishment of two years or fine or both, if a death of a person is caused by the negligence of medical practitioner.

Liability of medical professionals under the Indian Contract Act, 1872 mainly depends upon the express and implied terms agreed upon by the patient of his representatives and the doctor or hospital. Consent for treatment on payment of fee on the part of the patient can be treated as an implied contract with the doctor, who by undertaking treatment on acceptance of fees, promises to exercise proper care and skill. If any medical professional does not undergo proper care and act negligently then his contract get breached and he is liable to pay compensation to the patient for breach of contract under Section 74 of the Indian Contract Act.[38]

Medical negligence as a tort, is a breach of a duty caused by omission to do something which a reasonable medical professional would do, or doing something, which a reasonable medical professional would not do. Under the law of torts remedies may be legal or extra-legal. Legal remedies include the remedies by way of damages and injunction. Extra-legal remedies are expulsion, re-entry on land, etc. However, remedies available for medical negligence are mostly damages and compensation.[39]

Liability under the Consumer Protection Act, 1986 came up before the Supreme Court in *Indian Medical Association v. V.P Shantha and Ors.*[40]It was held that patients aggrieved by any deficiency in treatment, from both private clinics and Govt. hospitals, are entitled to seek damages under the Consumer Protection Act. The Court further held that:

with both.

38 *Supra* note 1 at 47.

39 *Ibid.*

40 A.I.R 1996 SC 550.

a. Service rendered to patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service) by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of "service" as defined in Secton 2(1)(o) of the C.P.Act.
b. The fact that medical practitioner belong to the medical profession and are subject to the disciplinary control of the Medical Council of India and /or State Medical Councils would not exclude the service rendered by them from the ambit of C.P.Act.
c. The services rendered by a doctor was under a contract for personal service (rather than a contract of personal service) and was not covered by the exclusionary clause of the definition of service contained in the C.P.Act.
d. A service rendered free of charge to everybody, would not be service as defined in the Act.
e. The hospitals and doctors cannot claim it to be free service if the expenses have been borne by an insurance company under medical care or by one's employer under the service condition.

Review of various laws having bearing on the medical negligence reveal that there is no specific legislation to deal with the medical negligence. It is the nature of the negligence which decides whether negligent act creates criminal or civil liability.

Conclusion and Suggestions

Medical negligence is neglect on the part of medical practitioners i.e., Doctors, Nurses, Pharmacists, etc. Various systems[41] of medicine are prevalent in India. Every system of medicine suffers from certain shortcomings. Since, each system is to be handled by human agency, it is subject to imperfection, but at the same time it does not exonerate the human agency for their inability of preventing harm. Various efforts

41 Ayurveda, Unani, Siddha and Allopathic.

have been made from ancient times to prevent medical negligence, as it is biggest threat to biggest assets of a nation, i.e., human beings.[42]In the modern times negligent malpractices are subject to legal process. If in practising the science of medicine some loss or injury is sustained by the patient due to doctor's negligence, law provides for civil and criminal liabilities.[43] However, it is only negligible number of medical negligence cases that comes before the eyes of law. It seems lack of awareness about medical negligence and poverty are the main obstacles in the dispensation of justice to the victims of medical negligence.

In order to see aggrieved patients or their families get justice, like Environmental Tribunals, Medical Negligence Tribunals may be established. Furthermore, to reduce the chances of medical professional malpractices, uniform central legislation dealing with the cases of medical negligence must be passed.

42 *Supra* note 1 at 140.
43 *Supra* note 2 at 213.

Conceptual Framework of Islamic Banking; An Analysis

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NAYEEM AHMAD BHAT**

Abstract

Islamic banking is a broader concept of Islamic faith. Islamic banking originated from pro-poor, equitable and welfare-oriented financial system of medina. Islamic banking started its initiatives in both Muslim and non-Muslim world. Present paper analysis Islamic banking system concept taking consideration how it developed within its Islamic bounds across the globe under various Acts and institutions. The Islamic rationale for the prohibition of riba(interest) is the exploitative nature of interest. Interest-based transactions violate humans birthright . Islamic banking played role in promoting banking entrepreneurship by providing finances to both Muslims and non-Muslims alike.

Keywords: Riba, Islamic Banking, Conventional Banking, Financial Principles, Muamlat

INTRODUCTION

Islamic banking refers to a financial system which is consistent with Principles of Islamic law (or *sharia*) and guided by Islamic Jurisprudence (*usul ul fiqh*). In particular, Islamic law prohibits Riba or Usury, the collection and payment of interest. Additionally, Islamic law prohibits investing

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in businesses considered unlawful *(haram*) or contrary to Islamic injections or doctrine. Islamic banking is the system of banking consistent with principles of Islamic law (Shari'ah) and guided by Islamic economics. Islamic economics is referred to that body of knowledge which helps realize human well-being through an allocation and distribution of scarce resources that is in conformity with Islamic teachings without unduly curbing individual freedom or creating continued macroeconomic and ecological imbalances[1].

