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Human Rights & Municipal Law: An analysis of Indian Legal System

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ABSTRACT

Fostering respect for basic human rights is not possible without its implementation. In this paper an effort has been made to analyse the position of international human rights instruments in its implementation and incorporation into municipal law. Indian legal system has laid down various human rights in the Constitution of India in the form of fundamental rights. Further the doctrine of incorporation has been evolved for the implementation and protection of human rights. Human rights crisis during disturbances is serious concern.

Keywords: human rights, doctrine of incorporation, fundamental rights, Indian constitution, implementation, judiciary, human rights violations

Introduction

All Human rights derive from the dignity and worth inherent in the human person and that the human person is the central subject of Human Rights and Fundamental Freedoms. In simple terms, whatever adds to the dignified and free existence of human rights should be regarded as human right. Evolution and crystalisation of human rights took a long time. In recorded history and ancient scriptures, there have been references to the basic human rights, though they were not referred to by that name. Western writers on the history of human rights generally believe that human rights have originated and developed in west and they never acknowledge that it owes its origin with the advent of Islam also. Human rights in Islam, like other branches of Islamic law, is based primarily on the two fundamental sources- the Quran and the *Sunnah*.

The term Human right was introduced in the United States Declaration of Independence in 1776 and US Constitution embodied a Bill of Human Rights. The French gave birth to the Declaration of Rights of Man and Citizen in 1789. In 1929, the Institute of International law, New York, prepared a Declaration of Human Rights and Duties. In 1945, the Inter-American Conference passed a resolution seeking the establishment of an International Forum for the furtherance of human rights of mankind.

The unspeaking atrocities committed during the World War-II, shocked the conscience of the world and allied powers vowed to usher in a world order for promoting respect for the observance of Human Rights and Fundamental Freedoms. The Charter of the United Nations Organisation in its Preamble declared, 'We the People of United Nations determined… to reaffirm faith in the fundamental human rights, in the dignity and worth of human persons, in the equal rights of men and women and of the Nations large and small…'The Charter also declared that the purpose of the United Nations is, 'To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect of Human Rights and for Fundamental freedoms for all without distinction as to race, sex, language or religion. The United Nations also proclaimed the Universal Declaration of Human Rights in 1948.

The Constitution of India which came into effect in 1950, incorporated a part on the Fundamental Rights. In India, the protection of Human Rights Act, 1993 defined Human Rights as, "the rights relating to liberty, equality and dignity of the Individual guaranteed by the Indian Constitution as embodied in the Fundamental Rights and the International Covenants.

Incorporation of Human Rights: Indian Scenario

The idea of Human rights is not new to India as in India human rights have been made an integral part of the Indian Constitution. The Constitution expressly ordains that the state shall not make any law which takes away or abridges the fundamental rights conferred in part III of the constitution. Directive principles of state policy being basically economic and social rights and regarded as fundamental in the governance of the country, though not enforceable by any court, it shall be the duty of the state to apply these principles in making laws. Article 51(c) stipulates about the doctrine of incorporation, "the state shall endeavor to foster respect for international law and treaty obligations in the dealings of organized people with one another." International human rights instruments/treaties do not automatically become part of national law. They have to be transformed into domestic law by a legislative act. The Union has the executive power to implement the international instruments and treaties. A rule of international law is binding in India provided that it is not inconsistent with Indian law. For the implementation, Article 253 provides that parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any country or countries or any decision made at any international association or other body.

Courts have adopted a pro-rights approach and adopted the rights from international arena without legislative sanction in this regard. Justice Krishna observed [1] that a new legislation is the best solution, but when the law makers take too long for social patience to suffer, as in the very case of prison reform, courts have to make with

[1] *Sunil Batra v. Delhi Adminstration*, AIR 1980 SC

interpretation and carve on wood and sculpt on stone ready at hand and not wait for any marble architecture. Similarly in *Vishakha and others v. State of Rajasthan*,[2] it was held that international conventions and norms shall be of significance and regard must be had to them for construing domestic law when there is no inconsistency between them and there is void in domestic law. While expressing the importance of international human rights instruments Supreme Court in *Apparel Export Promotion v. A.K. Chopra*,[3] said 'the message of international instruments such as the Convention on the Elimination of All Forms of Discrimination against Woman, which directs all State Parties to take appropriate measures to prevent discrimination of all forms against women besides taking step to protect the dignity of women is loud and clear. These international instruments create an obligation on the Indian State to gender sensitise its laws and the courts are under an obligation to see that the message of the international instruments is not allowed to be drowned.'

India is party to various human rights instruments[4]. When the Covenant on Civil and Political Right and the Covenant on Economic, Social and Cultural rights were being deliberated internationally, India was part of this discourse. India ratified the covenants in 1979, with reservations relating to, right of self determination, right of non-refoulment and compensation for those detained unlawfully. [5] The courts however incorporated many of the rights from the covenants within Indian *corpus juris* through

[2] 1997 (6) SCC 241

[3] 1999 (1) SCC 759

[4] International covenant On Economic, Social And Cultural Rights; International covenant On Civil And Political Rights; Convention On The Prevention And Punishment Of Crime Of Genocide; Convention On The Non-Applicability Of Statutory Limitations To War Crimes Against Humanity; International Convention On The Elimination Of All Forms Of Racial Discrimination; Convention On The Rights Of The Child; Convention On The Elimination Of All Forms Of Discrimination Against Women; Slavery Convention; Protocol Amending The Slavery Convention; Supplementary Convention On The Abolition Of Slavery, The Slave Trade, And Institutions And Practices Similar O Slavery; International Convention On The Suppression And Punishment Of The Crime Of Apartheid; Convention On The Political Rights Of Women; Convention On The Suppression Of The Traffic In Persons And Of The Exploitation Of The Prostitution Of Others; India Is Signatory To, Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment; Convention On The Nationality Of Married Women. In *India's Global Human Rights Obligations, A Status Report*, Part1, P.C. Sinha, Kanishka Publishers, New Delhi, 2003.

[5] Declaration by the Government of India: I. With reference to Article 1 of the International Covenant on Economic Social and Cultural Rights and Article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words "right of self-determination" appearing in those articles apply only to the peoples under foreign domination and that these words do not apply to sovereign independent states or to a section of a people or nation which is the essence of national integrity. II. With reference to Article 9 of the International Covenant on Civil and Political Rights, the Government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of the clauses 3 to 7 of article 22 of the Constitution of India. Further under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State. *In* Hand Book of International Humanitarian Law and Human Rights Law, David L. Roberts, S. Subramanian, The Regional Declaration of the International Committee of the Red Cross (New Delhi, 2001)

liberal interpretation of various fundamental rights provided in the constitution. The preamble, fundamental rights and directive principles of State together provide the basic human rights for citizens as well as non-citizens. While Fundamental Rights stress on the existing Rights, directive principles provide future dynamic movement towards the goal of providing Human rights for all.

The international covenants and declarations as adopted by the United Nations have to be respected by all signatory states and the meaning given to the words in those declarations and covenants have to be such as would help in the effective implementation of those rights. But reservations to international human rights instruments is serious concern and sometimes states hesitate even to be a party and to ratify legal instruments. [6] India is not a party to Rome Statute of International Criminal Court,1998. The principal objections of India to the Rome Statute are: 1. It has made the ICC subordinate to the UN Security Council and in effect to its permanent members; and their political interference by providing it the power to refer cases to ICC and the power to block ICC proceedings; 2. it provided extraordinary power to the UN Security Council to bind non-state parties to the ICC, and violates fundamental principle of the Vienna Convention on the Law of Treaties, that no state can be forced to accede to a treaty or be bound by the provisions of a treaty it has not accepted; 3. It has lured the legal distinction between normative customary law and treaty obligations, particularly in respect of the definitions of crimes against humanity and their applicability to internal conflicts, placing countries in a position of being forced to acquiescence through the Rome Statutes to provisions of international instruments they have not yet accepted.

It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for constructing domestic law when there is no inconsistency between them and there is a void in the domestic law.[7] In *Gramophone Co. of India Ltd. V. Brindra Bahudur Pandey*,[8] the Supreme Court held that the comity of nation require that rules of international law may be accommodated in the Municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. The doctrine of incorporation also recognizes the position that the rules of international law are incorporated into national law and considered as part of national law, unless they are in conflict with the national law.

While national legislation has to be respected, even if it contravenes rules binding

[6] India is only signatory (on 02 February 2007) but has not ratified till date International Convention for the Protection of All Persons from Enforced Disappearance, 2006. When India submitted its first Universal Periodic Report, it said that it will ratify the UN Convention on Enforced Disappearances. UN Human Rights Commission, said, "There is no evidence that the Government intends to ratify CED. Enforced disappearance is not codified as a criminal offence in domestic law nor are extant provisions of law used to deter the practice."
[7] AIR 1997 SC 471
[8] AIR 1984 SC 667

on India under international law, Indian Courts, in particular the Supreme Court, have consistently construed statutes so as to ensure their compatibility with international law.[9] The judicial opinion in India as expressed in numerous judgments of the Supreme Court of India demonstrates that the rules of international law and municipal law should be construed harmoniously, and only when there is an inevitable conflict between these two laws should municipal law prevail over international law.[10] The Supreme Court has even gone a step further by repeatedly holding, when interpreting the fundamental rights provisions of the Constitution, that those provisions of the International Covenant on Civil and Political Rights, which elucidate and effectuate the fundamental rights guaranteed by the Constitution can be relied upon by courts as facets of those fundamental rights and are, therefore, enforceable. [11]

Members of Armed Forces, Para- Military and Police Forces are often called upon to restore order, when large scale disturbances take place. In these conditions, it may appear that restoration of order is of paramount importance and first priority and often the need to observe the human rights of the population is lost sight of. It should be remembered that since Human rights are part of national laws, order should be restored without violating laws, that is, without transgressing human rights.

Article 33 provides the powers of the parliament to modify the rights conferred by the part III in their application to forces etc. It lays down that, "Parliament may, by law, determine to what extent any of the rights conferred by this part shall be restricted or abrogated so as to ensure the proper discharge of their duties and maintenance of discipline among them, in their application to:

[9] *Vishakha & Others v. State of Rajasthan & Others,* 1997 (6) SCC 241: "(it is) now an accepted rule of judicial construction that regard must be had to international conventions and norms of construing domestic law when there is no inconsistency between them and there is a void in domestic law"; *Apparel Export Promotion vs. A.K. Chopra,* 1999 (1) SCC 759: "In cases involving violation of human rights, the courts must ever remain alive to the international instruments and conventions and apply the same to a given case where there is no inconsistency between the international norms and the domestic law occupying the field."

[10] Verma, CJ, in *Vishaka v State of Rajasthan,* (1997) 6 SCC 241, at 251 for cases, here gender equality and guarantees against sexual harassment, in which there is no domestic law: "(a)ny international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Art.51 (c) and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Art.253 with Entry 14 of List 1 of the Schedule."

[11] *People's Union of Civil Liberties v Union of India & Anor,* affirming jurisprudence of Supreme Court in earlier cases concerning Article 9 (5) ICCPR that provides for a right to compensation for victims of unlawful arrest or detention. Remarkably, the Supreme Court has found Article 9 (5) ICCPR to be enforceable in India even though India has not adopted any legislation to this effect but had even entered a specific reservation to Article 9 (5) ICCPR when ratifying the Convention in 1979, stating that the Indian legal system did not recognise a right to compensation for victims of unlawful arrest or detention. See also the case of *Prem Shaker Shukla v Delhi Administration,* AIR 1980 SC 1535.

a) The members of the Armed Forces; or
b) The members of the Forces charged with the maintenance of the public order; or
c) Persons employed in any bureau or other organization established by the state for the purposes of intelligence or counter intelligence; or
d) Persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organization referred to in clauses (a) to (c).

Thus, Article 33 empowers the parliament to restrict or abrogate the application of fundamental rights in relation to the Armed Forces, Paramilitary Forces, and the Police etc.[12]

Article 34 puts restriction on rights conferred by part III while martial law is in force in any area. It lays down that, "notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture order or other act done under martial law in such area.

A law enacted by Parliament governing the armed forces cannot be challenged on the ground that it infringes any Fundamental Rights. The power is conferred on the Parliament and not on the Statute Legislatures. The Parliament is entitled to lay down to what extent Fundamental Rights can be modified by State legislation applicable to the forces charged with the maintenance of the public order.

The tribunals, known as the court-martial, are established under the Military Law. The Supreme Court in the case of, *Unoin of India & Ors. v. Major A. Hussain*,[13] has described a court-martial as; "It has been rightly said that court-martial remains to a significant degree, a specialized part of overall mechanism by which the military discipline is preserved. It is for the special need for the armed forces that a person subject to Army Act is tried by court —martial for an act which is an offence under the Act. Court martial discharges judicial function and to a great extent is a court where the provisions of Evidence Act are applicable. A court-martial has also the same responsibility as any court to protect the rights of the accused charged before it and follow the procedural safeguards." These tribunals have been excluded by Art. 136(2) from the Supreme Court's appellate jurisdiction under Art. 136(1). According to the Art.136(2), nothing in Art.136(1) 'shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces'. These tribunals have been excluded from the

[12] *Achustan v. UOI,* 1976 1 SCWR 80; *Gopal v. UOI,* AIR 1987 SC 413
[13] AIR 1998 SC 577, 586; (1998) 1 SCC 537

power of superintendence vested in a High Court under Art. 227(4). The military tribunals are not, however, exempt from the Supreme Courts writ jurisdiction under Art.32 and High Court's writ jurisdiction under Article 226. A high court can thus intervene if inter alia a court martial is not properly constituted, or acts against natural justice, or acts outside its jurisdiction, or there is an error apparent on the face of the record. However the Fundamental rights can be curtailed under Art.33 under a Parliamentary law and, to that extent, the court martial can be excluded from the purview of Arts.32 and 226.

Martial law as stated in Art.34 is not defined in the Constitution of India. Martial law is the action of the military authorities when, in order to deal with a situation amounting to insurrection or war within the country, they impose restrictions and regulations on civilians. The basis of the power of the military in such a situation is the rule that every citizen is under duty to assist in the suppression of riotous assemblies and insurrections, in the maintenance of order and in repelling invaders. This clothes the military with an authority to repel force by force and take all necessary steps to preserve order.[14] During the period of major emergency, the military authorities may exercise abnormal powers outside the ordinary law. During the period of rebellion or insurrection, the military authorities interferes with the actions, life and liberty of the civilians.

Martial law is a much more restrictive concept than emergency under Art.352. Emergency cannot come into existence without a presidential proclamation to that effect but strictly speaking, no proclamation is necessary for enforcement of martial law which depends on the factual existence of insurrection or armed rebellion, and depends on the right of the state to repel force by force in self defence. Martial law can come into being only in the actual area of rebellion and not throughout the country, whereas emergency under Art.352 (at least until the 42nd Constitutional Amendment), came into effect throughout the country, and the fundamental rights of the people all over the country could be adversely affected. Under emergency, not merely the function of maintaining law and order but many aspects of the government are affected, e.g., federalism, legislative powers and fundamental rights. Martial law depends on the factual existence of a state of rebellion, insurrection etc., while emergency depends upon the subjective satisfaction of the President regarding threat to the security of India by war, external aggression, armed rebellion. Emergency can be declared even when the actual event has not happened but there is eminent danger thereof.

To tackle the problem of law and order, Parliament has enacted some drastic laws conferring broad powers on the military personnel but falling short of martial law. The Armed Forces (Assam and Manipur) Special Powers Act, enacted in 1958, conferred special powers on the members of the armed forces in the disturbed areas

[14] M.P.Jain, *Indian Constitutional Law* (Fifth Edition 2006, Wadhwa Nagpur) p.1334

of Assam, Manipur, Nagaland, Tripura, Meghalaya and Arunachal Pradesh. This Act was held to be constitutionally valid by the Delhi High Court in *Inderjit Barua v/s. State of Assam*.[15] The Act has been upheld by the Supreme Court in *Naga People's Movement of Human Rights v. UOI*,[16] the court rules that the Act relates to entry 2A in List I and, thus Parliament is competent to enact the law. The act has been enacted by the Parliament in the exercise of the power under Articles 246 and 248.The Act has been enacted to confer certain powers on Armed Forces when deployed in aid of civil authorities to deal with the situation of internal disturbance in a disturbed area.

The Chandigarh Disturbed Areas Act, 1983 was enacted by the Parliament to make better provisions for the suppression of disorder and for the restoration and maintenance of public order in disturbed areas in Chandigarh. The Administration was authorized by notification in the official gazette, to declare Chandigarh as a disturbed area. Thereafter, police becomes authorized to use force, even to fire, for maintaining public order after giving due warning, even to the extent of causing death of any one contravening law or order.

The Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983, authorized armed forces to use force, even to the extent of firing and causing death, on any person infringing law and order in the disturbed area. The army officers could arrest without warrant any person infringing law and order in the disturbed area. The army officers could arrest without warrant any person committing a cognizable offence and also search any premise, vehicle, etc.

The Disturbed Areas (Special Courts) Amendment Act, 1983, empowered the central government to declare an area as disturbed area and set up special courts for speedy disposal of cases connected with the disturbances.

The Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA), was enacted by the Parliament to fight terrorist activities in the country. The Preamble of the Act stated that it was being enacted to make special provisions for the prevention of, and for coping with, terrorist and disruptive activities. The Act prescribed capital punishment for any terrorist act causing death. Provision was made for establishing designated courts for the speedy trial of the offenders and the verdict of such courts could only be challenged in the Supreme Court. Life of the law was restricted for two years. The Act was replaced by another Act in 1987 called Prevention of Terrorist Activities Act (POTA).

These laws are no doubt draconian in nature and it is usually complained that a good deal of abuse of power takes place under these special laws. Human rights scenario in the disturbed State of Jammu & Kashmir can better explain the position on

[15] AIR 1983 Del 513
[16] AIR 1998 SC 431

implementation of human rights.

J&K has witnessed more than 68,708 incidents of violence in the past 22 years, according to the Ministry of Home Affairs. This means that the state would each day witness eight incidents of violence. The details furnished by the Ministry of Home Affairs reveal that the State has witnessed 68,708 militancy related incidents from 1990 to July 2012. According to the information, the State has recorded highest incidents of violence in 1995 (5,938) followed by 1994 and 1993 (5,829 and 5,247 incidents respectively). The State has, however, witnessed decline in violence after 1996 with the number of incidents being 2900-3400 between 1997-2000. But thereafter the violence has witnessed uprising with the year 2001 and 2002 recording 4,522 and 4038 such incidents. According to details, 2003, 2004, 2005, 2006 and 2007 respectively recorded 3401, 2565, 1990, 1667 and 1092 incidents of violence. In 2008 the number of incidents reported is 708 and in the following three years, 499, 488 and 340 incidents were witnessed in the State. Pertinently the State Home Department in July this year claimed that 43,000 persons including 16000 civilians were killed in the conflict since 1990.[17]

As against the figures projected by the state, so far 40,000 to 100,000 people are believed to have got killed in the ongoing violence in Jammu and Kashmir. Separatist organizations and human rights activists put the figures of deaths (mostly of civilians) due to violence close to 100,000, while as state government says the figure is 40,000.[18]

The conflict from 2002 to 2009 has resulted in the loss of life of 3404 civilians, 7504 militants (claimed by government), 2451 troopers and 674 others. According to media reports there were 225 custodial killings and 360 persons were subjected to enforced disappearances from 2002 to 2009.From 2004 to 2009, 157 troopers committed suicide while as 55 personnel were killed in fratricidal incidents. The data suggests high level of stress on the soldiers in the current conditions.[19]

According to the available data, from 2002 to 2009 the government ordered 140 probes on different human rights abuses, out of which only 16 enquiries have been concluded. In just one case an army personnel who was accused of rape has been punished for misbehavior and sent to 1 year rigorous imprisonment. Mysterious killings by unidentified gunmen have resulted in the killings of 47 persons in 2008 and 26 people in 2009. Since January 2002 to December 2009, the conflict has consumed the lives of 258 children (under the age of 18).[20]

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[17] 'Bloody Conflicts, 68,000 incidents of Violence in 22 Years: MHA Divulges Figures under RTI' *Greater Kashmir* (Srinagar, 19 September 2012)

[18] Haroon Mirani, 'Half Orphans of Kashmir waiting for the fuller life :Comparative study' (*Child Rights and You*) <www.cry.org> accessed 20 March 2012

[19] Jammu and Kashmir Coalition of Civil Society, Srinagar, *Peace and Processes of Violence: An observation on situation in Jammu and Kashmir from 2002 to 2009* (2010)

[20] Jammu and Kashmir Coalition of Civil Society, Srinagar, *Peace and Processes of Violence: An observation on situation in Jammu and Kashmir from 2002 to 2009* (2010)

According to State's Parliamentary Affairs Minister, 1,243 people died in militancy violence in the state in the first five months of the 2003 year which was less as compared to 1,568 deaths in the year 2002. Of them 404 were civilians, 672 militants and 167security personnel, he said. Ex-gratia relief was being provided to the next of kin of the victims, cases of relief and compassionate appointment till June 1997 has also been cleared.[21]

An estimated number of 8842 per year and 737 per month (widows and orphans) were added to the total existing number during the last 19 years from 1990-2008 (Table 1).

Table 1: Estimated Number of Deaths in J&K from 1990-2008.
Source: Dabla B.A, "Social impact of Militancy in Kashmir" (Gyan Publishing House: New Delhi), 2012.

Groups whose members were killed	**No. of Persons**	**Killed Widows**	**Orphans**
Military Personnel	3,000	1800	5400
Para-military Security Personnel	6,000	3600	10800
Local Police Personnel (JKAP)	7,000	4200	12600
Militants and Civilians	54,000	32400	97200
TOTAL	**70,000**	**42000**	**129600**

There are varying statements regarding bringing perpetrators to justice/ fair trials conducted in the State of J&K. In 1996, Prime Minister,[22] stated that 272 members of the armed forces had been punished for human rights violations between 1991 and 1996 in J&K.[23] But on 23 November 2005, Union Home Security [24] stated that since January 1990, only 215 members of the armed forces had been punished for excess in J&K.[25] The former Chief of the Army Staff [26]on 21 May 2004 stated that two thousand complaints of human rights violations were received during the last 14 years and that most of them were found incorrect, 35 armed forces personnel were punished which included eight officers. Some of them were dismissed from service and later on jailed. But in a contradictory letter to the National Human Rights Commission (NHRC), dated 24 May 2004, stated that 131 army personnel of various ranks were punished for human rights violations.[27]

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[21] 'Militancy violence declines in Valley: J-K minister' *Press Trust of India* (India, 21 Jun 2003) <http://expressindia.indianexpress.com> accessed March 28 2012

[22] H.D. Deva Gowda

[23] Syed Junaid Hashmi, 'Official Records in J&K 'murky' on 'penalised' securitymen' *Countercurrents* (19 January 2011) <http://www.countercurrents.org/hashmi19011.htm> accessed 28 March 2011

[24] V.K. Duggal

[25] Syed Junaid Hashmi, 'Official Records in J&K 'murky' on 'penalised' securitymen' *Countercurrents* (19 January 2011) <http://www.countercurrents.org/hashmi19011.htm> accessed 28 March 2011

[26] General N.C. Vij

[27] Ibid

Table 2: Statistics relating Human Rights Violations in J&K and North East India by the Indian Army from 1990-1995. *Source: 'Human Rights and the Indian Armed Forces', Ran Vir Kumar, B.P. Sharma, Sterling Publishers Private Limited, 1998, p.173.*

State of Human Rights Violations(1990-1995)	**Jammu &Kashmir**	**North East India**
Total No. of Complaints	478	225
Number Investigated	470	183
Under Investigation	8	42
Number Declared False/Baseless	448	178
Number Found True	22	05
Number of Army Personnel Punished	52	18

According to the World Report-2015, it was reiterated that "In a rare case in 2014, the army reported that a military court sentenced five soldiers, including two officers, to life in prison for the 2010 extrajudicial executions of three innocent villagers. The army ordered a military trial after using the draconian AFSPA to block prosecution by civilian courts. The army also chooses military trial for the alleged 2000 extrajudicial killing of five civilians of Pathribal in northern Jammu and Kashmir State. However, in January, the army court of inquiry dismissed charges against five officers."[28]

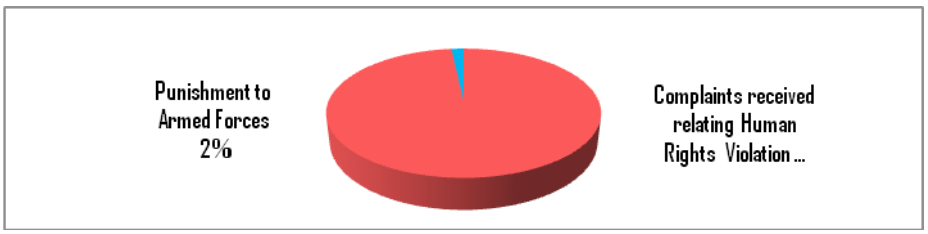
Table 2: Complaints relating Human Rights Violations by Armed Personnel & justice process in J&K.*Source: Syed JunaidHashmi, Official Records in J&K 'murky' on 'penalised' securitymen, 19 January 2011,http:// www.countercurrents.org/hashmi19011.htm*

Year No. of Complaints relating Human Rights Violation	**No. of Armed Personnel Punished**	
1991-2004	2000	35 (Minimum) to272 (Maximum)

Figure 1: Justice under Army Act in the State of J&K. *Source: Statement of the Chief of the Indian Army Staff, dated 21 May 2004. In Syed Junaid Hashmi, Official Records in J&K 'murky' on 'penalised' security men, 19 January 2011.URL: http://www.countercurrents.org/hashmi19011.htm*

Human rights offer an effective moral guide in turbulent times and that violating rights can spark or aggravate serious security challenges. The short term gains of undermining core values of freedom and non-discrimination are rarely worth the long term price. Human rights are not just arbitrary restraints on governments. They reflect fundamental values, widely shared and deeply held, imposing limits on the power of governments and essential safeguards for human dignity and autonomy. Betraying these values rarely turns out well.[29]

It will be useful to note that in the final text of Article 4 of the International Covenant



on Civil and Political Rights, it was recorded: "In times of public emergency which threatens the life of the nation and existence of which is officially proclaimed, State party to the present Covenant may take measures derogating from their obligations under the present covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the grounds of race, religion, sex, language or social origin". It must however be remembered that there are certain non derogable rights even in emergencies, they are also known as "*paris minimum standared*".

It is worthy to mention that all human rights do not get suspended during the situation of conflict. All the derogation clauses within various human rights treaties identify those rights which cannot be suspended during emergencies and conflict situations. The rights provided through different human rights treaties under this category include right to life, protections against torture and other forms of degrading treatment, protection against slavery, protection against expost facto criminal laws. While availing derogation in context of other rights states are not supposed to do anything which is inconsistent to their obligation under international law. It is obvious that party to a human rights treaty while availing the avenue of derogation is not supposed to deviate from its obligations under international humanitarian law. Thus non-derogable portion of human rights and humanitarian law both continue to operate during the situations of conflict.

Conclusion

Weak implementation of human rights is connected with the question of domestic jurisdiction. Question of domestic jurisdiction should not arise in civilized nations when it comes to protection of human rights. The principle of domestic jurisdiction, for implementation of globally recognized human rights may create international problem because such principle will cross over boundaries resulting disrespect for basic rights. Judicial intervention for incorporation and protection of human rights are helpful in this regard. India is party to many international instruments and has ratified many but violation of basic rights during conflict like situations is a serious issue. Laws of Impunity and non-accountability are major reasons contributing towards rampant human rights violations in Jammu and Kashmir. Humans can't cease to be humans in two different situations vis conflict and normalcy because certain basic rights are non-derogable. Applicability of basic human rights in two different situations tends to dilute the nature of 'basic human rights'.

CONCEPTUALISING THE APPLICABILITY OF THE TRANSITIONAL JUSTICE METHODS IN THE CONTEXT OF AN ON-GOING CONFLICT OF JAMMU AND KASHMIR

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ABSTRACT

The study of 'transitional justice' is a rapidly expanding field at the intersection of jurisprudence, comparative politics, and political theory. In the wake of the revolutions in Eastern Europe, the democratization of South Africa, and the ever-increasing popularity of international human rights talk, an academic literature has arisen that examines regime transitions in developing nations. Social research on transitions, as well as within the field of transitional justice, has primarily focused on the implementation of transitional justice policies in the cases of well-known ***Paradigmatic Transitions****. However, this approach leaves unexplored the experiences of* ***Conflicted Democracies*** *- the 'procedural democracies' framed within the midst of an armed conflict and their transitional processes in becoming 'substantive democracies' free of violence.*

The study of Transitional Justice (TJ) amidst on-going political and armed conflict is a relatively new field of inquiry. This approach has so far been followed in only a few cases, most notably, Northern Ireland and Colombia. It is to be appreciated that all conflicts are different and come with their own peculiar challenges, as a result, every conflict, in addition to conforming to a set of general rules, has to develop its own sets of principles in order to be studied in a suitable perspective. Keeping this in mind, this essay envisions studying the applicability of transitional justice tools and methods in the case of conflicted region of Jammu and Kashmir.

I. INTRODUCTION

Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. [1] It is also used to signify a set of official and non-official measures which governments and societies implement in periods of

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1 ICTJ, *What is Transitional Justice?* Available at: http://ictj.org/about/transitional-justice (accessed 25 December, 2014). 2

political change, such as transformations from violent conflicts or authoritarian regimes to the pursuit of accountability‘ and reparation‘ for massive violence and human rights violations, and to the consolidation of a new non-conflicted democratic order .[2] The most common accepted premise of the transitional justice structure include contribution towards accountability, an end to impunity‘, the reconstruction of state-citizen relationships, and the creation of democratic institutions‘- all of which are crucial for addressing the grievances of victims‘. [3] The concept of transitional justice has a strong normative character with a basis in many human rights treaties and conventions.[4] Transitional justice analyses provide important tools in understanding how societies emerge from violent conflict. As is generally understood, transitional justice encompasses the legal, moral and political dilemmas that arise in holding human rights abusers accountable at the end of conflict . [5]

Transitional justice is not a special‘ kind of justice, but an approach to achieving justice in times of transition from conflict and/or state repression. By trying to achieve accountability and redressing victims, transitional justice provides recognition of the rights of victims‘, promotes civic trust and strengthens the democratic rule of law‘. [6] Accountability in transitional justice is pursued by a variety of mechanisms or policies such as: implementing demobilization and reintegration programs, holding trials in domestic or international courts, granting amnesties and reduced sentences, vetting and purging wrongdoers from public or security posts, creating truth and inquiry commissions, providing reparation to victims, allowing public access to security files, building memorials and offering public apologies . [7] Two main categories of transitional justice policies as identified by José Zalaquett are: [8] *firstly*, those measures aimed at repairing the damage inflicted such as the displacement of people and the dispossession of land (through, for example, the return of territory) and *secondly*, those measures to prevent the recurrence of abuses and achieve accountability through mechanisms such as trials and truth commissions. [9]

2 RUTI TEITEL, TRANSITIONAL JUSTICE, 4 (New York: Oxford University Press, 2000).
3 Debidatta A. Mahapatra, *Mapping Transitional Justice in Kashmir: Drivers, Initiatives, and Challenges*, Oxford Transitional Justice Research – Research Article 3, 7 December 2010, 3. Available at: http://goo.gl/bWnNwK (accessed 25 December, 2014).
4 Michael O'Flaherty, *Future Protection of Human Rights in Post-Conflict Societies: the Role of the United Nations*, Human Rights Law Review 3, no. 1: 53-76 (2003).
5 Fionnuala Ní Aoláin and Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, Human Rights Quarterly 27: 172-213 (2005).
6 ICTJ, *what is Transitional Justice?"* (Fn. 1, above).
7 Eric Posner and Adrian Vermeule, *Transitional Justice as Ordinary justice*, Public Law and Legal Theory: Working Paper, University of Chicago 40, 5 (2003).
8 Jose Zalaquett, *Confronting Human rights violations committed by former governments: Principles applicable and political constraints*, in Neil J. Kritz (ed.), TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, Vol. 1. 5 (Washington D.C: United States Institute of Peace Press, 1995).
9 Christine Bell, Colm Campbell and Fionnuala Ni Aolain, *Justice Discourses in Transition*, Social Legal Studies 13, 314 (2004).

The major focus of the transitional justice field has devoted its attention to the implementation of transitional justice policies in Paradigmatic transitions' (i.e. the transitions from authoritarian regimes' to liberal democracies'). In paradigmatic transitions it is generally supposed that the foundation of previous regime is illegitimate .[10] There is, however, a deficiency in adopting this approach, in that it leaves unexplored the experiences of procedural democracies' framed within the midst of an armed conflict and their transitional processes in becoming substantive democracies' free of violence. Fionnuala Ní Aoláin and Colm Campbell call these regimes, composed of the minimal requirements to be considered a formal democracy as Conflicted Democracies .[11] The study of transitional justice in transitions within conflicted democracies is new and has been followed in only a few cases, most notably, Ireland and Colombia.[12]

This essay will discuss whether this approach can be adopted in the case of Jammu and Kashmir (J&K).[13] Since 1947, Kashmir has been in the midst of political conflict resulting in division of the territory of Kashmir between India and Pakistan. Also, a small portion (Aksai Chin), largely mountainous, is held by China.[14] The conflict later took a shape of an active armed rebellion against the Indian state in its controlled part of J&K, resulting in the gross human rights violation of civilian population including torture, murder, custodial deaths,

10 Guillermo O'Donnell and Schmitter Phillipe C., *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, in Neil J. Kritz (ed.), TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, Vol. 1. 57-64 (Washington D.C: United States Institute of Peace Press, 1995).

11 Fionnuala Ní Aoláin and Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, 1 (Fn. 5) above.

12 ROSARIO FIGARI LAYUS, THE ROLE OF TRANSITIONAL JUSTICE IN THE MIDST OF ONGOING ARMED CONFLICTS: THE CASE OF COLOMBIA, 12 (University of Potsdam, 2010).

13 The territory that is surrounded by China on the north east side, Pakistan in the west and North West and India in the south was known as Princely State of Kashmir'. The territory of Princely State of Kashmir included the region of Jammu, Kashmir valley, Ladakh, Mirpur, Gilgit and Baltistan. For the sake of simplicity, in this essay, I will use a single term Kashmir' to mean comprising all these regions. So when I say Kashmir conflict' – it is rather a broad way of describing the political conflict of the entire region and not limiting to any specific region under the actual control of India, Pakistan or the China. Generally, Kashmir conflict' is interchangeably referred to as Kashmir dispute, Kashmir issue, Kashmir Problem, J & K issue, J & K dispute by different parties in the conflict. India defines part of J&K under Pakistani control as Pakistan Occupied Kashmir', while Pakistan defines part of J&K under Indian control as Indian Occupied Kashmir'. A more temperate form used by academics in the two countries is Indian Administered Kashmir' and Pakistan Administered Kashmir'. In this essay, Indian Administered Kashmir that comprises the region of Jammu, Kashmir valley and Ladakh, is referred as Jammu and Kashmir or simply J&K/Kashmir. It is this region which is the primary focus of this discussion. Map of Kashmir is available on this: http://goo.gl/VU1yw6.

14 A LAMB, KASHMIR: A DISPUTED LEGACY, Roxford book, New edition (1 November 1991).

15 Human Rights Watch, *India's Secret Army in Kashmir: New Patterns of Abuse Emerge in the Conflict*, 1 May 1996. available at: http://www.unhcr.org/refworld/docid/3ae6a8558.html (accessed 26 December, 2014).

16 Anjana Pasricha, *20 Killed in Surge of Violence in Indian Kashmir*, Voice of America, 05 December, 2014. Available at http://goo.gl/RzBRYd(accessed 26 December, 2014). Also *see*, Yusuf Shabir, Curfew Stifles Kashmir, Greater Kashmir, 15 March, 2013, http://goo.gl/FuBkrE (accessed 26 December, 2014). *See* also, *Mufti expresses concern over sudden spurt in violence*, The Tribune, 7 December, 2014. Available at: http://goo.gl/MTaHon (accessed 26 December, 2014).

enforced disappearances etc. [15] In fact, it continues to be in such state till date. [16]

While studying the Kashmir conflict' two approaches become quite discernible. *First*, is the external approach' - highlighting the International dimension of the Kashmir conflict including the role of the international community, United Nations resolutions, legality or otherwise of the Kashmir's claim for self-determination, bilateral relation between India and Pakistan and so forth. *Second*, is the internal approach' that concerns itself with the dimension studying the present internal administration' of Kashmir and its relation with India in Indian administered Kashmir' and with Pakistan in Pakistani administered Kashmir' respectively.

This essay would mainly like to focus on the second dimension i.e. the internal approach'. Even in that, to make this essay further manageable, it intends to specifically limit itself to the relation of Indian administered Kashmir' (formally known as the State of J&K) with the Indian state'. [17]Therefore, the relation of Pakistani administered Kashmir' with the Pakistani state', which has seen insignificant militant violence, does not seem to be fit for transitional justice processes and is therefore not considered in this essay.

Apart from academic interest and attempting to analyse the Kashmir conflict' from a relatively novel perspective, this essay assumes practical significance specifically due to the former Chief Minister (CM) of State of J&K, Mr Omar Abdullah [18] - making reference to the setting up of Truth and Reconciliation Commission' (one of the instruments of transitional justice) across both sides of the line of control [19] (L.O.C) in his blog some months before he actually assumed the charge of this office from the year 2009.[20] He has been publically advocating his stand ever since. [21] His assertion perhaps gained further weight after Jammu and Kashmir's State Human Right Commission's (SHRC) special investigative team confirmed the presence of 2,156 unidentified bodies in unmarked mass graves' in 38 sites, only in 4 districts of north Kashmir. [22] However, so far, there has been no response, neither in affirmation nor in denial, from the central authority' of the Indian state over his proposal.

17 As per Constitution of Indian, India considers J&K to be one of its 29 states and 4 Union territories that Union of India' at present possesses.

18 Chief Minister in the Indian system of administration is the head of the government of a particular state.

19 The de-facto border which divides the Kashmir into Indian administered and Pakistan administered parts.

20 *See, Omar Advocates Truth and Reconciliation commission for Kashmir*, Kashmir Newz, January 15, 2009. Available at: http://www.kashmirnewz.com/n000388.html (accessed 27 December, 2014).

21 *See, Omar Abdullah for setting up Truth and Reconciliation Commission in J&K*, DNA, Sept. 10, 2011. available at: http://goo.gl/r9W6Ef (accessed 27 December, 2014).

22 *See*, Special correspondent, *J&K Human Rights Commission s SIT confirms 2,156 unidentified bodies in „mass grave*s', The Hindu, 22 August, 2011. Available at: http://goo.gl/I7jd0A (accessed 27 December, 2014). On further investigations, it was revealed that the number has arisen up to 2730 graves only in 4 districts. *See, Govt. buries head in sand as SHRC Discovers mass graves in Kashmir*, News Clickin Sept 7, 2011. Available at: http://goo.gl/ (accessed 27 December, 2014). In J&K, officially there are a total of 22 administrative units known as Districts' headed by a senior government official known as Deputy Commissioner (DM/DC).

Against this backdrop, the main question of interest in this essay is to determine whether or not is it possible to initiate the policies of transitional justice in the midst of ongoing conflict in Jammu and Kashmir? Alternatively, does transitional justice need to fulfil certain essential pre-conditions before its actual methods such as Truth Commissions and holding trials etc. can be considered?

As this study attempts to analyse the Kashmir conflict' from a totally novel perspective, there is a dearth of relevant source material in the shape of books and research journals. Therefore, much reliance, particularly, in the last two sections has been put on the contemporary source materials including NGO reports, magazines, Newspapers and TV reports.

II. MAKING A CASE FOR CONFLICTED DEMOCRACY IN JAMMU AND KASHMIR

According to Ní Aoláin and Campbell, Conflicted democracies are the states with a known record of prolonged political violence'. According to these authors, a conflicted democracy involves two elements. *First*, there must be a deep-seated and sharp division in the political body whether on ethnic, racial, religious, class, or ideological grounds. *Second*, this division must be so acute and the political circumstances so charged that the atmosphere could result in or threatens significant political violence'. [23] Likewise, while defining conflicted democracies', Thomas Carothers conceives them to be the grey zones between the ideal type of a liberal democracy' and a dictatorship'. As per Carothers, these states do possess some attributes of democratic political life, including at least limited' political space for opposition parties and independent civil society, as well as regular elections and democratic constitutions. However, according to him, they suffer from serious democratic deficits', often including poor representation of citizens' interests, low levels of political participation beyond voting, frequent abuse of the law by government officials, elections of uncertain legitimacy, very low levels of public confidence in state institutions, and persistently poor institutional performance by the state . [24]

In order to succeed in making out a case for conflicted democracy in J&K', the above mentioned criteria as set forth by Ní Aoláin and Campbell as well as those laid down by Thomas Carothers need to be demonstrated. The following discussion is aimed to establish such a claim.

i. DEMOCRATIC DEFICIT: ELECTIONS OF UNCERTAIN LEGITIMACY, POOR REPRESENTATION OF CITIZENS' INTERESTS

23 Fionnuala Ní Aoláin and Colm Campbell, *The Paradox of Transition in Conflicted Democracies,* 174 (Fn. 5, above).

24 Thomas Carothers, *The End of the Transition Paradigm,* Journal of Democracy 13 (1): 5-21, 9-10 (2002). 6

An example of illegitimate democratic process in the State of J&K became visible from the year 1951 onwards itself when the first election to the constituent assembly was held unopposed .[25] Almost every other election that followed, except the one held in 1977, [26] were seldom free from controversies. [27] Besides being held in an unfair‘ manner, the participation of people in elections has throughout been marginal, thus, emphasising the unrepresentative character‘ of most of the governments which came to power in J&K. [28] The election process in J&K was succinctly summarized by Mr. Prem Nath Bazaz, a prominent Hindu Kashmiri journalist and activist, way back in 1978 in the following words: [29]

After independence, rulers of J&K State were not the freely chosen representatives of the people as they should have been but were the nominees and the protégés of the Central Congress Government. Whether they were the leaders of the National Conference as in the early years (1947-53) and during 1975-77, or belonged to the Congress as in the intervening period, their source of power was New Delhi...

To support his argument, B.K. Nehru, who was the Governor of J&K from 1981 to 1984, in his memoirs, writes: [30]

From 1953 to 1975, Chief Ministers of that State [of J&K] had been nominees of Delhi. Their appointment to that post was legitimised by the holding of farcical and totally rigged elections in which the Congress party led by Delhi’s nominee was elected by huge majorities.

The situation in J&K changed for the worst immediately after the 1987 elections. There were allegations of massive rigging (election fraud) at an unprecedented level for the state assembly polls. [31] This event is considered to be a water shed‘ in the history of Kashmir. [32] It is believed to be the igniting point‘ that later ushered in a full blown‘ armed insurgency against the Indian rule in

25 B SINGH, AUTONOMY OR SECESSION JAMMU AND KASHMIR, 40 (Har-Anand Publications Pvt. Ltd, 2001).

26 VICTORIA SCHOFIELD, KASHMIR IN CONFLICT: INDIA, PAKISTAN AND THE UNENDING WAR, 124 (I.B. Tauris & Co Ltd, 2010).

27 *See*, *White Paper on Elections in Kashmir*, published by The All Parties Hurriyat Conference (APHC), Srinagar, Kashmir, June 17, 2010. Available at: http://goo.gl/KZXCkQ (accessed 28 December, 2014)

28 Awais Bin Wasi, *Elections in Indian Held Kashmir and the Kashmir Dispute*, Policy Perspectives , Volume 6, Number 2, July - December 2009, Institute of Policy Studies, Islamabad. Available at: http:// goo.gl/aWsM2r (accessed 28 December, 2014).

29 PREM NATH BAZAZ, DEMOCRACY THROUGH INTIMIDATION AND TERROR, 87,15,124-132 (Heritage Publishers, 1978).

30 B.K. NEHRU, NICE GUYS FINISH SECOND, 614-15 (Viking, 1997).

31 VICTORIA SCHOFIELD, KASHMIR IN CONFLICT: INDIA, PAKISTAN AND THE UNENDING WAR, 137-138 (Fn. 26).

32 *See*, Shahid A Ronga, *Steps Towards Peace In Kashmir*, State Observer, June 16, 2012. Available at: http://goo.gl/Um83Vf (accessed 29 December, 2014).

33 Deepshikha Hooda, *2014 General Elections in Kashmir Valley: Incidents of Violence and its Impact*, Institute of Defense Studies and Analyses, 25 September, 2014. Available at: http://goo.gl/JhZiAM (accessed 29 December, 2014).

J&K,[33] resulting in an open confrontation between the insurgent groups' and the Indian army'.[34] Many opposition candidates drew the conclusion that democratic' politics offered no channels for the redressal of Kashmiri grievances.[35] It was this event that led to the rebirth' of the dormant popular demand for the right to self-determination'.[36] …As the simmering resentment' transformed into mass rebellion, the response of the Indian state centred on militarily-backed repression.[37] In the counter-insurgency process, by one estimate, India deployed as many as 700,000 troops in J&K,[38] while others put it slightly lesser than that number.[39] In any case, it is believed to be the highest soldier–civilian ratio in any conflict of the world.[40]

Since 1947, the people in J&K have lived under unrepresentative governments as the elections are rigged and people are forced to vote under the shadow of the gun'.[41] This practice continues unabated, which is clear from the 2008 as well as the recent 2014 elections that were marred by violence, boycott and curfews.[42] In any case, it is argued that elections in J&K are not fought by substituting the ultimate political question of Kashmir but contested mainly on the plank of governance and local self-government.[43]

ii. DEEP-SEATED AND SHARP DIVISION IN THE POLITICAL BODY AND THREAT OF SIGNIFICANT

Politically, the main opposition to the government in J&K comes from All Party's Hurriyat Conference (APHC). It's a socio-political umbrella organisation of various pro-freedom organisations that publically confronts India's position of considering J&K as an integral part of Indian Union.[44] The party positions

34 VICTORIA SCHOFIELD, KASHMIR IN CONFLICT: INDIA, PAKISTAN AND THE UNENDING WAR, 138 (Fn. 26).
35 Sten Widmalm, *Kashmir in Comparative Perspective: Democracy and Violent Separatism in India*, 80 (Routledge Curzon, 2002).
36 Ibid.138 (Fn. 26).
37 Seema Kazi, *Law, governance and gender in Indian Administered Kashmir*, Jawahar Lal University, 5 (November, 2012). Also available at: http://goo.gl/TCrzd4 (accessed 29 December, 2014).
38 R KNUTH, BURNING BOOKS AND LEAVING LIBRARIES - EXTREMIST VIOLENCE AND CULTURAL DESTRUCTION, 77 (Westport: Praeger, 2006).
39 Anuj Chopra, *Kashmir: The Disappeared in Kashmir: A troubled Paradise,* Frontline world. Available at: http://www.pbs.org/frontlineworld/flash_point/kashmir/dispatch.html (accessed 29 December, 2014).
40 *Ibid*.
41 S GANGULY, THE CRISIS IN KASHMIR: PORTENTS OF WAR, HOPES OF PEACE, 84 (Cambridge University Press,1997).
42 M Ahmad, *Protesters, security forces clash during Kashmir elections,* CNN. corn/Asia, (23rd November 2008). Available at: http://goo.gl/86Aq7k (accessed 29 December, 2014). Also see, PTI, *Jammu and Kashmir poll campaign: 92 incidents of violence, 117 injured*, Niti Central, 19 December 19, 2014. Available at: http://goo.gl/4rQzgJ (accessed 29 December, 2014).
43 *See, Omar de-clubs K-solution and elections* , Kashmir Images, 20 October, 2012. Available at: http:/ /goo.gl/DWfjNb (accessed 29 December, 2014).
44 *See, Kashmir is not an integral part of India, Geelani tells all-party delegation*, Rediff News, 20 September, 2010. Available at: http://goo.gl/kXOS5W (accessed 31 December, 2014).

itself markedly different from the mainstream political parties like National Conference (NC), People's Democratic Party (PDP), Indian National Congress (INC), People's Conference (PC), and People's Democratic Front (PDF) etc, which take an oath on Indian Constitution and form the government in J&K. [45]

APHC was formed in March 10, 1993 and is a very popular organisation enjoying substantial mass support at least in the majority Muslim dominated Kashmir Valley' of State of J&K. [46] Although formed on ethno-socio-religious lines and using religious invocations [47] as part of its public mobilisation strategy', this organisation offers a stiff political resistance' to the government in J&K. [48] It is vocal in highlighting the excess and human rights violations, committed by Indian military and police forces, at the local as well as on the international platforms. [49] The protest programs including shut-down calendars' given by the Hurriyat conference from time to time are generally obeyed by the masses in letter and spirit'. [50] This goes on to reflect the presence of deep-seated and sharp division in the body politics' of J&K. Thus, qualifying J&K for conflicted democracy' as per the first element of the criteria laid down Ní Aoláin and Campbell.

iii. PROLONGED POLITICAL VIOLENCE

In proactive anti-insurgency operations' the state forces in J&K committed many human rights violations against civilians many of whom were seen as sympathetic to insurgents. [51] Gross human right violations such as extra-judicial killings, custodial killings, disappearances, rape and torture etc. became the order of the day. [52] Over the years thousands of Kashmiris have been arrested in search operations and many homes, schools and institutions have been gutted.