Islamic banking is part of the broader concept of Islamic faith and governance, which aims at the introduction of value system and ethics of Islam into the socio-economic sphere. Because of this ethical foundation, the concept of Islamic Banking for the follower of Islamic faith is more than merely a concept on how to do banking. It is the embodiment of the submission to Allah, since following the Islamic precepts is a religious obligation. Based on this tenet, the Islamic banking can be elaborated as a system of banking which provides financing under the Islamic jurisprudence of justice, fairness and equality. It was under the doctrines of said jurisprudential exigencies that inspired the rightly guided Caliphs in their management of the economy, the jurists in their working out the details of the Shariah relating to economic affairs and the social thinkers when they surveyed economic systems and made policy recommendation.

Brief Historical Development of Islamic Banking

Before the daybreak of Islam, the Makka, the Holy city of Arabian Peninsula, was the centre of world trade and regarded as a safe heaven for investors and business people. Amid this relative security and local prosperity in trade and business, it was obvious that primitive system deposits and the utilization of money shall appear in pre-Islamic Makka society[2]. Mostly goods were exchanged on bartered basis while payments also

1 Chapra, M. Umar, "What is Islamic Economics." Islamic Development Bank Jeddah in IDB PrizeWinner's Lecture Series No. 9, First Edition, Published by IRTI, 1996.

2 Akram Diya al Umri,(1991),Madinan Society At The Time of Prophet. International Insti-

made in Dinar and Dirham coins (Dinar coins were in gold while Dirham coins were in silver). The parity between Dinar and Dirham was 1.12.

The business of money changing was common. Similarly, lending money on interest (Riba) was also common in Arabian Peninsula[3]. The Jews of Medina, Banu Nadir, monopolized local business. They lend money to local people and charged high rate of interest. It was their main source of income. They were in majority and wealthy community as compared to other communities while the Quresh tribe of Makka were the men of trade and commerce. They pooled financial resources for carrying out large business ventures and share profit according to proportion of their contribution[4].

On the Migration of Holy Prophet (SAAS) the entity of city of Medina was changed and it emerged as one of the main business centres of Arab region[5]. The tiny Muslim state was emerged from the city of Medina and was transformed into the big empire of the world due to introduction of pro-poor, equitable and welfare-oriented financial system. The next four to six centuries saw a continuous expansion of Muslim empire and high living standard of its citizens.

The Muslim's love for trade is expressed by Goitein[6] in these words: "*Merchants, craftsmen, and scholars alike would combine journeys undertaken in their personal interests with pilgrimages to holy places. The Muslim pilgrimage, of course, far outstripped in importance those of the other two religious. In the first place, pilgrimage was one of the main religious duties of a Muslim, whereas in Christianity and Judaism it was only a meritorious deed. Secondly, from its very inception, the pilgrimage to Mecca was connected with the great transcontinental trade and remained so throughout the middle Ages. The*

tute of Islamic Thought, Herndon, Virginia

3 Ibid.

4 Warde,Ibrahim (2006) "Islamic Finance in the Global Economy",Edinburgh University Press,U.K.

5 Akram Diya al Umri,(1991),Madinan Society At The Time of Prophet. International Institute of Islamic Thought, Herndon, Virginia

6 Goitein,S.D.(1967), "A Mediterranean Society," University of California Press,California,U.S.A.at page no 55.

standing wish for a Muslim pilgrim was: "May your Hajj be accepted, your sin be forgiven and your merchandise not remain unsold."

It is by and large believed that there can be no banking system in Islam, as interest, the cogwheel of the modern banking is strictly prohibited[7]. However, Islamic Banking has a long history which dates back to the early days of the Islamic State, also known as the Caliphate. The foundations of mercantilism, sometimes called Islamic capitalism were developed during the 8th- 12th centuries and a stable currency called the dinar was spread throughout the Islamic state. Many innovative modes of financing were developed during this time such as bills of exchange, different forms of partnerships, cheques and trust which later spread to Italy and the rest of Europe in the 13th century because of extensive trade and interaction with the Islamic state[8]. When the Islamic state was abolished in 1924 the concept of Islamic banks died with it and European styled conventional banking spread throughout the Muslim world.

Islamic Banking Movement in the World

Islamic Banking, based on the Islamic economic system, is not limited to Muslims only. The objective of Islam injunction is welfare of the whole humanity. Islamic Banking is no longer confined to concepts and ideas only. No doubt, until the first half of the 20th century, it was more or less an abstract concept.

The first modern experiment involving Islamic banking activities started in Egypt during 1960's[9]. Established as an interest-free banking alternative, the bank mainly focused on providing savings facilities based on the profit and loss sharing concept, often referred to as the PLS scheme. Islamic Banking and finance revived in 1963 when MitGhambr Savings

7 Muslehuddin,m.(1992),Banking and Islamic law,international Islamic publishers,New Delhi.

8 Moin,M.S (2008).Performance of Islamic Banking and Conventional Banking in Pakistan:A-Comperative Study. Available at WWW.Diva-portal.org/Smash/get /divz2:113713/full-text01(12 december2011)

9 Islamicity, Finance Information Center, http://islamicity.com/finance/IslamicBanking_Evolution.htm

Bank began offering interest free banking in Egypt. This bank and its branches were forced to close down in 1971.