Approximately 8-10,000 people have disappeared after arrest and more

45 *For example*, the present government in J&K is a NC-Indian Congress led coalition. Previous government, which held the office from 2002-2008 was coalition between PDP-Indian National Congress.
46 *See*, Gowhar Bhat, *Protests, sit-ins across Valley*, Greater Kashmir, 16th July 2010. Available at: http://goo.gl/3hxS0d (accessed 31 December, 2014). Also see, GK News Network, *Govt afraid of Geelani s popularity: Hurriyat (G)*, Greater Kashmir, 20th June 2010. Available at: http://goo.gl/9ZPp91 (accessed 31 December, 2014).
47 *See*, The official website of Tehreek-A-Hurriyat [Hurriyat (G)] - outlining their stand on Kashmir and can be found on: http://goo.gl/JZojGU (accessed 01 January, 2015).
48 *See*, KL Report, *Govt Repeats Dictatorial Tactics by Imposing Curfew: Hurriyat (M)*, Kashmir Life, Srinagar, July 19, 2013. Available at: http://goo.gl/DoAYtd (accessed 01 January, 2015).
49 *For example*, See, Kashmircentre, *Mirwaiz Umar Farooq Speech in EU Parliament*, uploaded on 24 May 2011. Available at: http://www.youtube.com/watch?v=sN4WbzHnEVg (accessed 01 January, 2015).
50 Gowhar Bhat, *Protests, sit-ins across Valley*, Greater Kashmir, (Fn. 46).
51 Human Rights Watch, *Everyone Lives in Fear: Patterns of Impunity in Jammu and Kashmir*, Vol. 18 No 11 (c) September 2006. Available at: http://goo.gl/slAOTU (accessed 01 January, 2015).
52 *See*, *Unreported World: Killing of Kashmir*, Channel 4 Documentary, 8th April 2004, Uploaded on 20 May 2011. Available at: http://www.youtube.com/watch?v=iQQ-owBAc1c (accessed 02 January, 2015).
53 *Kashmir Terror Group Warning*, CNN.com-Kashmir, 4th February 2002. Available at: http://goo.gl/PQpsxf (accessed 01 January, 2015).

than 80,000 [53] people have been killed also creating 2.05 million displaced people. [54] All of these rights violations are well documented by the international NGO's like Human Rights Watch, [55] Amnesty International, [56] Physicians for Human Rights [57] and indigenous human rights organisations such as the Coalition for Civil Societies. [58]

iv. ABUSE OF LEGISLATIVE POWER: COVER-UP USING UNDEMOCRATIC LEGISLATIONS AND ORDERS

Unrelenting human rights abuse and the absence of safeguard mechanisms have been construed to indicate compromised law and order situations in J&K. The state force stationed in J&K has been given *carte blanche* to kill merely on the basis of suspicion', a practice backed up by the largely undemocratic legislations'. [59] Under the Public Safety Act 1978 (as amended in 1990), a detainee can be held under administrative detention for a maximum of two years without a court order. [60] Similarly, the Armed Forces Special Powers Act (AFSPA) 1958 that was introduced in J&K in December 1990, after declaring Kashmir valley and most of the Jammu province as disturbed areas, gave the army unfettered powers to arrest people and thus reinforced impunity. Under section 3 of this Act, the army can arrest people without warrant and under section 4 (a) have power to shoot with intention to kill. The state force officials involved in committing human rights abuses generally enjoyed de facto impunity, although there were reports of investigations into individual abuse cases. [61]
The police have been rendered powerless to arrest or prosecute security forces accused or suspected of committing abuses. Section 7 AFSPA, provides that [n]o prosecution, suit or other legal proceeding shall be instituted against a member

54 PUBLIC COMMISSION ON HUMAN RIGHTS, STATE OF HUMAN RIGHTS IN JAMMU AND KASHMIR 1990-2005, 38 (Hindustan Printers, 2006).
55 *See*, Human Rights Watch, *Everyone Lives in Fear: Patterns of Impunity in Jammu and Kashmir*, (Fn. 51, above).
56 Amnesty International, *A Lawless Law : under the Jammu and Kashmir Public Safety Act, 1978*, 2011. Available at: http://goo.gl/j1Axt7 (accessed 02 January, 2015). Also *see*, Amnesty International, *Still a 'Lawless Law : Detentions under the Jammu and Kashmir Public Safety Act*, 1978, 13 October 2012, ASA 20/035/2012. Available at: http://goo.gl/te4dKk (accessed 02 January, 2015).
57 Physicians for Human Rights (UK), *Kashmir 1991: Health Consequences of the Civil Unrest and the Police and Military Action*, (Dundee, 1991).
58 IPTK, *Alleged Perpetrators - Stories of Impunity in Jammu and Kashmir*, IPTK and APDP, December 2012. Available at: http://goo.gl/DhVaQu (accessed 03 January, 2015).
59 For example, Jammu and Kashmir Armed Forces (Special Powers) Act 1990, the Prevention of Terrorism Act 2002, Jammu and Kashmir Public Safety Act 1978 and the Terrorist and Disruptive Activities (Prevention) Act 1987.
60 Alfred K. Lowenstein, *The Myth of Normalcy: Impunity and the Judiciary in Kashmir*, International Human Rights Clinic, Yale Law School, 26 (2009). Available at: http://goo.gl/VVwXL9 (accessed 02 January, 2015).
61 US Department of State, *Country Reports on Human Rights Practices-India 2005*, Released by the Bureau of Democracy, Human Rights, and Labor March 8th 2006. Available at: http://www.state.gov/j/drl/rls/hrrpt/2005/61707.htm (accessed 02 January, 2015).

of the security forces except with the previous sanction of the Central Government. [62] To apply for the central government's sanction to proceed with the arrest and prosecution of security personnel, Kashmir police departments must submit a case file to the state home secretary, who forwards the request to the central Home Ministry. [63] Similarly, section 197 of the Criminal procedure code (CrPC) states that when officers of the central government are accused of any offence alleged to have been committed by [them] while acting or purporting to act in the discharge of [their] official duty no court shall take cognizance of such offence except with the previous sanction . . . of the Central Government. [64] Section 45 of the CrPC places a more specific prohibition on the arrest of Armed Forces members; it requires that no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central Government. [65]

The majority of cases submitted to the central government for sanction request for persecution are never responded to. Even in those limited cases in which the government officially denies the request, it typically does so only after many years. [66] There is no formal legal mechanism for victims to challenge the central government's inaction or decision to deny its consent to the arrest and prosecution of a member of the security forces. [67] As matter of fact, a 1992 circular instructed Kashmiri police stations, contrary to the requirements of the Code of Criminal Procedure, to stop filing FIRs against security forces without the approval of higher authorities. [68]

v. POOR LEVEL OF PUBLIC CONFIDENCE IN THE STATE INSTITUTIONS AND PERSISTENT POOR INSTITUTIONAL PERFORMANCE: A CASE OF DEFUNCT JUDICIARY IN J&K

The manifestation of conflicted democracy is best depicted by the weak judiciary of J&K. [69] Article 32 of the J&K Constitution grants the state's High Court [70] the power to issue and enforce writs to protect fundamental rights, including habeas corpus and mandamus. The High Court of J&K has been admired

62 Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (No. 21 of 1990), 1 1990, Available at: http://www.refworld.org/docid/3ae6b52a14.html (accessed 03 January, 2015).
63 The Home Ministry, also known as the Ministry of Home Affairs, exists at both the central and state level. The Home Minister is responsible for internal administration, including law and order affairs—thus, counter-intelligence and police matters fall under the Ministry's jurisdiction.
64 Indian Code of Criminal Procedure, 1973 chapter. 20, Section 197. Available at: http://goo.gl/daU0Hc (accessed 03 January, 2015).
65 *Ibid*, Section 145 (1).
66 Alfred K. Lowenstein, *The Myth of Normalcy: Impunity and the Judiciary in Kashmir*, 13 (Fn. 60).
67 *Ibid*,14.
68 Letter No: SP (5Exg/267881 dated 14.4.1992).
69 *See*, Alfred K. Lowenstein, *The Myth of Normalcy: Impunity and the Judiciary in Kashmir* (Fn. 60).
70 In theory, High Courts are the highest court for each state of the union. In total, however, there are only 21 High Courts as three of them exercise jurisdiction over more than one state.

for its decisive actions on Public Interest Litigation's relating to the issue including environmental regulations, public transportation initiatives and the Dal Lake clean-up effort. [71] However, in spite of depicting such bold judicial activism, the Kashmiri justice system—both the courts' as well as the legal process' fall short of international standards while dealing with the case relating to the human rights claims.

J&K's judiciary has to operate within a reactionary conflicting situation. In this territorial extension executive and military prerogatives are regarded as sacrosanct'. As such, the judiciary of J&K, despite its purported independence, has played an instrumental role in ensuring the Indian government's ability to maintain its control over Kashmir and combat pro-freedom militant groups operating in the region . [72]

In this context, the report of the US Department of State on Human Rights Practices for India (2000) further states:

> Problems have heightened in Kashmir, where judicial tolerance of the Government's heavy-handed counter-insurgency tactics, the refusal of security forces to obey court orders, and terrorist threats have disrupted the judicial system….the number of insurgency-related killings in Kashmir by regular Indian security forces has increased. [73]

Human rights lawyers identified two factors that impede convictions. *First*, the military does not assist in passing on state force members for prosecution. In fact, in some cases, the military has taken active steps to prevent prosecution. [74] *Second*, the failure of courts to hold trials and hearings in a sensible fashion allows defendants to remain at large for lengthy stretch of time pending a resumption of the legal process. Also, the Courts are generous to offer criminal defendants (who are members of the state forces) the option of removing their cases to military courts'. [75] These courts martial are not transparent, as victims

71 *See*, e.g., Arif Shafi Wani, *13,000 Trees Axed in Dal Lake on Court Orders*, Greater Kashmir, Jan. 5, 2006 (lake clean-up); Anil Bhatt, *7,300 Vehicles To Go Off the Road*, rediff india abroad, Nov. 11, 2005, Available at: http://goo.gl/a7ROGW (transportation related pollution control); *Aziz Timber Corp. v. State, of J&K* O.W.P. No. 568-84/96 continuing petition No. 51/96, May 10, 1996 (deforestation and illegal logging); *Jammu & Kashmir High Court Asks Government to Set up Committee to Examine Waste Disposal: HC.* Available at: http://goo.gl/kdwB9y, Mar. 11 2007 (accessed 5 January 2015) (waste disposal).

72 Alfred K. Lowenstein, *The Myth of Normalcy: Impunity and the Judiciary in Kashmir,* 3 (Fn. 60).

73 US Department of State, *"Country Reports on Human Rights Practices- India 2000"*, Released by the Bureau of Democracy, Human Rights, and Labor, February 23rd 2001. Available at: http://www.state.gov/j/drl/rls/hrrpt/2000/sa/717.htm (accessed 5 January 2015).

74 Alfred K. Lowenstein, *The Myth of Normalcy: Impunity and the Judiciary in Kashmir,* 15 (Fn. 60).

75 Majid Jahangir/TNS, *Army to try 5 officers for Pathribal killings,* The Tribune, 29 June, 2012. Available at: http://goo.gl/bnmLcq (accessed 5 January 2015).

76 *Ibid*, 16 (Fn. 60). *See* also, Sameer Yasir, *In Kashmir, victims' families shocked as Army closes Pathribal fake encounter case*, F. India, 24 January, 2014. Available at: http://goo.gl/eVSMi5 (accessed 5 January 2015).

rarely learn of the results or findings. [76]

III. PREPARING THE PATH OF TRANSITION TOWARDS TRANSITIONAL JUSTICE METHODS IN J&K

In the context of scenario of mass violence, facilitation of transitional process can start with *first*, break with the previous regime' and *second*, movement away from a conflicted democracy'. [77]

Again there remains a lack of consensus' over the criteria for determining what transitional really means – when a transition starts and when it is over. [78] Nevertheless, generally it means, it is a *movement'* or a certain degree of *change'* in the power, actors and configuration of a political structure. To be precise, transition implicates break from the previous order'. The underlying factor to most transitions is the lack of legitimacy' i.e. previous regime is, to a greater or lesser degree, illegitimate'. [79]

A. BREAK WITH THE PREVIOUS REGIME

In the context of conflicted democracy of J&K, there has been no visible change in the political structure'. Present political dispensation continues to be perceived as illegitimate' for leading the situation to this impasse. In fact, the very political parties, National Conference (NC) – Indian Congress coalition, were mainly responsible for stifling democratic political process' in J&K.[80] They continue to hold on to the reins of power and were running the government in J&K few months ago. Therefore, there appears to be no break with the past'. The characterization of the previous order as conflicted' is intact and continues to exist in that order. Ironically, as previously mentioned, recently the demand for the establishing one of the institutions of transitional justice methods (i.e. the establishment of truth and reconciliation commission) has come from the chief minister who belongs to one of these parties. [81]

As a matter of practice, J&K does hold regular elections for the state assembly' after every six years. The most recent one was held in the last month

77 ROSARIO FIGARI LAYUS, THE ROLE OF TRANSITIONAL JUSTICE IN THE MIDST OF ONGOING ARMED CONFLICTS: THE CASE OF COLOMBIA, 21 (Fn. 12).

78 Fionnuala Ní Aoláin and Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, 182 (Fn. 5).

79 *Ibid*.

80 *See,* Page 8, above. Also see, *Ex-NC leader says 1987 elections were rigged*, Greater Kashmir, 29 September, 2013. Available at: http://goo.gl/Fm5N6L (accessed 5 January 2015)., *See,* also, Aurangzeb Naqshbandi, *NC-Cong rigged J&K polls hand in hand, says Mufti*, Hindustan Times, 17 November, 2013. Available at: http://goo.gl/f3hMSh (accessed 5 January 2015).

81 The present chief minister Mr. Omar Abdullah belonging to NC party and is the son of Mr. Farooq Abdullah, the-then chief of NC who is accused of committing election fraud with the undue help of Central govt. of India in assembly elections of 1987.

82 National Bureau, *Impressive turnout in J&K and Jharkhand*, The Hindu, 23 December, 2014. Available at: http://goo.gl/4x5VSB (accessed 5 January 2015).

of 2014. Unlike previous elections, this election registered a good turnout of people's participation. [82]Although not free from controversies, [83] unlike several past elections there were no serious doubts cast over its authenticity and have been recorded at an unprecedented' scale. [84] However, the elections (along with the elections held at local levels - municipal and Panchayat levels) are being fought on the plank of better roads and drinking-water supplies, an end to frequent power cuts and more job opportunities for the region's unemployed youth [85] and should not be considered as India's strategic victory . [86] As a matter of fact, it is asserted by the very candidates contesting these elections that elections are no substitute for the resolution of the Kashmir problem [87] and hence does not render any mandate to any political party to that effect.

After the year 2008, modus operandi of resistance movement' in J&K appeared to be changing from violent militant conflict' to the mass base civil unrest'. [88] It is believed that Kashmir saw its own form of Arab spring' before the Arab region saw it. [89] Large demonstrations, curfews and shutdowns are routine in J&K. [90] Peaceful demonstration mixed with sporadic clashes between demonstrators and the state forces continue to take place after intermittent spells of relative calm. [91] In spite of this transformation from violent militant conflict, the years from 2008-2010 witnessed the killing of more than 200 unarmed protests by state forces [92] along with the curfew of almost the entire region of Kashmir valley for more than 5 months at a stretch. [93] Consequently, there is a huge trust deficit' between the government and the people of J&K. [94] As already mentioned,

83 Deepshikha Hooda, *2014 General Election s in Kashmir Valley: Incidents of Violence and its Impact.* (Fn. 33).
84 *See*, Monitor News Bureau, *J&K records highest voter turnout in 27 years*, The Kashmir Monitor, 21 December, 2014. Available at: http://goo.gl/v2Rxdz (accessed 5 January 2015).
85 *See*, Yusuf Jameel, *Big Turnout, Amid Protests, in Kashmir Vote,* Time world, 24 Dec. 2008. Available at: http://goo.gl/WM4sRX (accessed 5 January 2015).
86 PTI, *Don't project good turnout in J&K polls as strategic victory: Omar Abdullah,* The Indian Express, 22 December, 2014. Available at: http://goo.gl/iPp1lv (accessed 5 January 2015).
87 *See* for instance, *Omar de-clubs K-solution and elections*, (Fn. 43).
88 Hashim Qureshi, *Civil disobedience, Hartals and stone pelting*, Greater Kashmir, 04 April 2013. Available at: http://goo.gl/oNHX1P (accessed 07 January 2015).
89 *See*, Haris Zargar, *Kashmir: A brewing Himalayan storm*, Opinion Internationale, 24 July 2013. Available at: http://goo.gl/8IWi6y (accessed 07 January 2015).
90 *See*, PTI, *Curfew lifted but tension prevails as Hurriyat calls for strike in Kashmir*, The Indian Express, 21 July 2013. Available at: http://goo.gl/m4ZVEP (accessed 07 January 2015). *See* also, Masood Hussain, *Protest strike marks 2012 conclusion in Kashmir*, The Economic Times, 31 Dec, 2012. Available at: http://goo.gl/qGUDLD (accessed 07 January 2015).
91 See, for example, *Violence in Srinagar*, NDTV.com. Available at: http://goo.gl/nEuDJq (accessed 07 January 2015).
92 *See*, Gowhar Geelani, *Sentiment & Conflict and the Gen-Next*, The Kashmir Monitor, 03 August 2013. Available at: http://goo.gl/3MNxEP (accessed 07 January 2015).
93 *See*, Hashim Qureshi, *Civil disobedience, Hartals and stone pelting,* (Fn. 88)
94 *See*, Shahid A Ronga, *Steps Towards Peace In Kashmir* (Fn. 32)

there is a huge support base for opposition fronts like Hurriyat and JKLF who openly advocate for and demand political resolution of Kashmir dispute' as per the wishes and aspirations' of the people of Kashmir with UN supervision. [95]

Although, of late, there has been some change in the level of violence' as the number of militants and level of militancy has been reduced to a significant level. [96] To put it in a perspective, according to official sources, there are only 147 militants presently active in Kashmir valley and around 100 in Jammu region. [97] Another source puts the number no more than 200 militants, whereas at the peak of the insurgency there were up to 20 times as many. [98] Furthermore, at its height in 2001, 4,500 deaths were recorded, according to the Institute for Conflict Management, a Delhi-based think tank. In 2012, only 117 people were killed. [99] Notwithstanding these apparently positive developments, it would be still difficult to hold that the state has gained, what Max Weber describes as a monopoly on the legitimate use of force (Webarain monopoly) within its boundaries over legitimate use of force. [100] There seems to be little respite from the repeated acts of systematic violence committed, [101] in particular, by state forces. [102] Fed up and dismayed with the status quo' and these human rights abuses' even after change in the mode of resistance, there has been a sudden spurt in the number of militant attacks against state forces in J&K. [103] Besides, there has been an emergence of new wave of militancy' with more number of better educated' young people [104] joining the militant groups. Also, there is a development of renewed threat in the militant attacks that have seen a surge. [105]

95 *See*, GK News Network, *Geelani writes to European Parliament*, Greater Kashmir, 28 May 2013. Available at: http://goo.gl/NdyCrV (accessed 08 January 2015).
96 Jason Burke, *Kashmir conflict ebbs as new wave of militant emerges*, The Guardian, 11 August 2013. Available at: http://goo.gl/bWUG4R (accessed 08 January 2015).
97 Shabir Ibn Yusuf, *Militancy in Last Stage: Khoda*, Greater Kashmir, 01 June 2012. Available at: http://goo.gl/kY5M59 (accessed 08 January 2015).
98 *See*, Jason Burke, *Kashmir conflict ebbs as new wave of militant emerges,* (Fn. 96).
99 *Ibid*.
100 Fionnuala Ní Aoláin, and Colm Campbell, *The Paradox of Transition in Conflicted Democracies,* 184 (Fn. 5).
101 Press Trust of India, *654 militants killed in Army ops in last 3 years: Anthony*, Rising Kashmir, 20 August 2013. Available at: http://goo.gl/O1bpV3 (accessed 08 January 2015).
102 See, M Saleem Pandit, *Killing of 2 Kashmiri boys a mistake, admits Army,* The Times of India, 8 November, 2014. Available at: http://goo.gl/G1Z00f (accessed 08 January 2015). *See* also, *India: Killing of Protestors by Border Security Force in Kashmir Condemned,* Asian forum for Human rights and Development, 30 July 2013. Available at: http://www.forum-asia.org/?p=16332 (accessed 08 January 2015).
103 *See*, for instance, Ahmed Ali Fayyaz, *8 killed in militant attack ahead of PM s J&K visit*, The Hindu, June 25, 2013. Available at: http://goo.gl/YqvNlg (accessed 09 January 2015). *See* also, Shabir Ibn Yusuf/Ghulam Muhammad, 4 cops killed in ambush, Greater Kashmir, 27 April 2013. Available at: http://goo.gl/ss4YWL (accessed 09 January 2015). *See* also, *Mufti expresses concern over sudden spurt in violence*, The Tribune, 7 December, 2014. Available at: http://goo.gl/MTaHon (accessed 09 January 2015).
104 Riyaz wani, *Young and Educated, Armed and Dangerous*, Tehelka.Com, issue 27 volume 10, 06 July 2013. Available at: http://goo.gl/tNhXoL (accessed 09 January 2015). Also See, Frank Jack Daniel, *In Indian Kashmir, angry youth flirt with armed militancy*, Reuters, 19 Aug, 2013. Available at: http://goo.gl/4F5EwM (accessed 09 January 2015).
105 Khurram Shahzad, *Kashmir militant threaten surge in attacks*, Live Mint, 28 August, 2013. Available at: http://goo.gl/JKGlcm (accessed 09 January 2015).

The trend looks worrisome especially in the wake of proposed withdrawal of US forces from Afghanistan. [106] In this sense, military victory over the militants has not been a complete success. The widespread resentment against the state fuelled by the very nature of the conflict', the sentiment against the legitimacy of political structure' and in even favour of resistance. After recent completing of 25 years of conflict, it remains alive and kicking . [107]

Therefore, from the above facts it seems very difficult, if not impossible, to envisage as to how transition' sans any change in the political structure' is supposed to take place in J&K? How can a break with a previous order' be ensured when on ground only a little has changed? In fact, there has been no regime change' and the status quo' has been tightly maintained. Consequently, legitimacy of the government continues to remain a big question mark'. Moreover, it also looks unclear as to how a transition from conflicted' to a non-conflicted' democracy can be achieved without guaranteeing the non-repetition of the systematic violence which characterized the previous order and continues to be in such a state.

B. MOVEMENT AWAY FROM A CONFLICTED DEMOCRACY

In order for a transition to help and create an ideal setting for a stage leading to the implementation of transitional justice methods, which would work as a means to transform the hostility from war' to peace', the following conditions needs to be fulfilled:

a) GUARANTEE OF NON-REPETITION OF CRIMES COMMITTED DURING THE CONFLICT

The requirement of guarantee of non-repetition of crimes committed during the conflict' in the context of J&K has to be properly analysed by considering all the relevant variables. First of all, it has to be understood that human rights abuses have been perpetrated by all sides' of the conflict. This includes state forces on one hand and militant fighters on the other.[108] However, due to the asymmetrical' nature of the conflict along with active confrontation, [109] the incidence of rights violation orchestrated by the former is relatively greater in number and magnitude than those committed by the latter. [110] For the latter, there is still a culture of sympathy' in the masses due to the very perception of conflict'

106 *Ibid*. 15
107 Faisul Yaseen, *At 25: Alive and kicking*, Rising Kashmir, 30 July 2013. Available at: http://www.risingkashmir.in/news/at-25-alive-and-kicking-52452.aspx (accessed 09 January 2015).
108 Human Rights Watch, *Behind the Kashmir Conflict: Abuses by Indian Security Forces and Militant Groups Continue*, 1 July 1999. Available at: http://www.refworld.org/docid/45d0609b2.html (accessed 10 January 2015). Also see, Jason Burke, *Kashmir conflict ebbs as new wave of militant emerges*, (Fn. 96).
109 Zahid Maqbool, *Excessive use of pepper gas pestering asthmatics*, Greater Kashmir, 21 February 2013. Available at: http://goo.gl/FTO7IV (accessed 10 January 2015).
110 *See*, Dilnaz Boga, *WikiLeaks cables: will the world now intervene over torture in Kashmir?*, 21 December 2010. Available at: http://goo.gl/44dtFM (accessed 10 January 2015).

held in the popular imagination and perhaps provides the people with counter-solace‘ from the excesses being committed by state forces. [111] This is the reason that there are generally protests, mourning and strikes when a militant fighter (especially when he happens to be a local) is neutralised while no such respect is shown when state armed personnel are killed. [112]

As stated previously, the state forces are generally immune from any prosecution owing to the shield provided by largely undemocratic legislations‘ like AFSPA. [113] The state forces, especially the army, consistently assert that it would not be possible for them to operate in a conflicted environment‘ without such legislative cover. [114] There are however, recommendations that rather than giving a *carte blanche* their powers should be regulated, at least, for certain offences, in some districts and under certain circumstances. [115] However, time and again these recommendations have been repudiated by the army. They argue that withdrawal of these legislations would lower the morale of *jawans'* (forces) and create interruption in their counter-military operations. [116]

Furthermore, although comparatively lesser in magnitude than the state and unidentified non-state actors, there has been a measure of human rights violations by militant fighters as well. They are largely local militia along with a share of foreign elements, supposedly fighting a battle of independence‘ of J&K against the Indian state. [117] These people like any other armed groups, anywhere in the world, wield a tremendous power and influence but remain largely unaccountable‘ due to the uncertain hierarchical order within the ranks and files of militant organisations. In any case, there is a lack of documented reports etc. to suggest otherwise.

Therefore, in this scenario, it becomes obvious that it is very difficult to stop the operation of militant fighters and seek assurances of cessation of hostilities‘ without peace talks‘ and negotiations‘. However, pending this arrangement, it should not debar the state from seeking assurances from their own forces, to stop committing rights abuse against civilian population of J&K, which ironically it would affirm to safeguard and protect. For this to happen, the attitude of state

111 *See*, Radio Free Europe/Radio Liberty, *India: Clashes erupt after Kashmiri militant hanged over 2001 attack*, 9 February 2013. Available at: http://goo.gl/cb4tg6 (accessed 10 January 2015).

112 *See*, Shabir Ahmad, *Day 2: Tral shuts against killing of 3 militants*, Kashmir Times, 3 July 2013. Available at: http://www.kashmirtimes.in/newsdet.aspx?q=19328 (accessed 10 January 2015).

113 *See*, pages 11-12 above.

114 *Army opposes AFSPA revocation again*, Kashmir Images, 18 June 2013. Available at: http://goo.gl/zhLUOD (accessed 10 January 2015).

115 PTI, *Removal of AFSPA not an effort to undermine the Army: Omar Abdullah*, The Times of India, 26 Oct, 2011. Available at: http://goo.gl/uXKlTe (accessed 10 January 2014). *See* also, JPNN, *J&K Interlocutors Recommend Review of AFSPA*, Jehlum Post, 24 May, 2012. Available at: http://goo.gl/UsmPdJ (accessed 10 January 2015). Also *See*, ibnlive, *J&K interlocutors report seeks AFSPA's review*, CNNibn, Uploaded on 11 Oct 2011. Available at: http://goo.gl/xjwbml (accessed 10 January 2015).

116 *See*, *Army opposes AFSPA revocation again*, Kashmir Images, 18 June 2013. Available at: http://goo.gl/Bso2UE (accessed 10 January 2015).

117 *See*, Human Rights Watch, *Everyone Lives in Fear: Patterns of Impunity in Jammu and Kashmir*, (Fn. 49).

forces towards the ordinary people in the streets and elsewhere warrants an extensive transformation. Rather than behaving like a colonial force' [118], they should conduct themselves more professionally and try to win over the resentful hearts and the confidence of local population. [119] To support and ensure answerability of state forces, apart from tightening the internal discipline, undemocratic legal shield under which state forces operate, needs to be substantially amended so as to bring some measure of assured accountability' for its wrong doings and rights violation. [120]

b) THE ELIMINATION OF INTERNAL ORGANIZED ARMED VIOLENCE

The conflicted democracy of J&K presents a unique challenge in that it is not simply an internal problem'. Though, this essay has consciously avoided going into the external dimension' of the Kashmir conflict. However, it becomes expedient here to make a brief reference to this aspect of the Kashmir conflict. If one reads, from a historical point of view, it becomes more than visible that apart from people of the Kashmir and Indian state, Pakistan's involvement in the entire discourse of this conflict may be overlooked but in error. It is an open secret that militancy in J&K, though largely an indigenous movement, has chiefly been backed, supported and financed' by the Pakistani state. [121] There is no restriction on them not to continue supporting it. Therefore, any step intending to do away with the internal organisation of armed violence' can't be completely successful unless the Pakistani state is also brought on board. How that can be done, is beyond the scope of this essay.

Moreover, the internal armed violence can be substantially reduced if the state sponsored groups like village defence committees (VDCs), set up by the state by arming civilians in the remote areas of J&K to counter militants, are

118 *See*, *Looming over Srinagar, Army s giant message triggers unease*, Kashmir Global, 24 June, 2013. Available at: http://goo.gl/fyHfDx (accessed 10 January 2015). Also *see*, Imran Muzaffar, *People believe Kashmir ruled by Army, Police: Aiyar*, Greater Kashmir, 28 April 2013. Available at: http://goo.gl/9IsGNR (accessed 10 January 2015). *See* also, Express News Service, *Omar Objects, Army removes slogan from Srinagar mountain face*, The Indian Express, 24 June, 2013. Available at: http://goo.gl/7SG9wK (accessed 10 January 2015).

119 Perhaps, this would not be an easy undertaking for the state forces given the perception about the very nature of conflict' both in the psychology of state forces as well as that of the people of J&K. State forces, especial army and armed paramilitary forces, instead of being appreciated for their work are largely despised' by the local population for the already stated reasons. *See*, Wilson John, *Kashmir: The Problem, and the Way Forward*, Vol. 35, No. 2 Strategic Analysis, 320 (March, 2011). Available at: http://goo.gl/ySYv3u (accessed 10 January 2015).

120 In this regard, recently, perhaps for the first time in the history of 27 year old bloody conflict in Kashmir the Indian armed forces have indicts some of its soldiers for rights violations. *See*, Suhasini Raj, *Indian Army Indicts 9 Soldiers in Killing of 2 Civilians in Kashmir*, The New York Times, 28 November, 2014. Available at: http://goo.gl/ykDpTG (accessed 10 January 2015). Although, this being an apparently welcome development but it has generated quite a debate regarding military justice in a purportedly civilian democratic setup, where the judiciary' rather than army' should be in-charge of the claims of justice' dispensation. *See*, Suchitra Vijayan, *Military Justice in a political season*, The Hindu, 18 November, 2014. Available at: http://goo.gl/pNEIvT(accessed 10 January 2015).

121 Human Rights Watch, *Everyone Lives in Fear: Patterns of Impunity in Jammu and Kashmir*, (Fn. 51).

122 Arshad Bhat, *The case against Village Defence Committees, Greater Kashmir*, 16 August 2013. Available at: http://goo.gl/P1Ldvf (accessed 10 January 2015).

disarmed and demobilised. [122] There has been a strong demand to unarm them as they have been alleged of committing rights abuse. [123] Even though the Indian Supreme court has ruled against the formation of such groups, but there seems to be no impact of such ruling in J&K. [124] The government‘s complicity in allowing VDC‘s to continue carrying on with their activities is clearly a brazen error in state policy that goes against the known standards of International law. Besides, in substantive‘ democracies as against the procedural‘ ones, it is the state and state alone that is allowed the legitimate use of force‘.

c) THE STRENGTHENING OF DEMOCRATIC INSTITUTIONS BY ENFORCING AND GUARANTEEING CITIZENS THE FULL EXERCISE OF THEIR CIVIL, POLITICAL, ECONOMIC AND SOCIAL RIGHTS

In a democratic setup judiciary is supposed to be the custodian, promoter and protector of rule of law. [125] However, as mentioned previously, the powers as well as independence of judiciary in conflicted democracy of J&K have been substantially compromised. [126] The failures of the judicial system in J&K are both structural‘, such as jurisdiction requirements and misallocation of resources and operational‘, such as the failure of courts to enforce their orders. Yet the failure of the judicial system is also the responsibility of actors beyond the courts. [127] Similarly, the State Human Rights Commission (SHRC), which should have been a bulwark against any human rights violation, has been turned incompetent‘ and has earned the epithet of a toothless tiger‘, ironically, from one of its own former Chairperson, Justice Abdul Qadir Parray. [128] The manner in which National Human Rights Commission was established (after which SHRC is modelled) reveals that there was a deliberate attempt to make it rather a weak body‘ as can be perused from its Constitution. [129] This body, rather than having its own independent

123 Rising Kashmir News, *VDC´s kidnap, kill civilian*, Rising Kashmir, 11 Aug 2013. Available at: http://goo.gl/2nVlwM (accessed 10 January 2015).

124 *Nandini Sundar & ors. v State of Chattisgarh writ petition* (civil) no(s). 250 of 2007, Supreme Court of India, 2011. Available at: http://goo.gl/WI63Zt (accessed 10 January 2015). For full text of the Judgment, *see*: http://goo.gl/6pNlqc (accessed 10 January 2015).

125 *S.P. Gupta vs President of India and Ors.* AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365. Available at: http://www.indiankanoon.org/doc/1294854/ (accessed 10 January 2015).

126 *See*, pages 13-14. *See*, also D A Rashid, *Army challenges jurisdiction of civil courts*, Greater Kashmir, 15 December 2011. Available at: http://goo.gl/anlteP (accessed 10 January 2015).

127 Alfred K. Lowenstein, *The Myth of Normalcy: Impunity and the Judiciary in Kashmir*, 3-4 (Fn. 60).

128 He observed in 2002 that cases of human rights violations in Kashmir at the hands of security forces are gathering dust in the official chambers of L.K. Advani (the then Home Minister of India). Our commission is only a recommendatory body and has not been provided with enough powers to force implementation http://himalmag.com/component/content/article/1683-.html (accessed 10 January 2014).

129 The Constitution of the parent body NHRC, on the interface of which Constitution of SHRC is modeled defines “human rights” in Section (d), in a rather very narrow terms as to mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants‘ and enforceable by courts in India . Therefore, those human rights that are not enforceable by Indian courts are not considered human rights for the jurisdiction of Human rights commissions in India. The constitution document of NHRC is available at: http://ahrc.gov.in/HR%20Act%2093.pdf (accessed 10 January 2015). *See* also, Manoj Mitta, *UN may downgrade NHRC status*, The Times of India, 23 May, 2011. Available at: http://goo.gl/2xXk8w (accessed 10 January 2015).

executive force, lacks substantial powers and resources such as staff and funding, has to depend on the same executive and police of the state that in most of the cases have been responsible for the rights abuses. [130] In any case, SHRC is only a recommendatory body' lacking the power to enforce implementation of its decisions. [131] Except the findings in the unmarked mass graves [132] and Kunan-Poshpora gang rape [133] cases, the work of this body has largely remained unsatisfactory'. Similarly, often there have been the establishment of host of inquiry commissions' to look into the alleged human right abuses committed by state forces. However, these commissions because of their consistent failures' have also earned a bad name. [134] They have been seldom allowed to complete their assigned task and to come up with anything substantial. Therefore, over the years these commissions are best seen to hoodwink' public grievances; pacifying the public protests and sweeping rights violation under the carpet'. [135]

Backed by politicians from Centre for showing political allegiance towards Indian state, [136] the other institutions like State accountability commission (SAC) (established to check the rampant ministerial and bureaucratic corruption) has in the same manner been rendered useless. [137] It has been made dysfunctional to such an extent that out of 17 high profile cases, involving top politicians, against whom SAC recommended action, not in a single case has any action been permitted by the government, asserting coalition and other unconvincing compulsions. [138] Likewise, State Information Commission (SIC), although initially appeared promising with some strength and sought accountability in normal working related to governance, has also been substantially reduced in power since its establishment in 2010. [139] Similarly, other key democratic institutions' have also been rendered dysfunctional in J&K. [140] Therefore in order to allow the

130 *See*, Debidatta Aurobinda Mahapatra, *Mapping Transitional Justice in Kashmi*, 15 (Fn. 3).
131 *See*, Ravi Nair, *The Healing can begin here*, Himal South Asian, November 2005. Available at: http://himalmag.com/component/content/article/1683-.html (accessed 10 January 2015).
132 *See*, Laura Schuurmans, *Mass Graves & Human Rights Violations in Indian-held Kashmir*, The International Council for Human Development & Kashmir Council EU, Brussels, 25 September 2012. Available at: http://goo.gl/rj70mk (accessed 10 January 2015).
133 *See*, Arun Singh, *Kunan Poshpora Mass Rape Case: SHRC regrets official indifference towards victims*, Rising Kashmir, 04 April 2013. Available at: http://goo.gl/NU8pEY (accessed 10 January 2015).
134 *See*, GK News Network, *Inquiry Commissions eyewash: Mirwaiz*, Greater Kashmir, 29 July 2010. Available at: http://goo.gl/DIYBsi (accessed 10 January 2014). Also *see*, Rising Kashmir News, *Inquiry commissions mere eyewash: Kashmir separatist*, Rising Kashmir, 03 Jan 2013. Available at: http://goo.gl/kGjH5F (accessed 10 January 2015).
135 *See*, The Newshour, *Debate: Quoting Gujarat to defend Kishtwar*, The Times of India, 13 August 2013, Available at: http://goo.gl/1OqOQo (accessed 10 January 2015).
136 *See*, Raja Muzaffar Bhat, *Defending the Corrupt!*, Greater Kashmir, 13 February 2012. Available at: http://goo.gl/YK6Rsk (accessed 10 January 2015).
137 *See*, *NC deliberately made SAC defunct: PDP*, The Northlines, 26 May, 2010 http://www.thenorthlines.com/newsdet.aspx?q=32513 (accessed 10 January 2015).
138 Information obtained through J&K Right to Information Act, 2009, Letter no. JKAC/S/140/2012. Dated: 04/04/2012 through State Accountability Commission.
139 *See*, Peerzada Ashiq, *Kashmir amends RTI Act, commissioner cries foul*, Hindustan times, 31 August 2012. Available at: http://goo.gl/BBfpbX (accessed 10 January 2015).
140 *See*, Umer Maqbool, *Government renders key institutions dysfunctional*, Greater Kashmir, 04 July 2013. Available at: http://goo.gl/HCwGCE (accessed 10 January 2015).

transition towards peace it becomes essential to strengthen these legal institutions and guide the movement from conflict' to the political contestation'. This will restore the faith of people' in genuine democratic exercise and the effective institutional mechanism it offers to settle any legitimate public grievance.

d) REBUILDING OF THE LAW'S LEGITIMACY

As mentioned earlier, [141] laws in J&K has been used as a tool of political repression' that has sought to muzzle any political opposition'. Laws like Armed forces special powers Act (AFSPA) [142] –which has resulted in numerous rights violations— [143] have generated much debate among the intellectuals [144] and policy makers, [145] besides, inviting harsh criticism from the international organisations as well. [146] In fact, there have been several recommendations to either completely repeal or at least curatively amend the impugned provisions. [147] However, strong military/security lobbying' in the government's decision making has led to an inaction and continuance of this undemocratic legislation. [148] Similarly, Public Safety Act (PSA) 1978 that was originally enacted to put a check on timber smugglers' by way of preventive custody' has been grossly misused and abused. This law has led to a wide political anarchy and lawlessness of such a magnitude that the recent Amnesty International report terms it as a lawless law . [149] After much public uproar and international exposure, certain amendments have been made to this Act. However, notwithstanding these amendments, it still continues to remain lawless' for most part as has been reaffirmed by a much recent report of Amnesty international titled Still a lawless . [150] Some other harsh laws that are presently in force in J&K include Disturbed Areas Act, Enemy Agent Ordinance (1948), the Egress and Internal Movement (Control) Ordinance (1948), Prevention of Unlawful Activities Act (1963), Prevention of Suppression and Sabotage Act (1965) etc. These laws have tremendously shaken the public confidence in law's legitimacy. These legislations are not only against International human right norms to which India is signatory but also against the very spirit of Indian Constitution

141 *See*, Pages 11-12.
142 Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (No. 21 of 1990), 1 1990. Available at: http://www.refworld.org/docid/3ae6b52a14.html (accessed 10 January 2015).
143 IPTK, *Alleged Perpetrators - Stories of Impunity in Jammu and Kashmir*, (Fn. 58).
144 Nazir Ahmad Shawl, *Why AFSPA & PSA should be scrapped*, Kashmir Reader, 30 June 2012. Available at: http://goo.gl/m0UhQ4 (accessed 10 January 2015).
145 *See*, Press Trust of India, *Armed Forces Special Powers Act (AFSPA) should be repealed from parts of Jammu and Kashmir: Omar Abdullah*, NDTV, 05 March, 2013. Available at: http://goo.gl/L3QYX3 (accessed 10 January 2015).
146 *India: Security forces cannot claim immunity under AFSPA, must face trial for violations*, Amnesty International, 7 February 2012. Available at: http://goo.gl/0g1qo6 (accessed 10 January 2015).
147 JPNN, *J&K Interlocutors Recommend Review of AFSPA*, (Fn. 115 above).
148 *Army opposes AFSPA revocation again* (Fn.116,above).
149 *See*, Amnesty International, *A 'Lawless Law : under the Jammu and Kashmir Public Safety Act*, 1978, 2011. (Fn. 56).
150 *Ibid*. 21
151 Alfred K. Lowenstein, *The Myth of Normalcy: Impunity and the Judiciary in Kashmir*, (Fn. 58).

- the *Grundnorm* of Indian Union. [151]

From the preceding discussion, it becomes clear that there has been a loss of faith‘ in democratic institutions in J&K that unfortunately have failed to protect‘, fulfil‘ and guarantee‘ the rights of its citizens which has complicated the conflicted democracy of J&K. Therefore, the above highlighted transitional measures that shall make necessary corrections to these democratic institutions, warrants imminent application. Allowing them to work properly; granting them autonomy‘ and taking out of interruptive and influential‘ political yoke, that looks everything through security prism‘, could lead to a favourable atmosphere. Also, the legal apparatus encouraging impunity needs to be reformulated and brought at par with the International human rights standards. This exercise by the state would help in restoring the public faith in the law‘s legitimacy that is seriously wanting in the conflicted democracy of J&K. In the context of conflicted democracy of J&K, apart from the above measures, the following steps might go a long way in changing the ground situation and allow some form of transition leading more favourable conditions for applying transitional justice methods in the furtherance of a durable peace‘.

a. ENGAGING WITH ALL STAKE HOLDERS AND OPINION MAKERS THROUGH DIALOGUE

A key to sustaining the transition process‘ from conflict‘ towards durable peace‘ is the necessity of continued dialogue‘ among all the stakeholders. This involves facilitating a democratic process involving cross section of Kashmiri people. In the context of Kashmir, the organisations like Hurriyat and JKLF enjoy an overwhelming public support. [152] In this scenario, it would seems to illogical not to involve these organisations in the dialogue process‘ aimed at an enduring political change‘ so as to generate right climate for using the actual instruments of transitional justice‘ program. In fact, over the years there have been few attempts on part of Indian state to take these organisations on board. In this regard, the remarks of Indian Prime Minister Manmohan Singh appear quite welcoming. He is reported to have said:

> [w]e would be happy to engage in dialogue with any group which is interested in talking. That option remains. We will welcome even those who are not in the political mainstream. If they have any views, they are welcome to give. [153]

In this connection, there have been on and off talks between Indian state and the above mentioned organisations. For example, in 2004 government of India started talks with Hurriyat (M) that continued through the year 2005. [154]

152 *See*, pages 9-10 above.
153 *See*, *Human rights violations in J-K will be dealt with firmly: PM*, Indian Express, 17 June 2009. Available at: http://goo.gl/vpdEtR (accessed 10 January 2015).
154 Debidatta Aurobinda Mahapatra, *Mapping Transitional Justice in Kashmir*, 9-10 (Fn. 3).

Prime Minister Manmohan Singh participated in two rounds of talks. During the second round of these talks, which took place on 5 September 2005, Prime Minister Singh assured Hurriyat leaders of the Indian government's commitment to provide a life of peace, self respect, and dignity' to the people of J& K. [155] However, further talks could only resumed in the year 2009 through what is known as quiet diplomacy' [156] unfortunately, ending unsuccessfully owing to the alleged non-seriousness' on part of Indian state. [157] As a matter of fact, talks and dialogue processes are now viewed with considerable scepticism' for its inevitable failure. [158] In fact, it would not be wrong to conclude that there has been an extensive use of rhetoric' from the state politician (perhaps to beguile the International community or the people of India as well as the people of J&K) bereft of any concrete' practice and outcome. The lack of seriousness in resolving the conflict in a democratic' and political manner' appears to be more than evident. [159] Therefore, there is a need to engage in a serious, object oriented and time bound discussion. However, these discussions should allow for a degree of flexibility and room for negotiation, without buckling under the pressures of an obtrusive nationalistic' media, operating from Indian mainland. [160] Moreover, achieving sustainable peace' in the region inevitably calls for an engagement with militant groups'. India's current policy of refusing to hold dialogue with groups who partake in violence leads to the exclusion of militant groups from the negotiating table. [161] But, it could be submitted that having no engagement' with these groups could lead to their further radicalisation'. As the experience would show, there can be hardly any military solution to a problem that is fundamentally political' in nature. [162] In fact, fed up with the continuous status

155 *See*, *Committed to ensuring a life of peace in Kashmir: Manmohan*, The Hindu, 6 September 2005. http://goo.gl/Wzx8mz (accessed 10 January 2015).
156 *See*, Vinay Kumar, *Govt favours quiet talks on Kashmir: Chidambaram*, The Hindu, 2 December 2009. Available at: http://goo.gl/97PJag (accessed 10 January 2015).
157 PTI, *Centre not serious about resolving Kashmir issue: Mirwaiz*, The Hindu, 14 October, 2011. Available at: http://goo.gl/u71jUu (accessed 10 January 2015).
158 *See*, Towseef Ahmad, *No takers for Omar s arbitration offer*, Fresh Initiative, 07 August 2013. Available at: http://goo.gl/uRFCfb (accessed 10 January 2015).
159 *See*, *No solution to Kashmir possible within Indian Constitution, Afzal Guru hanging a historic blunder: Gautum Navlakha*, The Kashmir Walla, 5 July 2013. Available at: http://goo.gl/os044P (accessed 10 January 2015).
160 *See*, Andrew Buncombe, *India's PM under pressure to cancel talks after Kashmir border attack*, The Independent, 08 August 2013. Available at: http://goo.gl/8Z98Vy (accessed 10 January 2015).
161 Debidatta Aurobinda Mahapatra, *Mapping Transitional Justice in Kashmir*, 10 (Fn. 3).
162 *See*, *No military solution to the J&K problem: Lt Gen. (retd) BS Jaswal*, IBNLive.com, 14 Mar, 2013. Available at: http://goo.gl/Z0wlWv (accessed 10 January 2015). *See* also, Zulfiqar Ahmad, *There s no military or militancy solution to Kashmir problem*, Business, Recorder, 19 December, 2013. Available at: http://www.brecorder.com/general-news/172/1269615/ (accessed 10 January 2015).
163 *See*, Jason Burke, *Kashmir conflict ebbs as new wave of militant emerges*, (Fn. 96). *See* also, *No solution to Kashmir possible within Indian Constitution, Afzal Guru hanging a historic blunder: Gautum Navlakha*, (Fn. 159).

quo', militant fighters are slowly gaining a fresh momentum [163] with a relatively better educated youth joining militant ranks. [164] They offer a constant source of threat perception' to the state forces [165], which ultimately end up harming the local civilian population by way of excessive securitisation' and curtailment in essential liberties'.

b. WITHDRAWAL OF ARMED FORCES

Immediately after the onslaught of armed militancy' that started in 1989, there has been a huge deployment of armed and paramilitary forces in J&K. According to many estimates their number is as high as seven hundred thousand making J&K highest militarized' place with people – forces ratio as 1:10.[166] Presence of state/armed forces is ubiquitous. Military bunkers and check posts can be seen in street, gardens, parks, orchards, educational institution, even health centres. [167] According to government's own statistics, at present, there are more than 1800 buildings under the occupation of the Army and paramilitary forces in J&K. [168] This omnipresence of uniformed men' is a source of a considered inconvenience' to the people as they carried out normal activities. [169] Although Indian state would like to portray the presence armed force in J&K for the security of the people, however, in reality, they do quite the opposite. [170] In this regard, Haley Duschinski, gives a snapshot of strictness in J&K:

> The saturation tactics of armed forces include checkpoints, surveillance, cordon and search operations, human shields, prison detention, and torture. The landscape of Kashmir Valley is mapped by official and unofficial stations of state violence: cantonments, barracks, joint interrogation centers, lock ups, and detention facilities.

Kashmiris live in a state of constant fear of arbitrary arrests, enforced disappearances, sexual harassment, torture, and custodial deaths. [171]

There have been several cases of molestation, rape and harassment of the

164 *See*, Riyaz wani, *Young and Educated, Armed and Dangerous*, (Fn.104, above).
165 *See*, Khurram Shahzad, *Kashmir militant threaten surge in attacks"*, (Fn. 105).
166 *Mythbusting: Soldiers-to-civilians ratio in Kashmir*, Pragmatic Euphony, June 16, 2011. Available at: http://goo.gl/yqzvQ1 (accessed 10 January 2015).
167 Debidatta Aurobinda Mahapatra, *Mapping Transitional Justice in Kashmir*, 15 (Fn. 3).
168 *1858 buildings still under occupation of Army, PMFs: Government*, Greater Kashmir, 17 April 2013. Available at: http://goo.gl/A3uOJ8 (accessed 10 January 2015).
169 Debidatta Aurobinda Mahapatra, *Mapping Transitional Justice in Kashmir*, 15 (Fn. 3).
170 *See*, IPTK, *Military Governance in Indian-Administered Kashmir*, CounterCurrent.Org, 30 June, 2010. Available at: http://www.countercurrents.org/iptk300610.htm (accessed 10 January 2015).
171 Haley Duschinski, *Destiny Effects: Militarization, State Power, and Punitive Containment in Kashmir Valley*, Vol. 82, No. 3 Anthropological Quarterly, 703 (Summer, 2009).
172 *See*, Asia Watch & Physicians for Human Rights, *Rape in Kashmir; A Crime of War*, Vol. 5, Issue 9. Available at: http://www.hrw.org/sites/default/files/reports/INDIA935.PDF (accessed 10 January 2015). Also see, *SHRC asks govt. to reinvestigate Kunan-Poshpora gang rape*, KashmirDispatch.com, 19 October 2011. Available at: http://goo.gl/rrflh3 (accessed 10 January 2015).

female population by the Indian armed forces in J&K. [172] Indeed the presence of Armed forces in and around civilian dwellings' is considered as an act of constant provocation, harassment and humiliation by the locals. [173] Therefore, it would hugely add to the prospectus of peace if armed forces are brought back into the barracks and/or redeployed at the border so as to let people have some respite, feel a sense of freedom and liberty' that not only several international human rights instruments but also the Constitution of India itself guarantees to them. [174]

c. ECONOMIC DEVELOPMENT AND EMPLOYMENT

In the human rights discourse, socio-economic rights are as important as civil and political rights. [175] It's been more than 27 years of militant conflict and as could be envisaged - J&K has been the worst hit on economic front, as well. There has been huge loss of economic wealth and property with restricted avenues of trade and commerce. [176] Besides, because of poor economic policies and unstoppable incidence of corruption, the government has failed to fully exploit the potential revenue generating sectors' in J&K. [177] In fact, there are reports of vandalization of J&K natural resources including J&K's green gold'. [178] Also, there are the issues of huge unemployment' and under-employment' in J&K. [179] Because of the hostile environment' the private sector is in shambles. Besides, the conflict is a major hindrance to the development in J&K. There is a fear and uncertainty among businessmen, local and non-local, they hesitate to invest. In this conflicting scenario people generally feel isolated and alienated . [180] Agriculture and its allied sectors contribute 27 percent to the State's Gross Domestic Product (with 70 percent population directly or indirectly relying on agriculture for their livelihoods) have been constantly witnessing a negative growth. [181] Tourism involving thousands of people has also been badly hit by the conflict. Government has failed to create an adequate infrastructure to woo the

173 *See*, Shahid A Ronga, *Steps Towards Peace In Kashmir*, (Fn. 32).
174 Alfred K. Lowenstein, *The Myth of Normalcy: Impunity and the Judiciary in Kashmir*, 1 (Fn. 60).
175 World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 14-25 June 1993, 5, U.N. Doc A/CONF.157/23 (July 12, 1993). Available at: http://goo.gl/BC5W3g (accessed 11 January 2015).
176 Seema Shekhawat, *Fragile Kashmir, Costs and Hopes for Peace*, University of Mumbai, Journal of Alternative Perspectives in the Social Sciences Vol. 1, No 3, 976-981 (2009). Available at: http://www.japss.org/upload/29._Seema.pdf (accessed 11 January 2015).
177 Faheem Aslam, *JK s economic potential impaired by conflict, corruption: Repor"*, Greater Kashmir, 17 September 2011. Available at: http://goo.gl/K64D9I (accessed 11 January 2015).
178 *See*, Kashmir Times, *Environmental cost of conflict in Kashmir*, South Asian Citizens Web, 27 February 2009. Available at: http://www.sacw.net/article707.html (accessed 11 January 2015).
See also, *Unrest in Kashmir a boom for timber smugglers*, freepresskashmir, 18 Feb. 2013. Available at: http://freepresskashmir.com/unrest-in-kashmir-a-boon-for-timber-smugglers/ (accessed 11 January 2015).
179 *See*, Abrar Ul Mustafa, *Exploiting the unemployed*, Greater Kashmir, 18 August 2013. Available at: http://goo.gl/o2pia7 (accessed 11 January 2015).
180 Faheem Aslam, *JK s economic potential impaired by conflict, corruption: Report,* (Fn. 177).
181 Kashmir Times, *Environmental cost of conflict in Kashmir,* (Fn. 178).
182 *See*, Shahid A Ronga, *Steps Towards Peace In Kashmir*, (Fn. 32).

investors or to give boost to the entrepreneurial spirited' local youth. [182] In this regard, the report, prepared by Mercy Crops (a US-based Non-Governmental Organization) reveals that the state's physical infrastructure is crumbling and development has become significantly dependent on central government's grant-in-aid and its potential revenue generating sectors and industries are not being fully exploited and fairly administered. [183] Faced with such unfavourable circumstances, many people leave the valley for better education and job prospects; however, because of their Kashmiri identity tag' they are being haunted by Indian secret agencies and police even in India's mainland [184] besides, denied passports on frivolous grounds, if they wish to travel overseas. [185] Therefore, there is a strong need for sincere economic initiatives that could be beneficial in two ways. *First*, they might help address economic grievances of residents, thereby contributing to the transitional processes'. *Second*, they can also reduce the chance of future conflict, as economic deprivation has a significant potential to generate violence. [186]

IV. CONCLUSION AND RECOMMENDATIONS

An attempt to approach the Kashmir conflict from a relatively strict and narrow perspective – highlighting only the internal aspect' of the problem – is highly challenging and has its own shortcomings. Nevertheless, this essay undertook the task of *firstly*, establishing' and *secondly*, highlighting' the conflicted nature of the democracy' currently practiced in J&K.