During the seventies, because of changes that took place in the political climate of many Muslim countries, there was no longer any strong need to establish Islamic financial institutions under cover. Both with letter and spirit, a number of Islamic banks were established in the Middle East, e.g., the Dubai Islamic Bank (l975), the Faisal Islamic Bank of Egypt (l977), the Faisal Islamic Bank of Sudan (l977), and the Bahrain Islamic Bank (l979), to mention a few.

A number of banks were also established in the Asia-Pacific region in response to these winds of change, e.g., The Philippine Amanah Bank (PAB) was established in l973 as a specialized banking institution by Presidential Decree without reference to its Islamic character in the bank's charter.

The Islamic Summit of Lahore, Pakistan held in 1974 recommended the creation of Islamic Banks and Islamic Development Bank. Starting from 1980's various Islamic Banks and Islamic financial institutions had begun their operations in different Islamic countries. While the countries like Iran and Pakistan have implemented Islamic Banking in the whole banking sector, other countries have permitted Islamic Banking institutions operate with the other traditional banks. Malaysia is the first country to issue bonds on Islamic basis. Malaysian government allowed conventional banks to offer Islamic instruments as well, if they want. Examination of the progress of these institutions in Iran and Pakistan reveals that in Pakistan this process is a gradual one. On the other hand in Iran the process of conversion of traditional banks and financial institutions into Islamic ones was very rapid[10].

The government of Iran has nationalized all the banks during the period of 1979-1982 after the Islamic revolution. In August 1983, the Iranian government had passed the law for riba free banking and asked all banks

10 Memon Noor Ahmed, Islamic Banking: Present and Future Challenges, Journal of Management and Social Sciences,Vol. 3, No. 1, (Spring 2007) 01-10.

to convert their deposits and finish islamisation of all their operations within three years. After this period government has started to exert control on the banks so that the banks provide interest free loans to public for housing and for small-scale projects. The banks have also provided funds for government projects. The six commercial banks and three specialized banks are mainly engaged in short term projects and profit sharing agreements are only small percentage of their activities.

Islamic banking was introduced in Malaysia in l983, but not without antecedents. Muslim Pilgrims Savings Corporation (MPSC) was the first (non-bank) Islamic financial institution in Malaysia setup in l963 for people to save for performing hajj (pilgrimage to Mecca and Medina). MPSC was evolved into the Pilgrims Management and Fund Board in 1969, which is now popularly known as the Tabung Haji. The success of the Tabung Haji also provided the main thrust for establishing Bank Islam Malaysia Berhad (BIMB), which represents a full-fledged Islamic (commercial) bank in Malaysia.

The Organization of Islamic Countries (OIC), established Islamic Development Bank (IDB) in December l973 with the purpose to foster economic development and social progress of member countries and Muslim communities individually as well as jointly in accordance with the principles of Shari'ah i.e., Islamic Law. The IDB not only provides fee-based financial services but also provides financial assistance on profit-sharing bases to its member countries.[11]

Reference should also be made to some Islamic financial institutions established in countries where Muslims are a minority. There was a proliferation of interest-free savings and loan societies in India during the seventies[12]. The Islamic Banking System (now called Islamic Finance House), established in Luxembourg in l978, represents the first attempt at Islamic

11 http://www.isdb.org

12 Siddiqi, M. N (1988), "Islamic Banking: Theory And Practice." In Mohammad Ariff Ed., Banking In Southeast Asia, Singapore: Institute Of Southeast Asian Studies, P.P. 34-67.

banking in the Western world. There is also an Islamic Bank International of Denmark, in Copenhagen, and the Islamic Investment Company has been set up in Melbourne, Australia. In the late 20th century, a number of Islamic banks were created, to cater to this particular banking market.

According to the Institute of Islamic Banking and Insurance, there are more than 300 Islamic Financial Institutions in the world. These institutions are working in the following countries: Albania, Algeria, Australia, Bahamas, Bahrain, Bangladesh, British Virgin Islands, Brunei, Canada, Cayman Islands, Cyprus, Djibouti, Egypt, France, Gambia, Germany, Guinea, India, Indonesia, Iran, Iraq, Italy, Ivory Coast, Jordan, Kazakhstan, Kuwait, Lebanon, Luxembourg, Malaysia, Mauritania, Morocco, The Netherlands, Niger, Nigeria , Oman, Pakistan, Palestine, Philippines, Qatar, Russia, Saudi Arabia, Senegal, South Africa, Sri Lanka, Sudan, Switzerland, Tunisia, Turkey, Trinidad and Tobago, United Arab Emirates, United Kingdom, United States, Yemen.

The positive realization of the Ummah's responsibility towards creating an Islamic framework of economic and financial system at state level owes itself to the late King Faisal bin Abdul Aziz Al Saoud of Saudi Arabia on whose initiative the organization of Islamic Conference was established. Concrete steps were taken to initiative collective efforts towards uniting the Muslims for common objectives. Malaysia, Bahrain and a few other countries of the Gulf no doubt are an exception because they are running a parallel system of Islamic Banking and finance and money market on a comprehensive scale.