The fundamental requirement for a state to move from a conflicted to a non-conflicted democracy, this essay advocated, could only be achieved by break with the previous regime' guaranteeing the non-repetition of the systematic violence' requiring the fulfilling of certain conditions. The elimination of widespread organized violence requiring change in the balance of powers i.e., the state must obtain the Weberian legitimate monopoly over the use of violence within its borders . This can be done either by using the strategy of escalating violence and aiming military victory over the enemy or the strategy of peace negotiations and agreements or both. However, transitional process, aimed at the guarantee of the non-repetition of crimes, in reality, should not only rely on the recovery of the lost monopoly over violence but aim for strengthening of democracy'. In the context of conflicted democracy of J&K, as has been demonstrated, there appears to be no break with previous regime. The regime, which is believed to be responsible for fanning and rekindling the dormant conflict

183 *See*, Faheem Aslam, *JK s economic potential impaired by conflict, corruption: Report,* (Fn. 177).
184 *See*, *Being Kashmiri is Sin in India*, The Kashmir Walla, 12 April 2010. Available at: http://goo.gl/0wjKIC (accessed 11 January 2015).
185 *See*, Ahmed Ali Fayyaz, *Kashmir girl denied passport as her uncle was former militant*, The Hindu, 6 August, 2013. Available at: http://goo.gl/MtF5BI (accessed 11 January 2015). *See* also, *Authorities deny passport to duo for their relative s involvement in militancy*, Jandk News, 19 August, 2013. Available at: http://goo.gl/v0dMjD (accessed 11 January 2015).
186 Debidatta Aurobinda Mahapatra, *Mapping Transitional Justice in Kashmir,* 16 (Fn. 3).

in 1989, continues to tightly maintain its position with an iron fist'. No doubt, with the help of ruthless militaristic policies, militancy has been contained to a substantial extent. However, the state has not been able to guarantee the non-repetition of the systematic violence, in particular, from its own forces. In addition, state has not fully succeeded in its aim to crush, overpower and defeat its enemy' just on the strength of its military power. Indeed, this approach appears rather simplistic'. The real enemy is a sentiment' that like any other sentiment of struggling people in the past or at present elsewhere in the world demands social, economic, religious and political emancipation. Sentiment that wants to see itself enjoying the freedom inherent in an organised and substantive democratic order, which is free from unwarranted repeated external interferences – in its decision making', in the exercise of carrying its democratic processes' and in the running of its democratic institutions'.

As has been said, unfortunately, so far the state has relied only on the option of recovering the lost monopoly over the use of violence' without necessarily strengthening of democracy' in equal and proportionate measure. Transition to the strengthening of democracy can be achieved by the State's opening and recognition of institutional democratic' and inclusive spaces'. In the context of conflicted democracy of J&K, it can be done by roping in a cross section of oppositions including Hurriyat, JKLF and even disgruntled militant fighters and starting some serious and object oriented, meaningful and unconditional dialogue within a stipulated time framework. To facilitate the transition, the dialogue process needs to reach some form of negotiated settlement' and an agreement' to end the conflict.

There is no doubt that people have lost their faith in democratic institutions. These institutions have time and again failed to protect', fulfil' and guarantee' the rights of its citizens adding complexity to the conflicted democracy of J&K. A transition to enduring peace should ensure that the state is capable of guaranteeing its citizens the full and equal exercise of their rights, strengthening of law and legal institutions. To allow this to happen, the legal apparatus that encourages impunity needs to be fundamentally reformulated, restructured and brought at par with the international human rights standards. This exercise by the state would help in restoring the public faith in the law's legitimacy that is seriously wanting in the conflicted democracy of J&K.

In an intermediate period, the state should consider the following recommendations:

1. Armed personnel should be called back to the barracks. This will allow the people to breathe in an atmosphere which is free from – the smell of ammunition; feed of a heavy metal diet' toxicity [187] and excessive fear of jackboots. Besides, the state should release all the

187 *See*, Indian Author Arundhati Roy on Kashmir's Independence, Democracy Now, Uploaded on 27 Oct 2010. Available at: http://www.youtube.com/watch?v=IX1hAQt-DWI [accessed 12 January 2015].

political prisoners' who have been wrongly detained under the slew of undemocratic legislations only for nurturing a particular set of political ideology. However, this exemption should not be allowed for the people who have been found involved in and convicted for any serious offences.

2. The government should liberate the media from all gags and unnecessary restrictions. The local broadcasting news media and short messaging services (SMS) of mobile telephony that remains banned should be allowed to function in the valley. [188] Besides, the policy of clapping down on the internet including social media, [189] every now and then, should be abandoned. This would certainly address the estranged and alienated' feeling of the ordinary people and enrich their freedom experience'.

3. On the economic front, the state should create necessary infrastructure in order to woo the investors. There is also a need of imparting trainings aiming to provide necessary marketable skills' to the population of more than six hundred thousand unemployed youth of J&K. It is important to keep on economic angle of the conflict in sight. After all as noticed, economic deprivation has a tremendous potential to regenerate conflict leading to further instability.

4. There is also a strong need to allow establishment of vigilant, vibrant, strong and impartial civil society groups that should work only for the people's interest rather than getting swayed by any specific political party or group. Instead of stifling the dissenting voices, the state should promote healthy public participation, institutions and platforms where the public grievances could be debated without any fear of being prosecuted. For this purpose, liberating state universities and colleges from induced politicisation and unnecessary restriction could provide an excellent start.

188 *See*, Adnan Majid, SMS ban continues, The Kashmir Walla, 7 June 2012. Available at: http://www.thekashmirwalla.com/2012/06/sms-ban-continues/ [accessed 12 January 2015].
189 *See*, Shehla Rashid, Accountability sans Power, Rising Kashmir, 26 July 2013. Available at: http://m.risingkashmir.in/news/accountability-sans-power-52139.aspx#.Uh6lUDa1FFD [accessed 12 January 2015].

All the above mentioned steps should be aimed at creating conducive environment extending the longevity of J&K's fragile normalcy. In the meantime, the period of normalcy' could be effectively utilised for the implementation of methods and instruments transitional justice programs like TRC, Judicial prosecution, reparations etc. Therefore, a transition from conflict to the peace in the context of J&K would not be a single but a two-step arrangement that includes first, the transition from the conflict to relatively longer period of normalcy by considering the above mentioned measures. And second from environment of the normalcy to the implementation of transitional justice methods that aim to render justice and accountability for past rights violations. It is submitted, that these exercises could in turn lead to a much aspired durable peace' in the entire J&K region.

It could be safely be concluded that any transitional process aiming enduring peace in J&K region will continue to remain an alluring proposition' unless external dimension of the conflict is also taken into consideration. Instead of seeing Kashmir as a bone of contention, it is submitted that it has a tremendous potential to act as a bridge of peace' between the hostile and antagonistic sibling states of India and Pakistan. This could bring prosperity not only to the beleaguered South Asian sub-continent, but to the entire world, in general. As in the ultimate analysis, we are all invariably inter-connected by a rather unseen but undoubtedly a strong fibre, namely Humanity' and Peace'.

Corporate Social Responsibility in India: Problems and Perspectives

Abstract

The concept of Corporate Social Responsibility (CSR) has grown into a very vital issue in the context of imbalanced growth and development in the country. The rationale for introduction of the concept of Corporate Social Responsibility arises from the fact that a business enterprise derives several benefits from society, which must therefore; require the enterprise to provide returns to society as well. Thus Corporate Social Responsibility is a concept that requires corporations to behave not just like sole profit earning entities but like responsible social players that cannot and must not ignore the well being of its employees, of the environment in which it operates and of both the individuals and the society as a whole in which it exists. Though India has a long tradition of Corporate philanthropy or charity, but before the Companies Amendment Act 2013, there was no legal provision in India that mandated the corporation to spend under the mandate of Corporate Social Responsibility. However the concept as introduced by the Act is not free of flaws which indicate that the concept has to evolve more to serve the needs of the system better. There are many issues but importantly the issue whether CSR is mandatory or not have come to fore. It has also been argued that the introduction of CSR requirement has overburdened the corporation to pay more towards the Government. This paper aims to seek solutions to these issues.

Key words: Corporate Social Responsibility, Company, Companies Amendment Act 2013, Society

Introduction:

Corporate Social Responsibility has become a highly debated concept in the context that corporations play an ever increasing role in the day-to-day lives of all individual. Corporations have become an important part of every society in which they operate and their activities have a direct impact upon the society in which they operate and upon the individual members of that society whether associated directly or indirectly with it. Corporations or business concerns have

a definite impact upon its surrounding and it can express itself in many forms. A corporation can alter the man and environment relationship in a particular place where it operates by the utilization of its natural resources; it affects the market and economics of a particular place; it can generate local employment and enrich the resource base in a locality; it can push traditional community practices or legacies to extinction; it can lead to climate change and its activities can also give birth to and encourage economic disparity among individual members of a society.[1] 'The broad rationale' for introduction of the concept of Corporate Social Responsibility 'arises from the fact that a business enterprise derives several benefits from society, which must, therefore, require the enterprise to provide returns to society as well.'[2] Thus, 'Corporate Social Responsibility is an important element of development because companies need to look after their Communities'[3], with whom they exist jointly in a society.

Defining CSR

CSR has been variously defined and every definition explores new dimension of the concept. Some definition 'explores the relationship of corporations with Governments and individual citizens. Locally the CSR is concerned with the relationship of Corporations with the society in which it operates. And another aspect deals with the relationship of corporation with its stakeholders'. [4]

According to World Business Council for Sustainable Development Corporate Social Responsibility (CSR) is "The continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large." [5]

The European Commission (EC)[6] defines CSR as "the responsibility of enterprises for their impacts on society". To completely meet their social responsibility, enterprises "should have in place a process to integrate social, environmental, ethical human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders"

According to the United Nations Industrial Development Organisation

1 David Growther & Guller Aras, *Corporate Social Responsibility*, Venture Publishing Aps (2008) @ ww.Bookboon.com. p 13

2 Richa Gautam and Anju Singh, Corporate Social Responsibility Practices in India: A Study of Top 500 Companies, *Global Business and Management Research: An International Journal*, p 41

3 Premlata and Anshika Agarwal, Corporate Social Responsibility: An Indian Perspective, *Journal of Business Law and Ethics*, Vol. 1 No. 1, December 2013 p 27

4 Ibid p 10

5 http://www.wbcsd.org/work-program/business-*role/previous-work/corporate-social-responsibility.aspx*

6 http://ec.europa.eu/enterprise/policies/sustainable-*business/corporate-social-responsibility/index_en.htm*

(UNIDO)[7], "Corporate social responsibility is a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders." [8]

Thus CSR is a concept that requires corporations to behave not just like sole profit earning entities but like responsible social players that cannot and must not ignore the well being of its employees, of the environment in which day operates and of both the individuals and the society as a whole in which they exist. The fact that corporations are an integral part of every society requires it to perform certain duties towards the society itself. This is more true about the corporations in India. In India, there are myriad contradictions in the society. On the one hand we have an ever increasing number of billionaires but on the other, the country is home to the largest populations living below poverty line. The gap between the haves and have not's is ever increasing. It is in this context that it becomes important for corporations to look beyond bare profit earning activities and ponder upon as to how they will integrate with the society in which they operate and wherein the people are occupied by the problems of hunger, illiteracy, malnutrition and non-access to adequate health care services and the like. Therefore, 'Indian businesses' have also 'realized' that 'they have to look not only at the economic dimension of their company, but also at its ecological and social impact' [9]

Brief history of CSR in India

The concept of Corporate Social Responsibility is not new in India. 'In India, Corporate Social Responsibility is known from ancient time as social duty or charity, which through different ages is changing its nature in broader aspect, now generally known as Corporate Social Responsibility'. [10] In its modern sense also the idea of contributing towards society by the local business entities has its roots dating back to the time when industrialization in its modern sense began in India itself. However, its nature has been changing from time to time. It is generally said that in India, Corporate Social Responsibility has passed through four stages[11]. In its first phase, the CSR existed in the form of charity and philanthropy. Many business houses would donate in different ways and forms a portion of their wealth for different social or religious causes. However, all this depended upon the sole discretion and good will of the owner/s of the corporation and there was neither any legal necessity to donate nor any social compulsion to donate. But

7 http://www.unido.org/what-we-do/trade/csr/what-*is-csr.html#pp1[g1]/0/*

8 See also Handbook on Corporate Social Responsibility in India, p 7 Confederation of Indian Industries.

9 Soheli Ghose, A Look Into Corporate Social Responsibility In Indian And Emerging Economies, *International Journal of Business and Management Invention*, Volume 1 Issue 1 December. 2012, p 24

10 Richa Gautam and Anju Singh, Corporate Social Responsibility Practices in India: A Study of Top 500 Companies, *Global Business and Management Research: An International Journal* P 43

11 See also Evolution of CSR in India, Wikipedia at em.m.wikipedia.org/wiki/ evolution_of_Corporate_Social_Responsibility_in _India

this changed during its second phase. This phase was the period of India's freedom struggle and though there was no legal compulsion to donate but the social pressure due to the growth of nationalism prompted corporations to donate for social causes like education, health care etc. The movements like Swadeshi or 'Self Reliance' and Boycott of foreign goods led to an increase in the number of Indian entrepreneurs and this was driven by the spirit of nationalism and responsibility which the industrialists had towards their country. 'Self Reliance also meant an effort to set up Swadeshi or indigenous enterprises. The period saw a mushrooming of Swadeshi textile mills, soap and match factories, tanneries, banks insurance companies etc. [12] However, even during this period, the concept of Corporate Social Responsibility retained its main form of charity and philanthropy.

During its third phase after independence, and upto the era of liberalization, most of the control of economic activity was taken over by Government itself and a very narrow and limited role was given to private enterprises. [13] The public sector enterprises were set up by Government to ensure suitable distribution of resources. However, the impact of the activities of the PSUs remained effective to a limited extent and it was argued that private sector must play an important role in the socio- economic development of the country. During this period also, the concept of SCR remained more or less limited to voluntary donations and other pro social voluntary activities by the country's limited private entrepreneurs.

During its fourth phase after the phase of liberalization in 1990s till now, the Indian economic activities increased many fold and India has now emerged as one of the leading economies of the world. But the concept of Corporate Social Responsibility remained as a philanthropic activity. However, under Global influences the concept has become more strategic in nature than philanthropic, and a large number of companies are reporting the activities they are undertaking in this space in their official websites, annual reports, sustainability reports and even publishing CSR reports. Companies are more willing to report on their contributions to the maintenance of a sound environment, a healthier society or more ethical business practices through both internal and external action within the countries in which they operate.[14] This helps the companies to earn good reputation in the society in which they have to operate and gives them an edge in open competition.

Post Liberalization, there has been a tremendous growth of corporate sector and 'the number of high net worth individuals in India is constantly on high

12 Bipin Chandra, India's Struggle for Freedom, *Penguin Books India*, (1989) p 131. See also Bipin Chandra, The Rise and Growth of Economic Nationalism in India, *Anamika Publishers and Distributors Pvt Ltd* (2004)

13 See India's First industrial policy and the subsequent five year plans upto the era of liberalization in 1990s

14 Soheli Ghose, A Look Into Corporate Social Responsibility In Indian And Emerging Economies, *International Journal of Business and Management Invention*, Volume 1 Issue 1 December. 2012, p 22

rise'[15]. However, on the other hand, India is still home to the largest number of people living in absolute poverty and the largest number of undernourished children. What emerges is a picture of uneven distribution of the benefits of growth which many believe, is the root cause of social unrest. [16] The gap between the haves and have nots has been widening. On the one hand Indian businesses have increased their foot prints globally and the number of billionaires in the country has been ever increasing, but on the other hand the promise of the Government and our political system of providing decent means of subsistence to every citizen has yet to be fulfilled. [17] This is contrary to the constitutional mandate of the country of equality and social justice. As such the political/ constitutional and the economic realities in the country are at cross roads.

Legal basis

Before the Companies Amendment Act 2013, there was no legal provision in India that mandated the corporation to spend under the mandate of Corporate Social Responsibility; whatever was spent was voluntary.

Companies Amendment Act 2013 introduced Section 135 which is applicable to companies with an annual turnover of 1,000 crore INR and more, or a net worth of 500 crore INR and more, or a net profit of five crore INR and more. The new rules, applicable from the fiscal year 2014-15 onwards, also require companies to set-up a Corporate Social Responsibility committee consisting of their board members, including at least one independent director.

The Act encourages companies to spend at least 2% of their average net profit in the previous three years on Corporate Social Responsibility activities. The Act lists out a set of activities eligible under Corporate Social Responsibility. Companies may implement these activities taking into account the local conditions after seeking board approval. The indicative activities which can be undertaken by a company under Corporate Social Responsibility have been specified under Schedule VII of the Act.

Analysis of Section 135:-

Section 35 Clause (1) of the Companies Act 2013 reads as:-

> *"Every company having net worth of Rupees Five Hundred Crore or more, or turnover of Rupees One thousand Crore or more, or a net profit of Rupees five Crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which one director shall be an*

15 Nishith Desai Associates, CSR and Social Building Models in India- A Legal and Tax Perspective, Nishith Desai Associates (2013) p 6, available at www.nishithdesai.com

16 Handbook on Corporate Social Responsibility in India, p 5 Confederation of Indian Industries

independent director" [18]

It therefore follows that the provision of Companies Act 2013 relating to CSR is applicable only to three classes of companies viz:

(a) Companies having net worth of Rupees Five Hundred Crore or more;
(b) Companies having turnover of Rupees One thousand Crore or more;
(c) Companies having a net profit of Rupees five Crore or more during any financial year.

Every company falling in any of the three categories is required to constitute a Corporate Social Responsibility Committee of the Board of directors which shall consist of three or more directors. The composition of the said Committee is required to be shown in the Statement by the Board of Directors in its Annual Report. [19] The Committee is entrusted with the task of formulating and recommending to the Board of Directors a policy on Corporate Social Responsibility, indicate the activities/ areas in which the company shall undertake as part of its Corporate Social Responsibility, recommend the amount of expenditure to be incurred and shall monitor the Corporate Social Responsibility policy of the company. [20]

The Board of every company is required to ensure that the company spends, in every financial year, at least two percent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its corporate social responsibility. [21]

CSR how to be utilized:-

Section 135 itself mentions that the CSR Committee has to recommend to the board such activities to be undertaken by the company as specified in Schedule VII of the Act.[22] Schedule VII contains a list of activities which may be undertaken by a company. These inter alia include, eradicating hunger, promotion of education, promotion of gender equality, empowering women, reducing inequalities faced by socially and economically backward sections of people, ensuring ecological sustainability, ecological balance, protection of national heritage, measures for the benefit of armed forces, war widows and their dependents, promotion of sports and contribution to Prime Minister's Relief Fund, and fund for promotion of technology etc. [23] However the list is illustrative only but not exhaustive. A company undertaking any of the above activities in its CSR

17 Under Article 21 of Indian Constitution, Right to decent standards of life is a Fundamental Right.
18 Section 135 (1) of Companies Amendment Act, 2013
19 Section 134 of Companies Amendment Act, 2013
20 Section 135 (3) of Companies Amendment Act,2013
21 Section 135 (5) of Companies Amendment Act, 2013
22 Section 135(3) (a) of Companies Amendment Act, 2013
23 Schedule VII of the Companies Amendment Act 2013 and Notification No. 96 dated 27 February 2014 of Ministry of Corporate Affairs

policy has to give preference to local area and areas around it where it operates for spending the amount earmarked for its CSR activity. [24]

Some issues:-

CSR whether mandatory:

Though the provisions relating to CSR have been now formally incorporated in the Companies Act, yet there are certain issues that need to be addressed. The first among these is whether it is necessary for companies to utilize a portion of their profits towards CSR. In the Act itself, though the word 'shall' has been used in clause (5) of Section 135 (*The Board of every company **shall** ensure*…), but the plain reading of second proviso to the said clause reveals that what is mandatory is not the actual spending by the company but reporting of the amount being so spent by the company. Second proviso to Clause (5) of Section 135 of the Act reads as:-

> *"Provided further that if the company fails to spend such amount, the board shall in its report made under clause (o) of sub section (3) of section 134, specify the reasons for not spending the amount"* [25]

It is therefore argued that 'the two per cent spending on CSR is not mandatory but reporting about it is mandatory.' [26] It is however submitted that the provision for spending the 2% minimum net profits is mandatory. If the company does not spend the requisite amount on CSR, it shall have to report the same and cite reasons for the same. This may put the company at embarrassing position which will affect the reputation of the company. It is however true that there are no express provisions in the Act which could suggest any penal action to be taken against the company failing to observe the provisions. In this context it could be stated that the provision relating to CSR in the Act though mandatory but there binding power is somewhat weak and backed merely by moral/ strategic pressure only.

Whether CSR an additional burden:

It has been argued and debated that a corporation should not be concerned with social responsibility. According to Milton Friedman, 'there is one and only one social responsibility of business- to use its resources and engage its activities designed to increase its profits so long it stays within the rules of the game…' [27]. However, it is equally true and now widely accepted that corporations are an

24 First proviso to Section 135 (5) of Companies Amendment Act, 2013

25 Second Proviso to section 135 (5) of the Act, 2013

26 Sanjay Kumar Sharma, A 360 degree analysis of Corporate Social Responsibility (CSR) Mandate of the New Companies Act, 2013, *Global Journal of Management and Business Studies*, Volume 3, Number 7 (2013), p. 758

27 C. f David Growther & Guller Aras, *Corporate Social Responsibility*, Venture Publishing Aps (2008) @ ww.Bookboon.com. p 12

integral part of society and in fact owe their existence to the society. But it has been again argued that 'like any other person, companies also pay various taxes to the government in one form or the other. Direct taxes particularly are a major tax directly borne by the companies which account for around 1/3rd of their profits every year. Apart from this, companies also pay wealth tax of 1% of their taxable net wealth. In one view the corporate responsibility should end there...' [28]. As such, the spending under CSR is viewed as an additional burden more so in view of the fact that the amount spent by a company under its CSR mandate cannot probably be claimed to come under deductions for the purpose of taxation. Under Income Tax Act, presently there is a cap of upto ten percent of the total income, which a company can claim as deduction out of the amount donated to certain funds or institutions. [29].

It is therefore suggested that, since Government of a state looks after the corporations and ensure that conducive environment is created for their smooth operations, it may be argued that CSR is a means through which the corporations share the burden of Government in addressing to the problems which Governments are facing at different fronts of social development. At the same time however, it is to be ensured that such sharing of responsibility must not prove to be an additional burden upon these corporations and thus a hindrance in their growth. As such the amount spent under the mandate of CSR may be treated as deduction under Income Tax Law.

Conclusion

After the passing of Companies Amendment Act 2013, the concept of CSR in India is now a reality in proper sense. The idea to have such a system in India is necessitated by the peculiar conditions in which the country is and the problems which it is facing. 'The issue of inclusive and sustainable growth is very crucial considering the disproportionate allocation of wealth and the widening gap between the prosperity of the rich and the plight of the poor.' [30] On the other hand the State cannot be overburdened to take the sole responsibility of bringing economic and social prosperity in the Country and thus the responsibility is to be shared. Also that the corporate culture has brought in better management skills in the country and they can help the state in utilizing those skills for the betterment of society as well. In this context therefore the idea of Corporate Social Responsibility becomes a relevant tool for the overall benefit of the country.

28 Sanjay Kumar Sharma, A 360 degree analysis of Corporate Social Responsibility (CSR) Mandate of the New Companies Act, 2013, *Global Journal of Management and Business Studies*, Volume 3, Number 7 (2013), p. 760

29 Section 80 G of Income Tax Act

30 See also Subhabrata Ghosh and Pabitra Kumar Ghosh, Role of Corporate Social Responsibility in Inclusive Growth Considering the Government Expenditure in Developing Social Infrastructure, paper presented at *Conference on Inclusive & Sustainable Growth Role of Industry, Government and Society Conference Proceedings: 2011*, p 1

31 Handbook on Corporate Social Responsibility in India, *Confederation of Indian Industries*

According to Indian Institute of Corporate Affairs, a minimum of 6,000 Indian companies will be required to undertake CSR projects in order to comply with the provisions of the Companies Act, 2013 and some estimates indicate that CSR commitments from companies can amount to as much as 20,000 crore INR. [31]. However it is equally important to have a balanced and more reasonable approach towards the concept itself. It should not become an impediment in the development of the companies and their profit earning capacity. That will affect the overall development of the country anyway. It would therefore be appropriate to give the benefit of tax deductions to such companies who undertake their CSR responsibility as per the requirement of law. That would encourage the companies to utilize their profits/ income for the development of the country. For this purpose the law on the subject has to evolve and needs to be refined in order to provide a more conducive environment for both corporations and the society to develop.

Anti-Defection Law in India
—A Constitutional Perspective

*Fatima Shah**

Abstract

The problem of defection- switching loyalty from one political party to another has been haunting the Indian polity for over 50 years. Beginning in 1960s, the politics of 'Aya Ram and Gaya Ram' has reached such a level that frequent defections, splits and the consequent governmental instability have vitiated the democratic ethos of our polity. The anti-defection law of 1985 and the latest Constitutional amendment to plug the loopholes have hardly made any impact. Rather than solving or containing the problem of defection, the law has aggravated it. Contributing to the problem of governmental instability at the centre and in many states, the law has exposed the most immoral and unethical character of politicians making a mockery of democracy. The present study aims at presenting various perspectives on defections with specific reference to defection politics in India. Examining the rather usual political behavior of our elected representatives, it analyses various provisions of the anti-defection law and their impact

Key words: Defection, Floor-crossing, Switching, Split, Horse-trading

Introduction:

Defection means floor-crossing by a member of one political party to another party.[1] Political defections among legislators have been a cause of concern in democratic political systems the world over, more so in parliamentary polities where the stability of the government is dependent on the support of the Legislature Party or coalition of parties. Political defections betray the mandate of the electorate, the fundamentals of a party system and lead to political instability. That being so, different countries have either evolved conventions or framed laws and rules to deal with political defections.

The Indian polity has also had to contend with the menace of political defections time and again, bringing in its trial political instability, both at the Centre and in the States, on several occasions. The Indian Parliament and its

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1M.P. Jain, Indian Constitutional Law, Ed: 5th, 2006, Wadhwa Publications, Nagpur P.42

various State Assemblies have, in the past 38 years, witnessed many changes of allegiance, defections and 'dal badal' as it is colloquially known. There have been splits and formations of breakaway groups from time to time. In the mid-sixties, the country saw the introduction of a new jargon of "Aaya Ram Gaya Ram" in political parlance. The introduction of this jargon was heralded by a certain Haryana state legislator Gaya Lal, who changed parties three times in the course of one day. During this period, there were rampant defections by members of India's parliament and state assemblies in order to save or bring down governments. This, in turn, led to discourse amongst different political groups and parties in order to prevent this undesirable trend in politics. Opposition leaders expounded the proposal that Anti-Defection Legislative measures were imperative in putting an end to this quandary. However, it was under the Prime Ministership of Rajiv Gandhi that the promulgation of the Tenth Schedule introduced by the Constitution (Fifty-Second Amendment) Act 1985 occurred which made provisions as to the disqualification of members on the grounds of defection. The amendment echoed the abysmal political development in its Statement of Objects and Reasons stating:

> *"The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it. With this object, an assurance was given in the address by the President to Parliament that the government intended to introduce in the current session of Parliament an anti-defection Bill. This Bill is meant for outlawing defection and fulfilling the above assurance."*

The Tenth Schedule provides in paragraph 2 (1) that a Member of Parliament or state legislature belonging to any political party shall be disqualified for continuing as such member if he

1. has voluntarily given up his membership of such political party; or
2. votes or abstains from voting in the House contrary to any direction issued by the political party to which he belongs or by any person or authority authorized by it in this behalf, without obtaining, in either case, the prior permission of such political party, person, or authority and such voting or abstention has not been condoned by such political party, person or authority within 15 days from the date of such voting or, leads to the restraint of party debate and dissent.

The main intent of Anti-defection law is to combat "the evil of political defections". This law was passed so that it curbs the political defection but the ever increasing hunger of legislators and with the circumventing of legal

provisions it was not difficult to find some loop holes in this law and they used it to their interest. The law has not been able to achieve the desired goal of checking defections.

The Anti-defection law in India has regulated parliamentary behaviours for over 26 years now. Though it has the advantage of providing stability to governments and ensuring loyalty to party manifestos, it reduces the accountability of the Government to Parliament and curbs dissent against party-policies. This study is an attempt to have a holistic view of the problem of defections, to evaluate and analyse Anti-defection law as contained in the Tenth Schedule to the Constitution of India.

Rationale Behind the Law

There have been cases of political defection both within and outside the Commonwealth. Therefore, efforts have been made at global level by various Parliaments to cope with the problem with the help of legislations. Generally speaking, the rationale behind enacting an anti-defection law, providing for punitive measures against a member who defects from one party to another after election, is to ensure stability especially in a parliamentary form of government. The law on defection seeks to provide safety measures to protect both the government and the opposition from instability arising out of shifts of party allegiance.

There are instances where governments have fallen due to defection from or split in a political party. For example, in Sri Lanka on two occasions, in 1964 and 2001, government fell due to defection. Governments have also fallen elsewhere in the world, including in the United Kingdom,where there is no Anti-Defection Law, due to defection or split in a political party. In India also even after the Anti-Defection Law came into operation, governments have fallen in various states due to political defections as in the case of Goa in 1989, Sikkim in 1994 and Arunachal Pradesh in 1999 and 2003. [2] These examples are only illustrative and not exhaustive.

In modern democracies, most of the members are elected to Parliament with substantial support and help from their parties and on the basis of their party manifestos. Constituents cast their vote in favour of contesting candidates not only keeping in mind their personal qualities but also the policies and programmes of their parties. It is, therefore, argued that a successful candidate is bound by the pledges made by his party during the electioneering. He is expected to remain loyal to his party and abide by the party discipline. If he chooses to leave the party, he must loose his membership too.

This logic could be put forward equally forcefully in the case of countries having the system of proportional representation in which parties play a crucial

2 See G.C. Malhotra, *Cabinet Responsibility to Legislature:* Motions of Confidence and No Confidence in LokSabha and State Legislatures (Delhi: Metropolitian, 2004) Pp. 187-206 and 775-790.

role in getting their members elected. Anti-Defection Law should be an essential component of such a system to ensure that the results of an election are not adversely affected by defecting members who gained their seats in the Legislature solely because of their position on party list.

On the other hand there is also a school of thought which holds the view that the Anti-Defection Laws tend to restrict the freedom of members of Parliament in the performance of their duties and interfere with the member's right to freedom of speech and expression.

In view of the above, it may not be out of place to mention here that while stability of the government is important, equally desirable is its accountability to the house which consists of members who inturn are accountable not only to their political parties but also to the electorate. [3]

Historical Background

Defection in the United Kingdom

The phenomenon of defection was not something altogether unknown to older democracies like Great Britain. It may be mentioned in this connection that in early stages of their parliamentary struggles for political power in United Kingdom, members resorted to defections frequently and even in large numbers. William Gladstone, regarded as the "grand old man" of British liberalism, began his Parliamentary carrier as a Conservative Member when he was elected to Parliament in December 1832. During Peel's second Ministry (1841-46), he crossed over to the Liberal side and was made Vice-President of the Board and later Secretary of the state for the Colonies.

In 1886, there was a mass defection from the Liberal party. Joseph Chamberlain was strongly opposed to the Irish Home Rule Bill and crossed the floor along with 93 other Liberal and Whig MPs. The defectors formed an independent group called the Liberal Unionists, but they voted with the Conservatives. The Home Rule Bill was defeated at the second reading stage and the Gladstone ministry had to resign.

Winston Churchill's political career was marked by repeated floor crossings. Churchill began his parliamentary life as a Conservative. In 1904 he defected from the Conservative Party and crossed over to the Liberal Party. From 1904 to 1922, Churchill remained a Liberal. In 1922, he contested the election as a "Lloyd George Liberal". [4]

Defections in India

Indian politics has been no exception to this phenomenon of defections. In fact, the history of defections in India can be traced back to the days of Central Legislature when Shree ShayamLal Nehru, a member of Central Legislative changed his allegiance from Congress Party to British side. The evils of crossing

3 *Ibid.*

4 SudarshanAgarwal, *The Anti-defection law in India,* Parliamentarian, January 1986, p.22

the floor, political turncoatism, politics of opportunism, politics of defection or horse trading had started much earlier, as early as 1937 when Mr. Hafiz Mohd. Ibrahim elected on Muslim League ticket joined the Congress Legislature Party by crossing the floor and was appointed as a Minister in the cabinet of Pt. GobindBallab Pant in U.P. Subsequently, he resigned from the Assembly and contested the election on a Congress Ticket and won the election. Toppling game was played in Bengal in March 1945, when Muslim League Ministry led by KhwazaNazimuddin was voted out of office when NawabBahadur of Dhaka along with his 15 friends defected. [5]

In the late sixties, the phenomenon of changing political party for reasons other than ideological engulfed the Indian polity. According to Chavan Committee Report (1969), following the Fourth General Elections, in the short period between March 1967 and February 1968, the Indian political scene was characterized by numerous instances of change of party allegiance by legislators in several states. Out of roughly 542 cases in the entire two-decade period between the First and the Fourth General Elections, at least 438 defections occurred in these 12months alone. Among Independents, 157 out of a total of 376 elected, joined various parties in this period. [6]

Between the Fourth and the Fifth General Elections in 1967 and 1972 from among the 4,000 odd members of the LokSabha and the Legislative Assemblies in the States and the Union Territories, there were nearly 2,000 cases of defection and counter-defection. By the end of March 1971 approximately 50 percent of legislators had changed their party affiliations and several of them did so more than once-some of them as many as five times. One MLA was found to have defected five times to be a Minister for only five days. For some time, on an average more than one legislator was defecting each day and almost one State Government falling each month due to these changes in party affiliations by members. In the case of State Assemblies alone, as much as 50.5 per cent of the total number of legislators changed their political affiliations at least once. The percentage would be even more alarming if such States were left out where Governments happened to be more stable and changes of political affiliations or defections from parties remained very infrequent. That the lure of office played a dominant part in this "political horse trading" was obvious from the fact that out of 210 defecting legislators of the various States during the first year of "defection politics", 116 were included in the Council of Ministers in the Governments which they helped to form. [7]

Evolution of Anti-Defection Law in India

The genesis of the endeavours towards bringing forward Legislation in

5 K.P.S Mahalwar, *Disqualification on the basis of defection-a need for strengthening anti-defectionLaw* ,NALSAR Law Review, Vol. 4,No. 1, 2008-2009.P. 116.
6 G.C. Malhotra, *Anti-defection Law in India and the Common Wealth*,2005, p.5.
7 *Supra* note *p.8.*

India for curbing the malaise of defections can be traced to a private member's resolution moved in the Fourth LokSabha on 11 August 1961 by Shri P. Venkatasubbaiah. When Shri P. Venkatasubbaiah's resolution in LokSabha was under discussion, the propriety of legislators changing their allegiance from one party to another and their frequent crossing of the floor and its effect on the growth of Parliamentary democracy was actively deliberated upon in the Presiding Officers' conference held in New Delhi on 14 and 15 October 1967. After due deliberations, the Presiding Officers' conference left the task of taking steps towards curbing defections to the political parties and the Government.In consonance with the opinion expressed in the resolution, a Committee of constitutional experts and representatives of political parties was set up by the Government under the chairmanship of the then Union Home Minister, Shri Y.B. Chavan to consider the problem of legislators changing their allegiance from one party to another and their frequent crossing of the floor, in all its aspects and to make recommendations in this regard. Informing the LokSabha of the appointment of the Committee on 21 March 1968, the Home Minister described defections as " a national malady" which was "eating into the very vitals of our democracy". [8] The Home Minister submitted papers on 'Defections', 'The Nature and Character of Representation in the Democratic System', and a couple of related issues while the Law Ministry submitted a note on the constitutional and legal aspects. [9]The report of the Committee was laid on the table on 28 February, 1969.

The Y.B. Chavan Committee's recommendations could not provide adequate solution to the problem of defections, the Constitution (Thirty-Second Amendment) Bill, 1973 was introduced during the Fifth LokSabha on 16 May 1973 for constitutionally providing for disqualification on defections. The Bill sought to amend Articles 102 and 191. It provided for disqualification of a member from continuing as a member of either House of Parliament, if he voluntarily gave up membership of his political party which sponsored him as a candidate at elections or if he without prior permission voted or abstained from voting in the House contrary to any direction issued by the political party to which he belonged.

In an article in his journal *Everyman's* (8 September 1973) Jayaprakash Narayan 'welcomed' the Bill as 'a step in the right direction' while pointing out 'some serious defects'. They concerned the wide sweep of the provision concerning whips and imprecise definition of splits. Mergers were not reckoned with either. [10]

On 13 December 1973, a motion for the reference of the Constitution (Thirty-Second Amendment) Bill, 1973 to a Joint Committee of the Houses of Parliament was adopted in the LokSabha. On 17 December 1973, the concurrence

8 Subhash C. Kashyap, *Anti-Defection Law and Parliamentary Priviliges,* Edn. 2nd , 2003, Pp 2-3.
9 A.G. Noorani, *Constitutional Questions in India,* P. 174.
10 *Id at P. 177.*

motion in this respect was adopted in the RajyaSabha. The Joint Committee of the Houses of Parliament became defunct upon dissolution of Fifth LokSabha on 18 January 1977. [11]

On 28 August 1978, another attempt was made in this direction by bringing forward the Constitution (Forty-eighth Amendment) Bill, 1978 in LokSabha. Several members belonging to both ruling party and opposition parties opposed the Bill at the introduction stage itself. In view of stiff opposition, the Minister withdrew the motion for leave to introduce the Bill by the leave of the House. [12]

Immediately after the general elections which were held in December 1984, the President of India in his address to the both Houses of Parliament assembled together on 17 January 1985 said that the Government intended to introduce in that session a Bill to outlaw defections. In fulfillment of that assurance, the Government introduced the Constitution (Fifty-second Amendment) Bill in the LokSabha on 24 January 1985.The Bill was passedby LokSabha and RajyaSabha on 30 and 31 January 1985, respectively. It received the President's assent on 15 February 1985. The Act came into force with effect from 1 March, 1985 after the issuance of the necessary notification in the Official Gazette [13] .

The Constitution (Fifty-second Amendment) Act, 1985, amended Articles 101, 102, 190, and 191 of the Constitution regarding vacation of seats and disqualifications from membership of Parliament and the State Legislatures and added a new schedule (Tenth Schedule) to the Constitution setting out certain provisions as to disqualification on grounds of defection. This Amendment is often referred to as the anti-defection law.

The Members of LokSabha (Disqualification on ground of Defection) Rules, 1985 framed by the speaker, LokSabha (in terms of Para 8 of the Tenth Schedule) for giving effect to the provisions of the Tenth Schedule came into force w.e.f 18 March 1986. [14] Again the anti-defection law was amended by the Constitution (Ninety-first Amendment) Act, 2003 which was notified in the Gazette of India 2004. The Act omitted provision regarding splits from the Tenth Schedule to the Constitution.

Anti-Defection Law: Its Scope and Constitutional Validity

The succinct legislation on defection contains 8 paragraphs- the first setting out definitions, the second stating the disqualifications, the third (now deleted by the 2003 Amendment to the constitution) about splits within the party, the fourth about a disqualification not to apply in case of mergers, the fifth setting out certain exemptions, the sixth and seventh- stating the person who would decide disputes and barring jurisdiction of courts in respect of questions relating to disqualification of a member, and finally, the last paragraph enabling a Speaker

11*Supra* note 5 at Pp. 7,8.
12*Id at 8,9.*
13The Constitution (Fifty-second Amendment) Act, 1985.
14 Supra note 5 at p. 9

or a Chairman to make rules for a House in order to give effect to the provisions contained in the Schedule.

The scope of this anti-defection law was examined in detail in ***KihotaHollohon v Zachillhu*** [15]**,** a case that also analyzed various other aspects of this legislation. Here, the court, speaking about the necessity of an anti-defection legislation, said,

> *"The object is to curb the evil of political defections motivated by lure of office or other similar considerations which endanger the foundations of our democracy. The remedy proposed to disqualify the members of either House of Parliament or of the State Legislature who is found to have defected from continuing as a Member of the House. The grounds of disqualification are specified in Paragraph 2 of the Tenth Schedule."*

The Courts of the land have been called upon to adjudicate upon and interpret almost all these provisions. Perhaps the one clause that has come under the judicial microscope the maximum number of times, is Para 2 that sets out the disqualifications of a member. Given the vicissitudes of Indian politics, the courts have taken defiant stands against acts of defection.

The definition clause of the Tenth Schedule suffers from a serious lacuna inasmuch as it defines 'legislature party' and 'Original Political Party' but fails to define 'political party'. This was particularly important because for the first time, political parties were being given constitutional recognition by the Fifty-second Amendment. Until then, it was only the Election Commission which had recognized political parties but it was only for purposes of allocation of election symbols. [16] However, it has been held in the case of ***Mayawati* v. *Markandeya Chand*** [17] that the expression 'political party' refers to the original political party and not the legislature party.

Various questions have been raised regarding the constitutional validity of this disqualification provision viz., the Anti- Defection law isagainst the basic freedoms of association, opinion and expression – including freedom of changing the association, opinion etc, guaranteed under the Fundamental Rights chapter of the Constitution. Also the most fundamental privilege of members guaranteed under Articles 105 and 194 of the Constitution namely that of Freedom of Speech and Expression in the Houses of Legislatures stands curtailed. Limiting the freedom of choice or binding the vote of a legislator may amount to tampering with the fundamentals of the constitution and democratic polity.

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15 AIR 1993 SC 412

16Subhash C. Kashyap, *Anti-defection Law and Parliamentary Privileges,* Second Edition 2003, p 113

17 (1998) 7 SCC 517; AIR 1998 SC 3340

Defiance of party direction is not punished by unseating the member concerned in countries like U.K, Canada, Australia and New Zealand where Parliamentary Democracysimilar to India prevails. Dissent is not considered defection because a dissenting member or one who does not comply with a particular party directive has neither changed sides, nor crossed the floor; he continues to be a member of his party.

A question has been raised, if votes are allowed to be altered by arguments and speeches,what is the use of the forum of Parliament? Also, if to ensure compliance by the members all that is to be done is issuance of a Whip, what happens to the quintessence of Parliamentary Democracy which is the continuous and day to day answerability of the Government enforced through the doctrine of ministerial responsibility?

Parliament is required to exercise its powers in certain matters which are quasi judicial in nature, example under Article 61 (relating to the impeachment of the President of India),Article 124(4) (relating to the removal of Supreme Court Judges), Article 148(1) (relating to the removal of The Comptroller and Auditor General, CAG), Article 217(1)(b) (relating to the Judge of a High Court) and Article 324(5) (relating to the removal of the Chief Election Commissioner). The proceedings in Parliament of such quasi judicial nature may beinfluenced by the issue of a party directive under para 2 of the 52 nd Amendment Act which isagainst the rule of Natural Justice.

Sub para 2 of para 2 of the Tenth Schedule deals with an independent member who has not been set up by a political party. Under this sub para, an independent member will be disqualified if he joins any political party after his election as member of the Legislature. But under sub para 3 of para 2 of the said Schedule, a nominated member is allowed to join a political party within six months of his nomination as a member. An independent members' freedom to join a party is fettered although he is a master of himself and owes his election tono political party. On the contrary, the ruling party picks and chooses persons for nominationand in a way puts them under obligation. Such members are therefore, likely to join the ruling party. Both these provisions are vitiated by an inbuilt irrationality and bias and are therefore violative of Article 14.

Thus the constitutional validity of paragraph 2, especially the clause providing that the member would incur a disqualification if he votes/abstains from voting against the party directions, has been challenged.The Supreme Court has analyzed this point in detail in ***KihotaHollohon's***case. [18] Explaining its position, the court said,

> *"there are certain side effects and fall outs which might affect and hurt even honest dissenters and conscientious objectors, but these are the usual plus and minus of all areas of*

18*Supra note 14.*

> *experimental legislation. In these areas, the distinction between what is constitutionally permissible and what is outside it is marked by a 'hazy gray line' and it is the Court's duty to identify, 'darken and deepen' the demarcating line of constitutionality…"*

Democracy is a political concept, concerning the collectivity of groups, association or society in relation to their decisions about the rules and policies. It claims that such decisions-making should be subject to the control of all members of the collectivity who are considered as equals. That is to say, democracy embraces the related principles of "popular control" and "Political equality". An universal definition of democracy is not possible. The literal meaning of the word democracy originated from the historic conjunction of the 'demos' and *'kratos'*. The expression *'demos'* used often by Greeks to describe 'many' as distinct from 'few', rather than the people as a whole, and *'kratos'* means 'power'. Therefore, democracy means a form of government in which power vests with the people. [19] The Constitution sets up in India a "*Democratic Republic"*.

Democracy has taken many different forms through the centuries. Thinkers attempted to define democracy from different angles, like it's kinds, its forms of government, its representative or participatory character, it's requisite, rules and principles. Yet in essence, the emphasis is on a system of government in which the people have a right to participate in the governance of the country. [20] In ***Indira Nehru Gandhi v. Raj Narian*** [21]**,**Justice Mathew observed: [22]

> *"No political terms have been subject to contradictory definitions as 'democracy' and 'democratic', since it has become fashionable and profitable for every state to style itself in this way."*

Again the Supreme Court in ***Mohan Lal v. Dist. Magistrate,***[23]observed that democracy is a concept, a political philosophy, an ideal practiced by many nations culturally advanced and politically mature by resorting to governance by representatives of the people elected directly or indirectly.

Another aspect of parliamentary democracy is that, since the people govern themselves through its elected officials; while it legislates, for that matter there are some privileges conferred upon the members of legislature so that they truly represent the people in the House.

19AnandBallabhKafaltiya, *Democracy and Election Laws,* Deep &Deep Publications Pvt. Ltd., 2003(Reprint 2007), P.11.
20Ibid.
21AIR 1975 SC 2299.
22Id. at P. 2387.
23AIR 1993 SC 2042.

Paradoxically, Tenth Schedule has created profound anti-democratic ramifications in the Indian polity. In parliamentary system where work should be conducted through debate and discussion, Paragraph 2(1)(b) seems to have curtailed both. It mandates that once the political party or its authorised person has directed voting on a matter in a particular way, a parliamentarian cannot vote in a contrary manner. The authorised person specified in Paragraph 2(1)(b) refers to the whip of a political party, a formulation borrowed from the British Parliament. Whips, as parliamentary functionaries, ensure attendance of party members and enforce voting according to party lines. [24]

Even if the member sees merit in a contrary opinion, this provision restricts individual decision-making and mandates a faithful adherence to the directions of the party whip. By curtailing a parliamentarian's discretion in vot-ing, this provision has effectively mitigated the need for debate in Parliament. An obvious corollary of encumbered voting is that the law has negatived any scope for expressing dissent in the House.In order for a parliamentarian to effectively fulfil his functions, he must have the right to vote according to his conscience and not be tied to his party lines. [25] Allowing for intra-party dissent on the floor of the house is, therefore, in line with the Parliament's duty of ensuring freedom in action of its members.

The ***KihotaHollohon***judgment reiterated the importance of in-centivising parliamentarians to debate. This ability gains significance espe-cially in cases when a member might choose to raise an opinion, different from the line taken by his party. The benefit of such an instance is that:

> *"[…] Not unoften the views expressed by the Members in the House have resulted in substantial modification, and even the withdrawal, of the proposals under consideration. Debate and expression of different points of view, thus, serve an essen-tial and healthy purpose in the functioning of Parliamentary democracy. At times such an expression of views during the debate in the House may lead to voting or abstinence from voting in the House otherwise than on party lines [...]"* [26]

This observation highlights the value of a distinct opinion in shap-ing legislative action, by rightly placing a premium on a multitude of opinions being put forth in Parliament. Further, it may add nuances to a bill that are not contemplated if debate on the same is not lively and there is little engagement.

In this context, what was observed on the English soil with all force by the Great Winston Churchill can be quoted, which is sufficient to express the

24 Subash C. Kashyap, Parliamentary Procedure: The Law, Privileges, Practice and Precedents, Vol. II, 23 45 (2000). The whips issued in parliament can of three types: one-line, two-line or three-line, which indicates the severity and importance of the mandate.

25 V. N. Shukla, *The Constitution of India*,(M.P. Singh) Edn., 11th , 2008, P.1064.

26 KihotaHollohon v. Zachilhu, AIR 1993 SC 412 at P. 432.

inhibition that will affect the freedom of the elected representative:

> *"What is the use of sending Members of Parliament to say popular things of the moment, and saying things merely to give satisfaction to the Government whips and by cheering loudly every Ministerial platitude? How could Parliament survive if the members stamped out every individual independent judgement?"* [27]

The Parliament is the body representing the length and breadth of India. It is the embodiment of the consciousness of the nation. In this regard, the legislature owes it to the electorate to ensure that it conducts business in the fairest and most efficient manner. It is astonishing that Paragraph 2(1)(b) has curtailed an air of democracy in the intrinsically democratic entity, the Parliament. [28]The effect of this restriction has transcended into the right of con-scientious dissent being denied to members of parliament as well.

Parliamentarians are vested with numerous privileges to ensure their effective functioning. [29]It has, however, been held that the extent of this privilege is much wider than any right vested in an ordinary person. While reasonable restrictions ap-ply in the case of Art. 19, no such restrictions have been imposed in case of Art. 105. This is indicative of the greater rights that parliamentarians enjoy. Members can, for instance, defame another without fear of censure unlike citi-zens under Art. 19. [30]

Aside from unrestricted speech, the Constitution provides for free voting in Parliament. [31]Generally, courts have regarded voting by ordinary citi-zens to be a part of speech on the grounds that it is a tool of expressing feel-ings, sentiments, ideas or opinions of an individual. [32]The right to vote for the candidate of one's choice is nothing but freedom of voting, and it is the essence of democratic polity. While the right to vote is a statutory right, the freedom to vote is considered a facet of the fundamental right enshrined in Art. 19(1)(a). [33]Every person has the right to form his opinion about any candidate. Casting a vote in favour of one or the other candidate is tantamount to expression of this preference. [34]This final stage in the exercise of voting marks the accomplish-ment of freedom of speech of the voter. [35]Extending this finding to voting in Parliament, voting becomes an

27 Gilbert Martin,*"The Wilderness Years*", Houghton Mifflin Co, 1982, p. 249
28 Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 Wash. U. Global Stud. L. Rev. 1 (2009).
29 Art. 105 of the Indian Constitution.
30 MadhaviDiwan, *Facets of Media law*,2006, P.102.
31 Constitution of India, Art.105(2).
32 Mian Bashir Ahmad v. State of J&K, AIR 1982 J&K 26.
33 JyotiBasu v. Debi Ghosal, (1982) 1 SCC 69: (1982) 3 SCR 318.
34 K.N. Subbareddy, Advocate v. Advocates Association represented by the Secretary of the Association, District Registrar of Societies Registration and Karnataka State Bar Council by its Chairman, ILR 2009 KAR 1697.
35 *Ibid.*

essential element of the freedom under Art. 105(1). Voting by members must not thus, be restricted by Paragraph 2(1)(b).

Having a restricted right to vote then amounts to an inconsist-ent situation, seeing as the privilege of unrestricted speech is much wider in the case of parliamentarians. Even assuming that voting is not placed on this pedestal; it is undeniable that voting is also a subject of a privilege under Art. 105(2). This does imply of course, that certain restrictions can be placed on the exercise of this right. Any restriction on the right of a parliamentarian to vote according to his own choice, conviction or conscience is a restriction of the exercise of the right of freedom of speech, and it must be reasonable. [36]A restriction in the form of Paragraph 2(1)(b) of the Tenth Schedule, however, stifles a legitimate avenue of dissent. [37]

Anti-defection law deals with the malaise of floor-crossing, which essentially hampers the functioning of the legislature. Dissent, however, would not pose a similar problem seeing as it is an intrinsic cog of a parliamentary democracy. Disqualification under Paragrpah 2(1)(b) then, confuses dissent for defection.

Voicing dissent is still seen as defection in parliamentary politics. The right to dissent is stifled by the frequent use of whips by political parties in order to protect their interests. This results in the unnecessary issuance of whips for trivial matters or as a fake display of party cohesion. The misuse of anti-defection law greatly reduces the authority that a member can exercise when called upon to vote. [38]His right to dissent is rarely or never exercised during voting. This is one of the reasons why the Law Commission recom-mended that the Government should restrict issuing whips only to situations when the Government is in danger. [39]Unfortunately, the issuance of whips is not governed by any law or rules framed under the Tenth Schedule or under Rules of Procedure and Conduct in the LokSabha/RajyaSabha. [40]It is regulated as a matter of party discretion. Controlling party discretion and judgment in this form, by way of a legislation, would be unsuitable. This trend is disappointing particularly as it means that even those considered qualified to represent the public exercise no individuality and creativity in decision-making.

However, it is pertinent to mention here that in countries such as U.K., Canada, Australia and New Zealand wherein a Parliamentary democracy similar to India prevails, defiance of party direction is not punished by unseating the member under consideration. Dissent is not considered a defection because a

36*Ibid*.
37Subash C. Kashyap, *Parliamentary Procedure: The Law, Privileges, Practice and Precedents*, Vol. II, 2000 Edn.,, P. 2157.
38The Hindu, *From roaring lion to timid mouse*, February 26, 2010, available at http://www.thehindu.com/opinion/lead/article113668.ece (Last visted on July 5, 2012).
39Law Commission of India, 170th Report: Reform of the Electoral Laws ("170th Report"), Part-II, Chapter-IV, 3.4.2.
40*Id.*

dissenting member or one who does not comply with a particular party directive has neither changed sides, nor crossed the floor and continues to be a member of his party.