A number of Islamic countries have taken legislative measures to facilitate functioning of Islamic financial institutions. Sudan, Bahrain, Saudi Arabia, Jordan, Turkey and some other countries are typical examples. In recent years, Bahrain satisfactorily emerged as the hub of Islamic Banking activities. Bahrain with the largest concentration of Islamic Financial Institutions in the Middle East region, is hosting 26 Islamic Financial Institutions dealing in diversified activities including Commercial banking, investment banking, offshore banking and funds management. It pursues

a dual banking system, where Islamic Banks operate in the environment in which Bahrain Monetary Agency (BMA) affords equal opportunities and treatment for Islamic Banks as for conventional banks. Bahrain also hosts the newly created Liquidity Management Centre (LMC) and the International Islamic Financial Market (ITEM) to coordinate the operations of Islamic Banks in the world. To provide appropriate regulatory set up, the BMA has introduced a comprehensive prudential and reporting framework that is industry specific to the concept of Islamic banking and finance. Further, the BMA has pioneered a range of innovations designed to broaden the depth of Islamic financial markets and to provide Islamic institutions with wider opportunities to manage their liquidity.

In USA, UK and a number of other European countries, various Islamic funds were laying idle for a number of years. Some conventional financial institutions of international standing in an endeavour to utilize them, established Islamic banking subsidies and windows. Many banks, both in the Muslim world and outside, are offering Islamic financial products and taking active part in capital market transactions. Liquid instruments from these products like equity mutual funds are emerging. Dow Jones Islamic Market Index is also there. Now since than 300 Islamic Financial Institutions were operating in the world from China to the USA managing funds to the tune of $300 billion, while the growth of Islamic Banking across the world was 20% that of conventional banking was much less. The system has the added advantage of curbing speculative activity as all its financing is linked with commercial transactions. The largest Islamic institutions are located in Bahrain, Kuwait, Saudi Arabia and Iran. Western banks through their Islamic units in the UK, Germany, Switzerland, Luxembourg etc. also practiced Islamic Banking.

Definition of Islamic Banking

An Islamic Banking is a financial institution that operates with the objective to implement and materialise the economic and financial principles of Islam. "*A banking system that is based on the principles of Islamic law and guided by Islamic economics. Two basic principles behind Islamic banking are*

the sharing of profit and loss and, significantly, the prohibition of the collection and payment of interest. Collecting interest is not permitted under Islamic law"[13].

The Organisation of Islamic conference (OIC) defined an Islamic Bank as *"a financial institution whose statutes, rules and procedures expressly state its commitment to the principles of Islamic Shariah and to the banning of the receipt and payment of interest on any of its operations".*[14]

According to Islamic Banking Act 1983 of Malaysia, an Islamic Bank is a "*company which carries on Islamic Banking business..... Islamic Banking business means banking business whose aims and operations do not involve any element which is not approved by the religion Islam.*"

Islamic banking has been defined as banking in consonance with the ethos and value system of Islam and governed, in addition to the conventional good governance and risk management rules, by the principles laid down by Islamic Shari'ah. Interest free banking is a narrow concept denoting a number of banking instruments or operations, which avoid interest. Islamic banking, the more general term is expected not only to avoid interest based transactions, prohibited in the Islamic Shari'ah, but also to avoid unethical practices and participate actively in achieving the goals and objectives of an Islamic economy[15] .

Riba in Islam

The Holy Book of Islam, the Qur'an, prohibits the demanding and receiving of interest in the following terms:

O ye who believe! Devour not usury, doubling and quadrupling (the sum lent). Observe your duty to Allah that you may be successful.[16]

Again,

O ye who believe! Observe your duty to Allah, and give up what remaineth

13 http://www.investopedia.com
14 www.oic.org
15 Shariah Board of Pakistan, www.sbp.org.pk
16 (Qur'an, 3:130)

(due to you) from usury, if ye are (in truth) believers.
And, if you do not, then be warned of war (against you) from Allah and His Messenger. And, if ye repent, then ye have your principal (without interest). Wrong not, and you shall not be wronged. [17]
The Holy Prophet (pbuh) has prohibited accepting of *riba*, paying of *riba*, and recording and witnessing it in the following terms:
Jabir (ra) said that Allah's Messenger (pbuh) cursed the acceptor of interest, its payer, and the one who records it; and the two witnesses; and he said: They are all equal[18].
The prohibition of *riba* is clear from the above statements in the original sources. However, the Qur'an did not define it — the same way it had not defined gambling, theft or adultery. What was meant was assumed understood. And the Prophet (pbuh) did not explain every possible aspect of *riba*. Later on, *Ulama* have attempted to define the word *riba* based on the practices obtaining at the time of the Prophet (pbuh). But unanimity of opinion had not been reached on all aspects. Furthermore, since the reasons for the prohibition have not been given in either of the two original sources, it is impossible to give a new all encompassing definition of *riba* under any present or future conditions.
Yusuf Ali, in his Commentary of the Qur'an, says:

> Usury is condemned and prohibited in the strongest possible terms. There can be no question about the prohibition. When we come to the definition of usury there is room for difference of opinion. Umar, according to Ibn Kathir, felt some difficulty in the matter, as the Prophet left this world before the details of the question were settled. This was one of the three questions on which he wished he had had more light from the Prophet, … Our *Ulama*, ancient and modern, have worked out a great body of literature on usury, based mainly on economic conditions as they existed at the rise of Islam.