Apart from the individual rights, the very fundamental structure of legislature, as conceived by the Constitution, seems to suffer erosion by reason of restrictions imposed by the Tenth schedule. It is no doubt possible to suggest that it fortifies the structure which must have majority rule. However, position is otherwise, majority can be of individuals and not necessarily of the given party. Individual can remain a free agent to act according to his freewill and not a cog in a moving machine, as a cog he would lose his vitality, initiative and inherent ability. Does the Constitution provide for a mere rule by such cogs? Or it opts for a rule by enlightened, free self-determining persons? The provisions of the Constitution unmistakably indicate that the Constitution of the Parliament (Article 79 to 81) and the provisions of the Legislatures of the States (Articles 168to 171) make references to "individual members" or the "elected members" which are distinct from "the parties".

These provisions do not refer to the parties that would compose or be the constituent of these legislative bodies, nor does the Tenth Schedule amends these provisions, although indirectly puts party over the member. When the Tenth Schedule now imposes an express rule of party dictate, it necessarily would eclipse the individual member. Even if he were to vote or abstain against it, he vacates his seat, in that he ceases to be the member. The very structure having reference to individual member and individual representation has been to large extent and fundamentally changed and appears to be affected. Pathetic as well as political questions surrounding the working of this schedule are likely to arise. The democratic set-up which we have opted for is not constitutionally "one party" or "twin party" or even "multi-party" composition of the legislatures. Party less position is not at all ruled out. Party, no doubt, plays a part of bringing individuals together united for achieving certain aims and objectives and having political goals. They may be essential media for electing personnel committed to certain ideology. But when we come to the Constitution, it is "the individual representative" who is pivot, recognized and the pilot of his politics.

The question of qualification has been touched upon in the case of ***Indira Gandhi v. Raj Narian*** [41],though in a different context, but nonetheless the Court's reasoning there suggests that as far as the constituent reference point is concerned, it is the individual. Democratic matrix is seminal. It is simple too. It interweaves individual into a political pattern of its own. Individual as a voter, individual as a candidate and individual as a representative. That is how by individual representations by their number the Parliament or the State legislature is constituted. Even upon dissolution of these bodies, consistently in the phraseology employed by the Constitution reference is made to the member. When the

41AIR 1975 SC 2299
42U. N. Rao v. Indira Gandhi, AIR 1971 SC 1002

legislature is dissolved, it is the member who vacates the office and his capacity to represent terminates. [42]This atomized democracy, the constitution has adopted and not mass-group-ruling democracy. May be in the elegant hope that we have opted for more developed form of democracy having free willing enlightened individuals collected in assembly to steer the affairs of Government. Fundamentally, the matrix is clear, so also its goal, objectives and orientations. Unless drastic departures are initiated, introduced after full deliberations, this atomized form of democracy is the core of the Constitution.

Thus the evil of political defection across the body polity and their consequent deleterious effect on the method of governance can be strongly tackled if necessary constitutional reforms are carried out as suggested above and also so called changes in the attitudes towards this problem by effective mobilization of support both at the national, regional and local level for the adoption of such mechanisms for promotion of the long term objective of a strong and stable political governance for furtherance of such ends.

Anti-Defection Law in Jammu and Kashmir

It is significant to mention here that the Jammu and Kashmir was the only State Legislature which attempted to tackle the problem of defection at the state level even before the enactment of the Constitution (Fifty-second Amendment)Act, in 1985.With a view to disqualifying a political defector from being a member of either House of Jammu and Kashmir State Legislature the Jammu and Kashmir Representation of People Act (4 of 1957)was amended and a new section 24(G) was inserted into the principal Act by the J&K Representation of People (Amendment) Act,1979 which came into force with effect from 29th September,1979.The Act, inter alia provided for disqualification of a member in Legislative Assembly/Council (a) if he, having been elected as such member, voluntarily gives up as a candidate in such election of which he became a member after such election, or (b) if he votes or abstains from voting in such House contrary to any direction or whip issued by such political party or by any person authorisedby it in this behalf, without obtaining prior permission of such party or by any person. This legislation was challenged in the J&K High Court on the main ground that it was violative of the fundamental Freedom of Speech and Expression and Freedom of Association guaranteed by Article 19 (1)(a) under Part III of the Constitution. The High Court by a Judgement delivered in November, 1981 in ***MianBasheer Ahmad v. State of Jammu and Kashmir,*** [43] by a thin majority sustained the legislation.

In this case, the Full Bench of the Jammu and Kashmir High Court consisting of four judges was equally divided while delivering the judgement. While the learned Chief Justice and a learned brother judge upheld the constitutional validity of Section 24 (G), two other learned judges declared Section 24(G) as unconstitutional. Despite the fact that the Full Bench was equally divided

43 AIR 1982 J&K 30.

the final decision leaned in favour of constitutional validity of that Section because of the pre-eminent position enjoyed by the Chief Justice of the High Court by virtue of Rule 21 of the Jammu and Kashmir High Court Rules.

The judges constituting the minority ruled that any anti-defection law that could not recognise "the right of constitutional dissent" would face judicial demotion since it would be both "unconstitutional" and "unethical". [44] In their opinion: [45]

> *"The fundamental right of freedom of speech and expression inheres in every citizen and does not disappear when he becomes a legislator. While he cannot exercise this fundamental right in the legislature as a citizen, "his election removes the fetter". Since Section 24(G) renders MLAs "robots" and make them "conscienceless" and deprives MLAs "of the right to vote according to their own choice, conviction and conscience" and since "morality" under Art. 19(2) cannot encompass "political authority", it should be struck down as unconstitutional."*

The object of the section 24(G), according to the learned judges constituting the majority was not "to curb dissent" but "to eradicate the evil of political defection". [46]In their opinion: [47]

> *"A legislator enjoys no fundamental right of speech and expression in the legislature and freedom ofspeech and expression enjoyed by a legislator under Art. 194(1) stands on a higher footing than the Art. 19(1)(a) right guaranteed to a citizen and the provisions of Art. 19(1)(a) which are general must yield to Art. 194(1) and the latter part of its Cl (3) which are special."*

The power of Parliament to make laws in case of State of Jammu and Kashmir is limited. The Anti-Defection law adopted in the country did not apply to State of Jammu and Kashmir. Article 370 makes it possible for the Jammu and Kashmir State Government to enact any such law that it may deem fit except any that has direct relationship with regard to Defense, Foreign Affairs and Communications. After adding Tenth Schedule [48] to the Indian Constitution by way of Constitution (Fifty-second Amendment) Act, 1985, Seventh Schedule has since been added to the Constitution of Jammu and Kashmir with several amendments in the year 1987 which is popularly known as Anti-Defection Law,

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44Id. at 46.
45*Id.* at 48, 49.
46*Id*. at 34.
47*Id. at 36, 37*.
48The Anti-Defection Law under the Indian Constitution..

by the Constitution of Jammu and Kashmir (Eighteenth Amendment) Act, 1987. It is also pertinent to mention that even after deletion of the split provision from the Tenth Schedule after enactment of the Constitution (Ninety- first Amendment) Act, 2003[49] the provision relating to split continues to exist in the Anti-Defection Law of Jammu and Kashmir.

It is noteworthy to mention that in case of Jammu and Kashmir if any question arises as to whether a member of the House has become subject to disqualification under the provisions of the law, the question shall be referred for the decision of the Leader of the Legislature Party to which such member belongs and his decision shall be final, giving unbridled authority to the leader of the party. In case, however, where the question which has arisen relates to a member belonging to a political party which has not elected any Leader of its Legislature Party, the question shall be referred for the decision of the Speaker or, the Chairman, as the case may be, and his decision shall be final.

However, if the question which has arisen relates to a member not belonging to any political party, the question shall be referred for the decision of the Speaker or the Chairman, as the case may be, and his decision shall be final. No case under Anti-Defection Law has been reported in Jammu and Kashmir till 2011. On November 18, 2011 in a first kind of its decision in history of the Jammu and Kashmir Assembly, the BharatiyaJanata Party (BJP) disqualified six MLAs from membership of the Legislative Assembly for indulging in cross voting in April 13 Legislative Council election in favour of National Conference and Congress. BJP Legislature party leader and MLA NagrotaJugal Kishore disqualified six party MLAs under Para 2 (b) of Seventh Schedule of the Constitution of Jammu and Kashmir read with Rule 3(6) of the Members of the Jammu and Kashmir Legislative Assembly (disqualification on the ground of defection) Rules. [50]

Conclusion

The 52nd Amendment to the Indian Constitution with regard to anti-defection law has been hailed as a bold step to clean public life in India, but, in course of time, certain defects therein have become apparent which have very much compromised the effectiveness of the law to achieve its objectives. The main intent of the law was to combat "the evil of political defections".Tenth Schedule was thus seen as a tool to cure this malaise.The import of this constitutional measure meant that once a mem-ber was elected under the symbol of a political party to Parliament, the member could not later opt to leave that party or switch to another party. Independent members of Parliament on the other hand would be liable upon moving to the folds of a political party subsequent to the election. The amendment was intended to bring stability to the structure of political partiesand strengthen parliamentary practice by banning floor-crossing.But floor-

49 This Amendment came into force on 1st January, 2004.

50 The Dialy Excelsior, *BJP disqualifies 6 MLAs, seeks removal of another from House,* 18 November 2011.

crossing is not the only form of defection envis-aged under Tenth Schedule. In the occasion of a direction being issued by a politi-cal party to vote in a particular manner on a matter, the member of the party is mandated to comply with the direction. Anything contrary to this directive is also perceived as an act amounting to defection.

If the representative is subjected by reason of penalty and not by choice, then we would be equating the candidate of the party while he contests election to continue to be so even when he steps in the legislative house and thereafter. The result is a wedlock which does not permit dissent. Once dissent, divorce is a must. It is possible, however, to suggest from what is enacted in the Tenth Schedule that the party structure is now being pre-empted and treated as basic and fundamental, for upon breach of the party mandate in the matters of vote or abstaining from voting or resignation, the representatives loses his seat itself. Party supremacy, thus, is accepted as a principle throughout, in the Tenth Schedule, which has wide ranging ramifications which do not appear to have been kept in view while enacting amendment to the Constitution. The possible meritor principle appears to be to instil discipline to erect and fortify party-system and stabilise it and avoid and discourage unethical conduct of cross-voting or floor-crossing for various inducements and consideration. With all these laudable objects, which are not very much explicitly in the text of the Schedule, inherently the scheme is in conflict with the initial scheme of our Constitution pattern that relies upon individual representative and confers unimpeded freedom upon him.

It is well agreed that this portion of the Constitution of India is enacted in order to protect the privileges of the House, however as every other law is not static and require changes, the Tenth Schedule in the wake of securing the privileges of House and to ensure smooth conduct of Parliamentary affairs has slightly touched upon the corners of democracy and if it is properly amended to suit the changing circumstances it may assist in living the dreams of Constitution drafters and the deciders of the faith of this nation.

Implementing Right to Education in India: Some Issues

*Dr. Naveen Kumar**

Abstract

This paper studies the change in the nature of legislation in favour of Right to Education (RTE), especially making it a part of the Fundamental Rights. The paper, in the beginning, situates the problem in the background of the international treaties and conventions for promoting children's education. The objective behind the RTE that it will bring a sea change in the field of quality education in India is critically examined on the basis of the progress in this direction during the last five years. Our studies show that the half-hearted efforts of the implementation of the RTE by the Governments have created a gap between the objectives of the Act and fulfillment of its goals. Hence, the stake holders approach Court and the interpretation of the RTE Act and Constitutional provisions by the approached Court have added new dimension in the whole process. It is in this background that the paper analyses the problem on the basis of certain judicial decisions. The evaluation of the progress in this direction on the basis of equity, access, quality and social inclusion has also been critically examined and suggestions have been mooted in this paper.

Key Words: Free and Compulsory Education, School Education, Fundamental Right to Education, International Obligations for Right to Education, Article 21 A of Constitution.

1. Introduction:

Children are about 50 percent of human population and one of the greatest assets to humanity. To make them responsible and productive members of

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tomorrow's society, conducive environment for their all-round development is to be provided. If the children are deprived in any form, in any country, the country in particular and the humanity in general is consequently deprived of the potential human resources for growth and development. Even realizing it fully well, children in India are most vulnerable and marginalized social group. For all-round development of children there are a number of international conventions, numerous writings and reports by UN and other bodies, and legislations in respective countries. It has also been incorporated into various regional treaties. The importance of education is realised worldwide and specific efforts are made towards the same. [1] Despite all these, there is a vast gap between the provisions and efforts aiming at the improvement of children's life and their conditions.

The goals set in the year 2000 by the International community has significantly influenced the Indian legislatures for enforcing the same. Resultantly, the Right to Education for All (EFA) became a world concern to be achieved by the 2015. The much determined international official commitment to EFA is also a part of the United Nations Millennium Development Goals. Rightly, considering the gravity of the situation and under growing world obligations and efforts, the Government of India has enacted the legislation related to the Right of Children to Free and Compulsory Education Act, 2009. It is in this background that the paper aims at analysing various issues related to the effective implementation of the RTE Act, 2009. It also focuses upon the two dimensions: i the desired goal at the time of amending the Constitution of India and later the passing of the Right of Children to Free and Compulsory Education Act, 2009; ii certain important issues cropped up for judicial interpretation by the Court. This paper also takes into consideration three other aspects such as: i.) access to quality education, ii.) infrastructure and iii.) regulatory mechanism under RTE Act.

2. International obligation for Right to Education

UNESCO, 2015 monitoring report [2], says that India has reduced its out of school children by over 90% and achieved most prominent goal of universal primary education. Globally, just one third of countries have achieved all of the measurable Education for All goals set in 2000. This RTE Act, 2009 is implemented from 1 st April 2010. The RTE Act has completed five years of its implementation with neglect and criticism. The Indian condition is not an exception. Achieving the right to basic education, as a fundamental human right is one of the biggest challenges faced by the international community even today. Millions of children, youth and adults remain deprived of basic education. Several international conventions, numerous writings and reports by U.N. bodies stress the importance of the fundamental right to education. The right to education is

1 According to Article1(2) of UNESCO Convention against Discrimination in Education,1960: the term education refers to all types and levels of education, and includes access to education, the standard and quality of education, and the condition under which it is given.

2 UNESCO'S 2015 Education for All, EFA global monitoring report.

codified in UDHR [3], ICESCR, the Convention on the Elimination of all forms of Discriminations Against Woman (CEDAW) and Convention on the Right of Child (CRC).[4] The international community reaffirmed the right to education at the World Education Forum in 2000. UNESCO has therefore placed the right to education at the forefront of its activities and education for all is high on its agenda. The right to education is an integral part of UNESCO's constitutional mandate. The constitution of UNESCO expresses the belief of its founders in "full and equal educational opportunities for all." The Dakar framework for action committed governments to strengthening national and regional mechanism to ensure that EFA was on the agenda *inter alia* of every national legislature. It also emphasises that at national level concrete measures be taken so that legal foundations of the right to education are strengthened in national systems. [5]

At international level, the ICESCR devotes two articles to the Right to Education namely Article 13 & 14. Article 13 contains provisions in the ICESCR [6] and is most wide ranging and comprehensive article on right to education in international human right law. According to article 13 (2) (a) of ICESCR primary education shall be compulsory and free for all. Primary education includes the elements of availability, accessibility, acceptability and adoptability, which are common to education in all its forms and at all levels. Article 14 of the ICESCR [7]

3 Article 26 of UDHR 1948 explains, (1) "Everyone has the right to education.Education shall be free, atleast in the elementary and fundamental stages. Elementary education shall be compulsory.Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. (3) Parents have prior rights to choose the kind of education that shall be given to their children."

4Article 28 of CRC, "1. States parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a)make primary education compulsory and available free to all;….Article 29

5 Manoj Kumar Sinha, "Right to Education: National and International Perspective," Vol 48 No2, 188-207 Indian Journal of International Law, 2008. And see also, Kishore Singh, "Non –Discrimination and Equality of opportunity in Education and UNESCO's Convention against Discrimination in Education: Recent Developments in International Law, with reference to India," Vol 49 No2, 213-237, Indian Journal of International Law, 2009 Sapna Chadha, "Operationalising Right to Education Act: Issues and Challenges," Vol. LVI No.3, The Indian Journal of Public Administration, 616-634, 2010.

6 Article 13 of the ICESCR provides, " (1) The State parties to the present Covenant recognize the right of everyone to education.They agree that education shall be directed to the full development of the human personality and sense of its dignity, and shall strength the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in free society,promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. 2. The State Parties to the present covenant recognized that, with a view to achieving the full realization for this right (a) primary education shall be made compulsory to all."

7 Article 14 of the ICESCR states: Each State Party to present Covenant which, at the time of becoming the party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge,undertakes,within two years, to workout and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all."

requires each state party to adopt a detailed plan of action for the progressive implementation of free and compulsory primary education to all. The Convention on the Rights of Persons with Disabilities, 2006, obligates the State to ensure inclusive education and prohibits any exclusion from free elementary education on the basis of a disability.

3. National Perspective on Right to Education

Besides the legislative and executive measures in India towards achieving the goal of the right to education in India and the efforts at international levels, as mentioned above, it is important to study the role of Indian Judiciary towards shaping The Right of Children to Free and Compulsory Education. In a landmark judgment of *Mohini Jain V. State of Karnataka* [8] case the Supreme Court (SC) has held that RTE is a fundamental right under article 21 of the Constitution which cannot be denied to a citizen by charging higher fee known as capitation fee. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by right to education. The SC held that the RTE at all levels is a fundamental right of a citizen under article 21 of the Constitution and charging capitation fee for admission to educational institution is illegal and amounted to the denial of citizen's right to education. The capitation fee makes the availability of education beyond the reach of poor. The education in India has never been a commodity for sale till the modern period.

In *Unni Krishnan v. State of Andhra Pradesh* [9], the SC was asked to examine the correctness of the decision given by the Court in Mohini Jain's case. The five judge bench by 3:2 majority partly agreed with the Mohini Jain's decisions and held that RTE is a fundamental right under article 21 of Constitution as it directly flows from right to life but as with regards to its content the court partly overruled the Mohini Jain's case and held that the right to free education is available only to children until they complete the age of 14 years but after that the obligation of the State to provide education is subject to the limits of the economic condition and development. The obligations created by articles 41, 45 and 46 of the Constitution of India can be discharged by the state.

In the case of *M.C. Mehta v. Union of India* [10] the court held that the Constitution prohibits employment of children in hazardous sectors and it should be stringently followed to ensure that children realize their full potential. The court observed that all children should receive education and the onus vests on the Government to devise job oriented courses so that the right to educations and work would be safeguarded.

8. 1992 (3)SCC 666

9. 1993(1)SCC 645.see also, P.P Rao, "Fundamental Right to Education,"Vol50 No4, JILI585-592(2009), Anuradha Saibaba Rajesh, " The Fundamental Right to Primary Education in India: A Critical Evaluation", Vol 50 No1, Indian Journal of International Law, 91-111, 2010.

10(1998)6SCC63.

In another case namely *Bandhua Mukti Morcha v. Union of India*[11] which primarily dealt with bonded child labour the Supreme Court made landmark judgment to protect the basic human rights of children. The court stated that illiteracy is the biggest threat to social integration and democracy and that compulsory education is pre-requisite to meaningful exercise of rights as well as discharge of social responsibilities. The court construed Part III and Part IV of the Constitution of India affirming Directive Principles of State Policy to be Fundamental and of utmost significance for governance.

Similarly, the U.S. Court has emphasized in one of its very far reaching Judgments related to right to education: [12] that "Today, education is perhaps the most important function of State and local governments. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful if any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." [13]

However, when it comes to Indian judiciary, sometimes the situation is not that encouraging. We have the instances of different stands of the judiciary in India. In *T.M.A Pai Foundation v. State of Karnatka* [14] the Supreme Court endorsed the rights to the private institution to determine their own fee structure and diluted the responsibility and obligation of the sovereign in the education sector.

Further in the case of *Ashok Thakur v. Union of India* [15] Supreme Court opined the need for ensuring the right to basic education to all and described it as a fundamental obligation of the Government. The case also affirmed that Article 51-A of the Constitution that elucidated a fundamental duty on every citizen to inculcate humanism and scientific temper would remain a sham unless right to primary education is a reality. The Supreme Court directed the Union of India to set a time limit within which Article 21-A is going to be completely implemented. The Court directed that this time limit must be set within six months and incase the Union of India fails to fix time limit, then this work has also to be done by the Supreme Court. The most important fundamental right under Article 21-A must be fully implemented in the larger interest of nation. Without Article 21-A, the other fundamental rights are effectively rendered meaningless.

In *State of Bihar v. Project Uchcha Vidaya Shikshak Sangh*, [16] it has been observed by the S C that "Imparting of education is a sovereign function of the State and is the primary duty of the State. Although establishment of high school may not be

11AIR1984SC355.

12In Brown v. Board of Education (1953) 98 Law Ed 873, Earl Warren, C.J., speaking for the U.S. Supreme Court emphasized the importance of the right to education.

13AIR 2003 SC 355.

14(2008)6 SCC1

15(2006) 2SCC 545

16AIR2010 Mad.142.

a constitutional function in the sense that citizens of India above 14 years might have any fundamental right in relation thereof but education as a part of human development, indisputably is a human right."

In the case *of T.N. Nursery Matriculation, and Higher Secondary Schools of Association, Chennai v. State of Tamil Nandu and others* [17] the Court held that The constitution (86 th Amendment Act, 2002) has made elementary education, a fundamental Right under Act 21-A of the constitution of India. The right to free and compulsory elementary education were a long felt need, which had now been given the status of a fundamental right. The Right of Children to Free and Compulsory Education Act, 2009, which came into force from 1 st April, 2010 was a consequential legislation to translate the constitutional intent into action. The RTE Act, 2009 provides for 25 percent seats in private schools for children from poor families and prohibition of donation or capitation fee. Though the RTE Act is central legislation its effective implementation lies in hands of the state governments. While implementing the RTE Act from 1 April 2010, the GOI announced that 25 percent reservation for children from economically weaker sections of the society would be operational from class I with effect from the academic year 2011. The present Impugned legislation is examined in the context of Act. Art. 21A of the Constitution of India and RTE Act is also valid.

The Supreme Court in *Avinash Mehrotra v.Union of India* [18] held that right to education attaches to the individual as an inalienable human right. The Supreme Court has further clarified that right to education is more than human or fundamental right. Article 21-A of the Constitution is a reciprocal agreement between the State and family, which places burden on all participants of civil society. Unlike other fundamental rights, the right to education places burden not only on the State but also on the parents/guardian. Articles 21-A & 51-A (c) of the Constitution balance the relative burdens on parents and on the State for compulsory education of children, free from fetters of cost, parental obstruction or State inaction. Education remains essential to the life of the individual as much as health and dignity and the State must provide it comprehensively and complete to satisfy its highest duty to citizens. Education is a tool for betterment of civil institutions, protection of civil liberties and path to informed and questioning citizenary.

4. Commissions for Monitoring RTE

The complex Indian situation is not only the outcome of the judgments of the Judiciary of India but also various commissions. The National Commission for Protection of Child's Right (NCPCR) is expected to monitor the implementation of the RTE. But it is not suitably equipped and its presence is

17(2009)6 SCC 398.

18Malini Bhattacharya, Dolashree Mysoor and Arun Siva Ramakrishnan, "RTE Grevance Redress in Karnataka," VOL XLIX NO 23 Economic & Political weekly, 37-41, 2014.

barely symbolic and has no academic staff to study cases and find solutions. It needs state level units and district level branches to suitably discharge its functions to achieve the target of the RTE Act. The effective implementation of the Right to Education Act, 2009 is very much dependent upon the Functioning of Child Rights Commission. The commitment of the Government can be understood by the fact that in many states the said commission is nonfunctional /nonexistent. The judicial intervention was required even to establish the Commission to monitor the functioning of the Right to Education Act. [19]

In the case of *In RE Exploitation of Children in Orphanages in State of Tamil Nadu v. Union of India* [20] the Supreme Court found that 19 States/Union Territories have not constituted commissions for protection of child rights under Section 17 of the Commissions for Protecting of Child Rights Act, 2005. The Court also took notice that provisions related to these Commissions are also contained in RTE Act, 2009 [21] and without proper functioning of this Commission Rights of children cannot be assured and monitored as per the requirement of RTE Act, 2009. The Court issued directions to the Government to constitute the commission without further delay and also make it functional so that the grievance redressal mechanism would be in place for appropriate action. The apex Court further highlighted that the rights of children can be secured adequately only if the monitoring and controlling provisions contained in these three Acts, namely, the Commission for Protection of Child Rights Act, 2005; The Right of Children to Free and Compulsory Education Act, 2009 and the Protection of Children from Sexual Offences Act, 2012 read with the Juvenile Justice (Care and Protection of Children) Act, 2000 are fully implemented. Further, states were directed to provide detailed information with regard to the measures adopted and action taken with regard to improving the conditions of children in various shelter homes and other places around the country, to eliminate trafficking of children under the garb of education and other promises.

The national monitoring body of the RTE has not been able to resolve as much as 76% of violation of the RTE. [22] There have been number of violations by the schools and NCPCR has not been able to place effective check on it. In two years, NCPCR received 2850 complaints regarding RTE Act. However, it has been able to resolve just 692 cases, or only 20% of the entire lot, by now. Normally, NCPCR is issuing notices to the schools or the education department for the

192013(1) SCALE 379.

20 Section 31(1): The National Commission for Protection of Child Rights constituted under section 3,or, as the case may be, the State Commission for Protection of Child Rights constituted under section 17, of the Commission for Child Rights Act, 2005 shall, in addition to the function assigned to them under that Act, also perform the following function namely:- (a) examine and review the safeguards for rights provided by or under this Act and recommend measures for their effective implementation; (b)inquire into complains relating to child‘s Right to Free and Compulsory Education; and (c) take necessary steps as provided under section 15 and 24 of the said commission for Protection of Child Rights Act.

21 The Shillong Times, April 1, 2012.

22 AIR 2013 Del 12

needful but it is important to note that this is not enough or until the cases see their its logical end after the notice? Does this body have requisite power to adjudicate all issues pertaining to RTE effectively? If this is the condition of the national commission, we can simply imagine the condition of the commissions at the state level.

The RTE matter is further complicated being the part of Fundamental Right and therefore justiciable matter. In the matter *of Jatin Singh v. Kendriya Vidyalaya Sangathan* [23] the very important question was raised whether reservation permissible for Schedule Castes and Schedule Tribes could be covered under the 25% reservation for weaker sections and disadvantaged group provided in the RTE Act, 2009? This issue was finally decided by the Delhi High Court by giving some directions to resolve the issues of admission in Kendriya Vidyalaya schools. The court observed that:

> "Though the reservation is permissible as provided under clause (4) of article 15 of the Constitution, that reservation cannot be made applicable to 25% of the seats earmarked for the children falling under the definition of clauses (d) and (e) of section 2 read with section 12(1) (c) of the Act. Of course, it is not as if the school cannot have a clause to reserve the seats for the benefits of SC and SC candidates, as such reservation is permissible in respect of remaining75% of the seats. On the contrary, at the guise of invoking clause (4) of article 15 of the Constitution of India, the school cannot carve out certain percentage of the seats out of 25% earmarked for the children falling under section 12(1) (c) and reserve for SC and ST candidates."