17 (Qur'an, 2:278-279)
18 (Sahih Muslim, Hadith no.3881)

The difficulty arises mainly because of the existence of two kinds of *riba*. One is called *riba al-Nasiah* and the other *riba al-Fadl*. The former relates to money-loans and credit transactions using money, and was well known and widely practised by the Arabs since long before the advent of Islam (hence it is also called *riba al-Jahiliyya*). *Riba al-Jahiliyya* is very similar to the present day interest on loans and credit sales. The core concept is a loan at a pre-agreed rate of interest. The variations include a grace period during which there is no interest (similar to today's credit cards), regular interest payments till the loan is fully paid (simple interest), and interest on interest and/or punitive additions beyond the pre-agreed period. That this practice was prohibited by the Qur'anic injunctions there is no disagreement.

Riba al-Fadl relates to commodity transactions and has been mentioned only in the prophetic traditions. Here *riba* may enter when barter-exchanging two different commodities or due to differences in quality and/or quantity in the exchange of the same species. Umar's difficulty is said to be related to only some details of this *riba*. According to the recent (23 December 1999) historic judgment of the Supreme Court of Pakistan (section written by Justice Taqi Usmani):

These narrations [given earlier] of the statement of Sayyidina Umar, *Radi-Allahu anhu*, clearly reveal two points: firstly, that all his concerns in the issues of *riba* related to *riba al-Fadl* and not to *riba al-Nasiah* which was prohibited by the Holy Qur'an, and secondly, that even in the issue of *riba al-Fadl* he did not feel difficulty in many transactions which were clearly prohibited, however, he was doubtful only with regard to some transactions which were not expressly mentioned in the relevant *Hadith* or in any other saying of the Prophet, *Sall-Allahu Alayhi wa sallam*.

In banking and finance, our concern is with money and money-loans. Therefore what is relevant to our discussion here is only *riba al-Nasiah,* and there has never been any doubts or differences of opinion as to what it meant. The Qur'an has prohibited the taking of this kind of *riba* in the strongest possible terms. Its authorised interpreter — the Prophet (pbuh) — has said that accepting, paying, recording and witnessing it are

all equally prohibited. On the other hand, the Qur'an also says, "… then ye have your principal (without interest)," thus entitling the lender to the full return of his capital. Therefore, in order to comply with the prohibition fully and without a shade of doubt, and in order not to infringe on the right of the lender, a simple but comprehensive definition is popularly adopted: that in money matters, *any* addition to the principal sum is *riba*. This also accords with the definition of usury in other faiths.

Rationale behind the prohibition of riba (interest)

The Islamic rationale for the prohibition of interest is the exploitative nature of interest. Interest-based transactions violate humans' birthright – free will. Interest-based consumption loans are taken out by the poor in times of hardship. Charging interest on such loans is sheer exploitation of the poor, which further aggravates social and economic disparities in the polity. Commercially based lending holds the borrower solely responsible for bearing all risks and losses and repaying the principal and accrued interest to the lender. Such transactions are labelled as voluntarily and morally justified in the conventional and Western worlds. However, it has much to do with selfishness and little to do with free will and mutual co-operation between the debtor and creditor if the entrepreneur incurs loses, he pledges or sells his personal assets to repay the loan and accrued interest. Sometimes, the borrower earns a very high profit but keeps most of it for himself. So either way, one party gains at the expense of the other. The interest-based business relationship creates a mistrustful and speculative environment. Sometimes, capitalists withhold their wealth to create an artificial fund shortage, which pushes rates of interest further up. The increasing cost of borrowing obliges a large number of businesses to wind them up under the threat of bankruptcy. The gravity of the situation may lead to the recurrence of business cycles, greater unemployment, inflationary pressures, budget deficits, debt-ridden economies, overproduction, dumping, low wage rates and growth without distributive justice (Maududi, 1961; Zarqa, 1983; Chapra, 1985; Ismail, 1989).

Islamic Economics Order

Islamic banking is an instrument for the development of an Islamic economic order. Some of the salient features of this order may be summed up as:

- ➲ While making allowance for the ways of human nature and yet not yielding to the 3. While permitting the individual the right to seek economic well-being, Islam makes a clear distinction between what is halal (lawful) and what is haram (forbidden or unlawful) in pursuit of such economic activity. In broad terms, Islam forbids all forms of economic activity, which are morally or socially injurious.
- ➲ While acknowledging the individual's right to ownership of wealth legitimately acquired, Islam makes it obligatory on the individual to spend his wealth judiciously and not to hoard it, keep it idle or to squander it.
- ➲ While allowing an individual to retain any surplus wealth, Islam seeks to reduce the margin of the surplus for the well-being of the community as a whole, in particular the destitute and deprived sections of society by participation in the process of Zakat (a tax on wealth that is distributed to the needy).
- ➲ Consequences of its worst propensities, Islam seeks to prevent the accumulation of wealth in a few hands to the detriment of society as a whole, by its laws of inheritance.

Viewed as a whole, the economic system envisaged by Islam aims at social justice without inhibiting individual enterprise beyond the point where it becomes not only collectively injurious but also individually self-destructive.

Key Functions of Islamic Banking

- ★ To provide all necessary banking services to its customers.
- ★ To finance those projects which generates employment?
- ★ To collect deposits from the people on profit-and-loss sharing basis.

- ★ To allocate financial resources (financing) in a way that it ensures equitable distribution of income.
- ★ To act as a development institution.
- ★ To promote entrepreneurship by providing finance on profit and loss basis.
- ★ To transform saving into investment in such a way that it benefits to the majority.
- ★ To provide expertise and technical advice to the finance-taker in order to improve the process of production and profitability.
- ★ To disperse financing and discourage its concentration.

Conclusion

The industry over the years has managed to offer a wide array of products encompassing almost the entire range of Islamic modes of financing that are able to cater to the needs of majority of the sectors of the economy.
In the current global environment the banks are performing multiple functions to provide a variety of products and services and providing the latest facilities to their customers. Islamic banking has emerged as a lively, provocative and dynamic institution. Islamic teachings in the fields of *muamalat*, or transactions, prohibit selling a certain quantity of any present goods or service for a different (presumably larger) quantity of the same good or/and service delivered in the future. This is understood to apply to money as well as to all other goods and services. As a result, any amount of present money cannot be exchanged for a larger amount of money in future. In addition, there are other rules of transactions that must be applied to insure fairness of dealing to both the contracting parties concerned. it is concluded that, the Islamic banking system can be defined as a faith based system of financial management, which derives its principles from the Islamic *Shari'ah*. It promotes profit-sharing in the conduct of banking business as well as prohibiting paying or receiving interest on any transaction .Islamic banking is no longer a novel experiment. When the concept of Islamic banking with its ethical values was propagated, financial circles the world over treated it as a utopian dream.

Besides their range of equity, trade-financing and lending operations, Islamic banks also offer a full spectrum of fee-paid retail services that do not involve interest payments, including checking accounts, spot foreign exchange transactions, fund transfers, letters of credit, safe-deposit boxes, securities safekeeping investment management and advice, and other normal services of modern banking. Islamic banking because of its value-orientated ethos enables it to draw finances from both Muslims and non-Muslims alike.

Human Rights and Gender Justice

ROMANA ASMAT*

MISS SIDRA MEHBOOB**

ABSTRACT

"A women feels as keenly, thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has much right to her freedom-to develop her personality to the full-as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals.

All human beings are born free and equal in dignity and rights .All human rights are universal, interdependent, indivisible and interrelated. Gender identity is integral to every person's dignity and humanity and must not be the basis for discrimination and abuse. Many advances have been made towards ensuring that all people can live with equal dignity and respect to which all persons are entitled. Many states now have laws and constitutions that guarantee the rights of equality and nondiscrimination without distinction. Many states and societies impose gender norms on individuals through custom, law and violence and seek to control personal relationships and how they identify themselves. The policing of sexuality remains a major force behind continuing gender base violence and gender inequality.

Nevertheless, human rights violations targeted towards a particular gender constitute a global and entrenched pattern of serious concern.They include extra judicial killings, torture and ill-treatment, sexual assault and rape, invasions of privacy, arbitrary detention, denial of employment and education opportunities, and serious discrimination in relation to the enjoyment of other human rights. These violations are often compounded by other forms of violence, hatred, discrimination and exclusion, based on race, age, religion, disability or economic, social or other status. This undermine the integrity and dignity of those subjected to these abuses, lead many to conceal or suppress their identity. Historically, people have experienced these human rights violations because they belong to social groups identified in particular societies.

KEY WORDS: Human Rights, Gender identity, Human Rights Violation.

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Introduction:

All men are created equal endowed with certain inalienable rights such as right to life and liberty and the pursuits of happiness. Concepts of individual human rights are assimilated into the political cultures and theory of inalienable rights has found a prominent place in the Universal Declaration of Human Rights. However, the doctrine of inalienable rights was criticized and some protagonists are of the view that the notion of the primacy of the group and the submission of the individual to the group persisted. The state has the right and the ability to curtail individual rights for the greater good of the community. Indira Gandhi said "it is not individuals who have rights but states". Despite divergence in conceptions of what constitutes the substance of human dignity there are certain common features.

Most of the countries are implementing restrains on human rights justifying such restrictions on the ground of emergencies. Human rights should not be viewed in isolation but in their social political and economic context. The population of India is comprised of unequals and the bulk of it is poor, downtrodden, oppressed, and backward socially and economically .The major part of the population does not get the necessities of life, such as food, drinking water, environment, medical facilities, and education etc. The exploitation of women and children, racial discrimination, mass hunger and neglect of freedom of conscience and freedom of speech are some of the examples of violation of these rights. If human rights are considered to be the conditions for fulfillment of the purpose of life, they should not confine merely to the higher and middle classes but should extend to the lower classes that comprise the large bulk of the population. The enjoyment of civil and political rights should not confine only to the fortunate few but to everyone. The plight of the women and children in developing countries particularly in India is more pathetic.

Guarante of Gender Justice Under Constitution of India and International Conventions:

The Constitution of India drafted around the same time as the Universal Declaration of Human Rights (1948) captures the essence of human rights in its Preamble, Fundamental Rights and the Directive Principles of State Policy. It is based on the principles that guided India's struggle against a colonial regime that consistently violated the civil, political, social, economic and cultural rights of the people of India. The freedom struggle itself was informed by the many movements for social reform, against oppressive social practices like sati, child marriage, untouchability etc.

The movement led by Dr. B.R. Ambedkar against discrimination against the Dalit's and women also had an impact on the Indian Constitution. Inspite of the fact that most of the human rights found clear expression in the Constitution of India, the independent Indian states carried forward many colonial tendencies and power structures, including those embedded in the elite Indian Civil service. Though the Indian state under Jawaharlal Nehru took many proactive steps and followed a welfare state model, the police and bureaucracy remained largely colonial in their approach and sought to exert control and power over citizens. The casteist, feudal and communal characteristics of the Indian polity coupled with a colonial bureaucracy, weighed against and dampened the spirit of freedom, rights and affirmative action enshrined in the Constitution.

The Preamble to the Constitution of India promises to secure all its citizens, Justice-Social, Economic and Political, Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all –Fraternity, assuring the dignity of the individual and the unity of the Nation. The Constitution, guarantees equality of opportunity and equal status to men and women. It directs that women shall not only have equal rights and privileges with men but also that the state shall make provisions-both general and special for welfare of women.

Article 14 ensures "equality before law" and Article 15 "Prohibits any

discrimination". There is also a specific provision in Article 15(3), which empowers the state to make "any special provision for women and children", even in violation of the fundamental obligation of nondiscrimination among citizens, inter alia on the ground of sex. The Constitution also imposes a fundamental duty on every citizen through Article 51(A)(e) to renounce the practices derogatory to the dignity of women.

Public Interest Litigation and the judicial activism of the Supreme Court initiated by Justice VR Krishna Iyer and PN Bhagwati has played major role in expanding the scope of human rights and giving it a much needed legitimacy through some very important verdicts[1].Justice Krishna Iyer, was instrumental in building a new discourse that brought together the left- oriented groups and civil liberties group as part of the larger human rights community in India. Most of his judgments reiterated the obligation of the state to protect rights and equally the participation of people in securing the rights and giving them meaning. The establishment of National Human Rights Commission provided a new impetus to civil and political rights in India. While civil and political rights focused largely on the rights of the individual, a new human rights discourse based on group rights, collective rights and people's rights, began to be articulated within the framework of social and political empowerment.

The emergence of women's movement gave a new dimension to the human rights in India. In 1974, the Committee on the status of women in India submitted a report that highlighted the marginalization of women in every sphere of life[2].The women's movement not only critiqued the Indian patriarchy, casteism and feudalism but also promoted a new awareness of women's rights. Though it began as a largely urban movement, over a period the women's movement has emerged as one of the most articulate and widespread movement's in India, with new campaigns for

1 *On prisoner's rights, rights of landless labourers,release of bonded laboureres etc.*

2 *The emergence of a number of women's groups such as Self Employed Women's Association (SEWA), Manushi, and Joint Women's Forum etc. raised a new consciousness and public debate on the issue of women's status, domestic violence, dowry, rape, custodial violence, trafficking and the invisible labour of women in the household.*

women's political participation and rights[3]. The women's movement has played a key role in ensuring the participation of women in the electoral process and governance.

An activist judiciary has also served to expand the scope of fundamental rights to incorporate economic and social rights as well. Progressive and creative judicial intervention expanded the scope of Article 21 of Indian Constitution which guarantees the Right to Life. Justice Krishna Iyer and other activist judges, through series of very significant judgments , drew extensively from human rights law , to conclude that the right to life means the right to live with dignity, and that the right to live with dignity includes the right to livelihood , right to education and right to health. These progressive judicial pronouncements were in many ways a response to the social action groups and movements that sought judicial interventions to persuade and pressurize the government to protect and fulfill the rights of the most marginalized. Thus emergence of Economic, Social and Cultural rights is the result of advocacy efforts by grassroots action groups and NGOs in India.

Internationally also, the World Conference on Human Rights (1993)at Vienna, which was one of the main turning points in women's right declared that human rights of women and of girl child are inalienable, integral and indivisible part of universal human rights. The Vienna Declaration specifically condemned gender based violence and all forms of sexual harassment and exploitation. The Conference concluded that:

The human rights of women and of girl child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels , and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community…The world conference on human rights urges governments, in-

3 *It is partly because of the pressure from the women's movement that the 73rd and 74th constitutional Amendments to introduce local self-government provided 33%reservation for women in local self- government institutions.*

stitutions, inter-governmental and non-governmental organisations to intensify their efforts for protection and promotion of human rights of women and the girl child".

The message of international instruments such as the Elimination Of All Forms Of Discrimination Against Women, 1979 (CEDAW) and Beijing Declaration which directs all state parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear. The international covenant on economic, social and cultural rights contains several provisions that are particularly important for women.

While the 1970s can be termed the decade of the emergence of civil liberties movement, the 1980s witnessed the emergence of group rights and people's rights over resources and livelihoods. It is in 1990s that Economic, Social and Cultural rights came to Centre-stage. Various factors including right based reorientation by international development agencies and organisations, political compulsions on the ground and the increased visibility of the rights discourse provided the right condition for advocating Economic, Social and Cultural Rights.

GENDER JUSTICE IN PRACTICE

The term "sex"and "Gender" are often used interchangeably in everyday life, but in sociological literature they are frequently differentiated. The term "sex" is applied to differences between men and women that are based on biological differences such as anatomy, physiology, hormones and chromosomes, and in this respect people are female or man. The term "Gender" is applied to the cultural aspects of male and female roles. In other words the behaviour, personality and other social attributes that are expected of males and females, and these social attributes become the basis of masculine and feminine roles. Sexuality and the different capacities of men and women in the reproductive process are particularly likely to be thought of as giving "Natural" reasons for gen-

der division in society[4].

Gender equality includes protection from sexual harassment and right to work with dignity, which is universally recognised basic human right. The common minimum requirement of this right has received global acceptance. The international Conventions and norms are, therefore of great significance in the formulation of the guidelines to achieve this purpose[5]. Historically, women had the unfortunate fate of bearing the brunt of discrimination in all walks of life. Access to good things like education, employment, property and opportunity to participate in social and political life on a footing equal to that of a men was denied to them. But in housekeeping, in child bearing caring and in the upkeep of family spirit and ethos, their responsibility is practically exclusive. However, their biological characters while essential for continuity of human kind often face male aggression.

The problem of gender injustice is a deep rooted social malady arising from power imbalance that occurred due to conversion of factors of difference into instruments of dominance by males. Gender injustice is a multi-headed hydra that enters into all areas of human activity and manipulate the rights and relations disfavoring women. It is primarily located in domination and oppression. Gender justice is a revolutionary concept of multidimensional strategy and impact. As a part of scheme of justice its roots in human rights and welfare policies are well established. Benevolence for women is a major factor in the cultural ethos of India although it has the fate of distortions and obstructions due to patriarchic approach. In the background of pathetic social realities about gender injustice the constitution set a visible trend for women's development. What is required is a pro-women mindset in the people who have to apply and follow the legal regime.

One of the fundamental obstacles in promoting gender equality in de-

4 *Justice J.N.Bhat. Judge Gujarat High Court in his article as "Gender Equality". AIR 1991 Journal Section 81.*

5 *Vishaka v State Of Rajasthan AIR 1977 SC 3011 at 3015.*

velopment remains at community level where attitudinal biases often prevent women from realizing their rights. The Government has done little to take on board these obstacles, apart from occasional and irregular campaigns around single issues like dowry, girl child education, amniocentesis and so on. Policy education campaign are restricted to occasional posters and TV sports, but are not consistent or backed up by strong and clear action by the state. The impact remains less than effective, particularly since there is little action taken against advertising or campaigns that are gender discriminatory[6].

Gender based discrimination represents ugly face of the society. This issue is global with varying degree and very old. Really, it is traversity of all canons of social justice and equity that women who constitute half of the world's population and works two third of world's working hours should earn just 1/10th of world's property and also should remain victim of inequality and injustice. This anomaly is now being openly questioned and the underlying discrimination is seriously challenged. Gender discrimination, though amongst the most subtle, is one of the most pervading form of institutionalized deprivation.

Conclusion:

The process of gender justice, broadly speaking, covers rights of women against exploitation and victimization. Today the fact is that women's exploitation is a reality and gender justice a fragile myth. Through law and policy, women have indeed, over the years, secured for themselves many entitlements, but so far they have not been able to defend themselves from crimes committed against them or societal prejudices. This negates the whole premise of gender justice.

Fight for justice by females or cry for gender equality is not a fight against men. It is fight against traditions that have chained them- a fight against attitudes that are ingrained in the society. Men must rise to the occasion.

6 *Justice J.N. Bhatt. Judge Gujarat High Court in his article "Gender Equality" AIR1998 Journal Section 81 and 83*

They must recognise and accept the fact that women are equal partners in life. Here it is apt to quote Krishna Iyer, J:

"The fight is not for woman's status but for human worth. The claim is not to end inequality of women but to restore universal justice. The bid is not for loaves and fishes for the forsaken gender but for cosmic harmony which never comes till woman comes[7]*".*

Awakening of the collective consciousness is the need of the day. Change of heart and attitude is what is needed. If women were to receive education and become economically independent, the possibility of many pernicious social evils dying a natural death may not remain a distinct dream. Laws are not enough to combat the growing menace of gender justice. A wider social movement of educating women of their rights is what is needed. Human rights for all must be made the focal point in good governance, to ensure progress of the nation and usher in a just and caring society. There can be no doubt's about the inevitability of human rights regime as the foundation of a good value based society-For human rights take a backward step, if gender justice is not achieved.

7 *Iyer, V.R.K, Law and Life, Vikas Publishing House , New Delhi, 1979, p.31*

FACULTY PROFILE

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S. No	Name of the Teacher	Qualification	Designation	Area of Specialization
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