The reasoning of the Delhi High court needs to be critically examined by the Supreme Court to finally settle the conflict between two kinds of reservation raised in this case, one provided by the section 12(1) (c) of the Act and the other by the clause (4) of article 15 of the Constitution of India. This is yet to be resolved and let us hope the interpretation given by the High Court may sustain in the Supreme Court and the matter also needs to be decided by the Constitutional Bench of the Supreme Court to settle the reservation policy under RTE, Act, 2009. It is important to highlight that there is no mention of reservation policy in the RTE Act or various rules related to this Act. All this has complicated the path to achieve the goal.

This complication is also reflected in the case *of Society for Unaided Private Schools of Rajasthan v. Union of India.*[24] A three-judge Bench through its majority decision delivered by the Chief Justice S.H. Kapadia and on behalf of Justice

23(2012) 6 SCC 1.
24 WRIT PETITION (C) No. 416 OF 2012

Swatanter Kumar (Justice K.S. Radha Krishnan disagreeing and delivering his minority opinion) upheld the constitutionality of the RTE Act, 2009 except to its applicability to unaided minority institutions. The Supreme Court rejected the argument of the petitioner that section 12(1) (c) of RTE Act, 2009 violates Article 14 or 19 of the Constitution of India. Section 12(1) (c) provides for admission to class 1, to the extent of 25% of the strength of class, of the children belonging to weaker section and disadvantaged group in neighborhood school and provide free and compulsory elementary education to them till its completion. The reservation of 25% seats in unaided private school for disadvantaged group of children satisfies the test of classification in Article 14. Such provisions are giving level playing field for the poor children to get quality education in unaided schools. Education is an activity in which we have several participants. Unaided schools are supplementing the primary obligation of the State to provide free and compulsory education to the specified category of children. Hence, it also satisfies the test of reasonableness to uphold the constitutionality of the section 12(1) (c) of RTE Act, 2009.

The Court took the child centric approach to interpret the said provision without giving some very convincing arguments to settle the issues purely on interpreting other provisions of the constitution. But when the issue raised before the Court about implementation of section 12(1) (c) of and 18 (3) of RTE Act, 2009 in unaided minority institution the Court completely takes altogether different position and declared unconstitutional on the ground that it violates Article 30 the Constitution. The minority opinion of justice Radha krishnan has examined the issue with some established earlier positions of the Court on similar matters. The difference of opinion of the Court to the types of institutions imparting similar kind of education further complicates the matter. Even for the arguments of declaring any provision unconstitutional, some detailed and exhaustive analysis is needed.

Finally this case was referred to the five judge Constitution Bench clubbed with *Pramati Educational & Cultural Trust & Ors v. Union of India & Ors* decided on May 6, 2014 [25] wherein the SC has been approached to examine the constitutional validity of clause (5) of Article 15 and of Article 21A of Constitution. Whether by inserting clause (5) in Article 15 of the Constitution and Article 21A, Parliament has altered the basic structure or framework of the Constitution? The Honourable Supreme Court held that:

> "While discussing the validity of clause (5) of Article 15 of the Constitution, we have held that members of communities other than the minority community which has established the school cannot be forced upon a minority institution because

25Vimla Ram chandran and Suman Bhattacharya, "Attend to Primary Schoolteachers!," VOL XLIV NO 31 Economic & Political weekly, 17-20, 2009 and for further details see also, Niranajanaradhya. V.P," The Right to Education, Constitution and the Common School System in India," Vol14 Issue 3&4,Nyaya Deep, 55 ,2013.

> that may destroy the minority character of the school. In our view, if the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009 Act insofar it is made applicable to minority schools aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009 Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution is ultra vires the Constitution. We are thus of the view that the majority judgment of this Court in *Society for Unaided Private Schools of Rajasthan v. Union of India & Anr*, in so far as it holds that the 2009 Act is applicable to aided minority schools is not correct. In the result, we hold that the Constitution (Ninety third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution and the Constitution (Eighty-Sixth Amendment) Act, 2002 inserting Article 21A of the Constitution do not alter the basic structure or framework of the Constitution and are constitutionally valid. We also hold that the 2009 Act is not ultra vires Article 19(1) (g) of the Constitution. We, however, hold that the 2009 Act in so far as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the Constitution."

Providing complete exemption to the minority educational institutions imparting general education may open flood gate to establish such institutions and completely ignore the governmental control to regulate such institutions is also matter of concern for regulatory bodies. It is necessary to visualise the role of such institution to facilitate the momentous task of government to achieve the goal of universalization of elementary education. By adopting common schooling or neighbourhood school system and if the avalaibality of good school in every locality increases than all these issues become insignificant. The basic problem is the non- availability of quality schools and poor funding by the government to establish and maintain such institutions and creating different type of educational institutions. Now it is necessary to look all these problems in totality otherwise even this Constitutional dream will also remain on paper.

5. Access to Quality Education

The quality of teaching in our elementary schools is also not what it should be. Teacher absenteeism is widespread, teachers are not adequately trained and the quality of pedagogy is poor. The eleventh plan aimed to correct these deficiencies and focused on improving the quality of education at the elementary

level especially in rural areas.[26] There are fears that there might be such a condition to appoint temporary, untrained and para-teachers to fulfill the conditionality of the Act. Moreover, some states have appointed large number of untrained teachers in their primary schools to deal with the emergent situation. The findings of some of the NGOs and other investigations prove the poor quality of education and the defeat of the purpose of the RTE Act. The tall claims made in the RTE Act at several places are hardly seen fulfilling on the ground.

Pratham, an NGO, has come out with stunning findings in its survey which shows that the primary education scenario is not encouraging; in rural areas though there is an increase in school-going children what they are learning is marginal. A class V student is in a position to read only a Class II textbook. It is apparent that the primary school going children are three steps down to their actual class in which they are studying. When this is the present situation it is anybody's guess how it would be possible to impart quality education to all the children in the near future. [27]

In the matter of *State of Orrisa v. Mamta Mohanty* [28]*and State of Tamil Nadu Siddhu Matriculation Hr. Sec School v. K. Shyam Sunder* [29] the Supreme Court opined that article 21-A had been added by amending the constitution with a view to facilitate the children to get proper and good quality education. Paucity of funds cannot be a ground for the State not to provide quality education to its citizens. It is also important to know that Article 21-A of the Constitution is part of the Basic Structure of the Constitution. [30] Moreover, access to quality education is necessary for the survival of democracy and the development of nation.

In *Federation of Public Schools v. Government of NCT of Delhi* [31] a division bench of the Delhi High Court considered the neighborhood school concept in the context of RTE Act, 2009 and extended the limits of neighborhood for providing admission to children belonging to the Economically Weaker Section (EWS). The Honorable Court issued various guidelines to address the issues of access to the education of EWS. It is apparent from various cases filed in the courts to deny access to the EWS category students in private unaided schools in

26 ASER Education Report,2009 and see also, Anil Boradia Commiitee Report on , "Report of the Committee on implementation of the Right of Children to Free and Compulsory Education Act,2009 and the Resultant Revamp of Sarva Siksha Abhiyan, Ministry of HRD,April,2010.

27(2011) 3 SCC 436.

28 (2011) 8 SCC 737.

29*M.Nagaraj v. UOI*, (2006) 8 SCC 1, para.141.

30 187(2012)DLT184, see generally, Archana Mehendale, Rahul Mukhopadhyay and Annie Namala," Right to Education and Inclusion in Private Unaided Schools An Exploratory Study in Bengaluru and Delhi," VOL L NO 7 Economic & Political weekly, 43-51, 2015, Sadhna Saxena, "Para-Teachers, Education Guarantee Scheme, And PPP Role to Dismantling the Public Education System" in Manoranjan Mohanty (ed.), India Social Development Report 2010 The Land Question and the Marginalized,88-100 , (Oxford, 2011).31 Economic & Political weekly, 17-20, 2009 and for further details see also, Niranajanaradhya. V.P," The Right to Education, Constitution and the Common School System in India," Vol14 Issue 3&4,Nyaya Deep, 55 ,2013.

31 AIR2013 Delhi 52 ,See also, M.P. Raju, "Educational Law" XLIX ASIL513-551(2013)

Delhi. It is pertinent to mention here that these private schools are legally bound to follow Government's direction because majority of them have been allotted land at very concessional rate to cater to the need of EWS people residing in the vicinity of the schools. They are trying to deny the regulation in any possible manner to defeat the very purpose of the RTE Act, 2009. The only purpose of highlighting these cases is to show the efforts of the court to protect the rights of downtrodden people's access in the elite schools of Delhi. The 25 percent quota for the disadvantaged in private schools is still a matter of concern and the debate between the admission and affording the other expenses of the school. The anomalies in the implementation of the same are observed as the education is in the concurrent list and the financial condition and the will and priority of a state also matter in this regard.

In the case of *Social Jurist v. Government of NCT of Delhi* [32] the Delhi High Court observed that the guidelines issued by Government of India and the order issued by Government of NCT did not apply to 75% admission made to nursery classes by private unaided schools, though they do apply to the remaining 25% admissions made by such schools to such classes in view of the proviso to section 12(1) of the RTE Act, 2009. Since, the RTE Act is not applicable to nursery schools, there cannot be any different yardstick to be adopted for education to children up to the age of 14 years irrespective of the fact that it applies to only elementary education. The Court held that it could not be said that if the RTE Act, 2009 did not apply to the 75% of the admission made by private unaided schools to nursery classes that they could charge capitation fee for such admission which is prohibited under section 13 of the Act. The Court took the holistic approach towards regulating the operational issues of elementary education as per the mandate of the Act. Further, the court has rightly suggested the Government to consider the applicability of RTE Act to nursery classes as well, necessary amendment should be considered by the State and the court hoped that the government may take the above observation in right spirit and act accordingly. All these anomalies add to the confusions and are able to defeat the purpose of the RTE Act.

This judgment is trying to resolve various operational issues of admission in unaided private schools and interpreting RTE Act to promote the constitutional mandate which is to provide compulsory quality elementary education on the basis of equal opportunity, regardless of the economic condition of the parents. It also tries to protect the child from the process of screening at the time of admission in various schools. This goal cannot be achieved by the State alone and the private unaided educational institutions are also equal stake holders to provide compulsory elementary education to the children of this country.

32(2012)10 SCC 197.

6. Lack of Infrastructure

In some recent cases the lack of infrastructure in schools has been noted. In *Environmental& Consumer Protection Foundation v. Delhi Administration* [33] the court while considering the PIL held that in order to ensure compliance of Article 21-A of the Constitution, it is imperative that schools must have qualified teachers and basic infrastructures. It is the responsibility of all states for development of infrastructure facilities in view of the right to education under Article 21-A of the Constitution. The court directed that since the court has already issued various directions for proper implementation of the RTE Act, 2009 and frame rules and the States to give effect to various directions already given by the court. In the matter of *Society for Unaided Private Schools of Rajasthan v. Union of India*, the court stressed for providing basic infrastructure in the school as earliest possible to make the dream of RTE a reality and also reiterated that if the directions are not fully implemented, it is open to the judicial scrutiny.

The infrastructural problem has gender dimension too. It is clearly reflected in various reports that the girls drop out even before standard VIII for lack of toilets and other essential gender specific requirements in schools. [34] The ASER, a comprehensive survey of government and private schools in 575 out of 583 rural districts in India, revealed that only 50 percent of government schools have toilets and that four out of 10 government schools did not have separate toilets for girls. Even where there were separate toilets for girls, as many as 12-15 percent were locked and only 30-40 percent was "usable".

If the Right to Education is not to remain merely a paper exercise, policy makers need to delve deep into the broader social and political architecture of our society at the grassroots. [35] Participation rates in education are poor largely because students from disadvantaged groups continue to find it difficult to pursue it. Even when they manage to participate, students suffering from disadvantages of gender, socio-economic status, physical disability, etc. tend to have access to education of considerably lower status schools than access to the best possible education so that they are able to catch up with the rest. [36]

What is more important is the political will for ensuring right to education to the people. However, there is a need to undertake many more micro level studies to generate dependable knowledge on the implementation of the RTE. If we are really concerned with equity, then the state of education especially in government schools is indeed the key to universal education. As we observed, that RTE has been implemented but nothing has changed significantly even in the five years of its implementation. The infrastructure and the student-teacher

33ASER (Annual Status of Education Report) 2009
34Krishna Kumar," why RTE remains a moral Dream",The Hindu,May 21,2011.
35Kiran Bhatty, "Review of Elementary Education Policy in India Has it upheld the Constitutional objective of Equality?", Economic & Political weekly VOL XLIX NOS 43&44, 100- 107, 2014.
36 Jay Tilak Guha Roy, "Right to Education: A Futuristic Perspective ," The Indian Journal of Public Administration, Vol. LVI No.3, 593-597, 2010.

ratio continue to be unsatisfactory.

Another critical issue pertaining to the effective implementation of the RTE Act is the strengthening of education system for the physically and mentally challenged children. [37] The governments should ensure that these children have access to education along with the other children in general whether private or public. The requisite infrastructure must be in place to ensure the access of the differently abled children in schools.

Another grey area in regard to the implementation of the RTE Act relates to fixing up the responsibility of sending children to schools. Section 10 of the Act stipulates that this responsibility lies with the parents. There is no denying that a larger number of parents are not economically capable of discharging this responsibility since it is economically conducive for them to employ their children as labourers and employing them in family works and thereby enhancing their family income, albeit marginally, rather than send them to schools for education. Where there is no guaranteed future out of the elementary/primary/basic education; since higher education is further unaffordable to this group. [38] This is indeed a harsh reality as revealed from the growing problem of child labour in the developing countries including India. If the governments are really committed to implement the RTE Act, they must take necessary measures to address the problem of child labour and also ensure that the parents of these hapless children are provided with adequate financial incentives to send their children to schools. [39] Only then the RTE Act would have discernible and visible impact.

Enacting the RTE Act is easier than implementing it in the spirit of the letter.

Appropriate steps must be taken to improve the quality of education in public schools so as to bring them at par with the eminent private schools to ensure that the poor children have access to better education. Promoting universal education is forthrightly regarded as an effective tool to prevent human rights violations, especially for the children belonging to the poor, illiterate and vulnerable sections of the society. It would also bring about economic and social empowerment of these children in future.

On the basis of above discussion regarding the conflicting conditions in the implementation and non-fulfillment of the desired goals of the RTE Act of

37 Ibid.

38Shantha Sinha," Child Rights and Implication for India's Democracy" in Manoranjan Mohanty (ed.), India Social Development Report 2010 The Land Question and the Marginalized, 70, (Oxford, 2011).

39 For details, see the article by Muchkund Dubey, "Universalizing School Education: A Missed Opportunity", in in ManoranjanMohanty (ed.), India Social Development Report 2010 The Land Question and the Marginalized, 80-87, (Oxford,2011), Pankaj S Jain and Ravindra H Dholakia, "Right to Education Act and Public-Private Partnership," VOL XLV NO 8 Economic & Political weekly, 78-80, 2010 and see also, Padma M Sarangapani, "Quality, Feasibility and Desirability of Low Cost Private Schooling," Economic & Political weekly, VOL XLIV NO 43 67-69, 2009.

2009 following points are suggested for perusal. This is high time to take stock of the situation after the five years of the working of the Act. Some of the suggestions have also been given by other scholars too.

7. Suggestions

1. The recommendation of the Kothari Commission for a common school system should be implemented otherwise the gaps between the haves and have-nots will not only continue but also widen due to commercialization of education by private players.
2. Government could expect well-endowed schools to set up or adopt additional 'free school' children of lower income families in the neighborhood.
3. It can be further suggested that through school and social mapping, we must address the entire gamut of social, economic, cultural, and indeed linguistic and pedagogic issues, factors that prevent children from weaker sections and disadvantaged groups, as also girls, from regularly attending and completing elementary education.
4. The focus must be on the poorest and most vulnerable since these groups are the most disempowered and at the greatest risk of violation or denial of their right to education. We will need to set up systems for equal opportunity for children with special needs. The Rural Development and Panchayati Raj Departments would need to accelerate poverty reduction programmes so that children are freed from domestic chores and wage-earning responsibilities. State Governments must simultaneously ensure that the Panchayati Raj institutions get appropriately involved so that "local authorities" can discharge their functions under the RTE Act. There is need for close cooperation between the NCPCR/SCPCR and the Department to ensure that children get their rights under the RTE Act; consequently India will be able to utilize the fruit of modern developments.

8. Conclusion:

Finally it can be said that making the education a right based activism to solve problem in any way is not going to help because of the feasibility and diverse socio-cultural and economic conditions of India. These create impediments towards the fulfillment of the desired goals set at national and international levels. It losses the focus of time bound implementation too. In this regard the role of judiciary becomes vital. Various interventions and judgments in the matters of the problem assume various new directions and dimensions, and losses its focus to reach at target group. It is not to deny the importance of justice and seeking justice but the pending issues of litigation further complicate the matter. On the basis of some of the case studies it also appears that the role of various national/

state commissions, though greatly helpful in fulfilling their objectives they are sometimes unable to decide effectively and take the desired steps in this matter. The issues related to human rights and/or child rights, positive discrimination etc. are such examples. The various stakeholders involved in the issue of RTE Act, the gap between the target set and achieved, regional variations, funding and resources for its implementation etc. are subjects of further detailed enquiry.

Lok Adalats in India: Speedy Disposals

NUZHAT WANI

"Resolving disputes through Lok Adalat not only minimizes litigation expenditure, it saves valuable time of the parties and their witnesses and also facilitates inexpensive and prompt remedy appropriately to the satisfaction of both the parties"

Justice Ramaswamy

Abstract

This paper examines the role of Lok Adalat in making inexpensive, efficacious and speedy justice accessible to the public. It facilitates amicable settlement of the disputes and helps in reducing pendency of cases in courts. Any conflict is like a disease, the sooner it is resolved the better for all the parties concerned and the society in general. Our Constitution makers emphasized to ensure justice to all even to the poorest of the poor through decentralized process and inexpensive access. The Indian Constitution as a form of social document is a significant symbol of the hopes and aspirations of the people. The Supreme Court in plethora of cases directed the judicial system as well as the legal profession of the country to mould their character in order to fulfill the aspirations of the weaker sections of society and for the long survival of the judicial system as an effective instrument of equal justice. The paper also gives data of disposals of matters through Lok Adalats in the state of J&K.

Key Words: Lok-Adalat, Settlement, Triology, Efficacious justice, Award

Introduction

The concept of Lok Adalat is an innovative Indian contribution to the system of administration of justice. The introduction of Lok Adalats added a new chapter to the justice dispensation system of this country and succeeded in providing a supplementary forum to the victims for satisfactory settlement of their disputes. Now, it is no longer an experiment in India, but it is an effective and efficient, pioneering and palliative alternative mode of dispute settlement which is accepted as a viable, economic, efficient, informal, expeditious form of resolution of disputes.[1]The very concept of settlement of dispute through mediation, negotiation

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1 Jitender N. Bhatt, "A Round Table Justice Through Lok Adalat (People's Court) – A Vibrant ADR in India," (2002) 1 SCC (Jour) 11.

or through arbitral process known as decision of "Nyaya-Panchayat" is conceptualized and institutionalized in the philosophy of Lok Adalat. It involves people who are directly or indirectly involved in or affected by dispute resolution. The institution of Lok Adalat in India, as the very name suggests, means, People's Court. "Lok" stands for "people" and the term "Adalat" means court. India has a long tradition and history of such methods being practiced in the society at grass roots level.

Here, it is necessary to dispel the imputations which normally attach to the expression 'People's Court'. The Lok Adalat is not a people's court in the sense in which it is understood in some other legal system of the Soviet type, although literally translated a Lok Adalat means a people's court. It may be better to call it a court for people, like every court of whatever description is meant for the people. The former word of the term Lok Adalat expresses the concept of public opinion while the latter devoting the accurate and thorough deliberation aspect of decision making. The Lok Adalat is an institution which settles dispute by adopting the principles of justice, equity and fair play. These noble principles are guiding factors for decisions of the Lok Adalats based on compromises to be arrived at before such Adalats. The Lok Adalat is a voluntary mechanism which is mainly concerned with two-fold functions – firstly, it provides a quick, easy, accessible, non-technical, sympathetic and disputant friendly forum to the people for resolution of their and secondly, it helps overcome the hazard of the docket explosion. The Lok Adalat is not a Nyaya Panchayat or Village Nyaya Panchayat of Indian tradition. Further, it is not a Village Panchayat recognised under the Village Panchayat Acts in some States. It is not a Caste Panchayat or Jati Sabba. It is neither a Bench Court nor a statutory tribunal meant to adjudicate or arbitrate. It appears to be a unique institution meant to take care of disputes as they arise between members of whatever section of society and disputes as they go before the court, that is, the pre-litigative and the post-litigative stages. It is only an institution meant to promote voluntary settlement between parties under the auspices of a set of individuals who have, to their credit, certain accomplishment necessary for playing a meaningful role in this process. The Lok Adalat, in its structure and memberships, is conceived in that view. [2]It is an amorphous crowd of concerned citizens animated by a common desire for justice and willing to experiment with consensual models of dispute resolution. The Lok Adalat being an innovative form of a voluntary efforts for amicable settlement of disputes between the parties and not akin to regularly, constituted law courts, is expected to supplement and not to supplant the existing adjudicatory machinery. It is true that initially, the Lok Adalats were organized under the legal services programmes. But, Lok Adalat system is not only a part of the legal aid movement while it is a unique symbol of Indian traditional participatory justice delivery system. Of

2 K. Gupteshwar, "The Statutory Lok Adalat: Its Structure and Role," 30 JILI, 174 at 177-178 (1988). 48. Shiraj Sidhva, "Quick, Informal, Nyaya," LEXET JURIS, 39 (1988).

course, there is no law against it. In fact, all laws and the Constitution demand mutual settlement of disputes which, under any circumstances, is superior to long drawn-out, expensive litigation. There are comparable provisions in the Civil Procedure Code, Criminal Procedure Code and in a variety of special and local laws (Family Court Act, Arbitration Act, etc.) which enable the court to attempt settlements and avoid adjudication whenever possible. The rationale behind such provisions is sound experience which tells us that an adversary adjudication ending up in one party declared the victor and the other the vanquished does not remove the dispute from society and may lead to further disputes or social tensions. On the other hand, mutually agreed settlements through Lok Adalat system contribute to greater social solidarity and better cohesion among disputants.

Origin

Historically, the Indian society was accustomed to a simple, affordable and quicker system of administration of justice. Most of the disputes were settled within the family by the intervention of the head of the tribe. This was followed by village panchayat system where the elderly and noble people of the village would administer justice in a non-formal manner but their decisions were revered by the people. This system continued for a long time although impartiality was questionable in some cases. After the independence of the nation from British yoke the formal judicial hierarchal system, as established by the British was continued for administration of justice which gradually felt the heavy burden of huge number of cases brought therein. The formal dispensation of justice, its expensive and dilatory nature dissatisfied the people and need was felt for economic and faster settlement of disputes. Hence, the birth of Lok Adalats. The concept of Lok Adalats was pushed back into oblivion in last few centuries before independence and particularly during the British regime. Now, this concept has, once again, been rejuvenated. It has, once again, become very popular and familiar amongst litigants. This is the system which has deep roots in Indian legal history and its close allegiance to the culture and perception of justice in Indian ethos. Experience has shown that it is one of the very efficient and important ADRs and most suited to the Indian environment, culture and societal interests. Camps of Lok Adalats were started initially in Gujarat in March 1982 and now it has been extended throughout the Country. The seed of Lok Adalat mechanism was sown in Gujarat which has now grown as a large tree whose branches have been reached in every nook and corner of the country. It is a democratized and alternative form of formal justice delivery system. The evolution of this movement was a part of the strategy to relieve heavy burden on the Courts with pending cases and to give relief to the litigants who were in a queue to get justice. The first Lok Adalat was held on March 14, 1982 at Junagarh in Gujarat, the land of Mahatma Gandhi. Maharashtra commenced the Lok Nyayalaya in 1984. Lok Adalats have been very successful in settlement of motor accident claim cases, matrimonial/family

disputes, labour disputes, disputes relating to public services such as telephone, electricity, bank recovery cases and so on.

Some statistics relating to Lok Adalats in J&K may give us a feeling of tremendous satisfaction and encouragement. In the state of J&K from the year 1998 to up to the year 2014 more than 5163 Lok Adalats have been held and therein more than 326849 cases have been settled, More than Rs 209.37 Crores were distributed by way of compensation to those who had suffered accidents. The following table gives facts and figures regarding the Lok Adalats in J&K.

Year	No. of Lok Adalats held	MACT CASES settled	Total Cases including MACT	Compensation Awarded in MACT Cases
1998	79	576	2763	80985443.00
1999	89	302	2837	27731000.00
2000	132	331	3295	41169000.00
2001	122	239	2069	29737690.00
2002	148	494	2543	62844487.00
2003	234	633	4587	89759714.00
2004	213	527	3555	78779100.00
2005	295	571	3845	77289216.00
2006	376	604	28523	111581640.00
2007	341	756	7415	142381998.00
2008	287	775	12521	136547600.00
2009	287	801	16254	144299777.00
2010	333	551	16582	133961269.00
2011	516	559	13474	120683780.00
2012	569	515	10883	139070999.00
2013	597	1033	63659	321402112.00
2014	545	924	132044	355525145.00
Total	**5163**	**10191**	**326849**	**2093749970.00**
				(Rs209.37crores)

Source: State Legal Service Authority J&K.

Scope and Object

The advent of Legal Services Authorities Act, 1987 gave a statutory status to Lok Adalats, pursuant to the constitutional mandate in Article 39-A of the Constitution of India which contains various provisions for settlement of disputes through Lok Adalat. It is an Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity. Even before the enforcement of the Act, the concept of Lok Adalat had been getting wide acceptance as People's Courts as the very name signifies. The Act has been amended in 2002, with the object to constitute 'Permanent Lok Adalats' for deciding the disputes concerning 'Public Utility Services." The Central or State Authorities have been authorized to establish by notification, Permanent Lok Adalats for determining issues in connection to Public Utility Services. In the Act, various Legal Services Authorities and Committees [3] are authorized to

organize Lok Adalats at such intervals and places for the purpose of settling the various matters. Lok Adalats are empowered for the resolution of all civil and compoundable criminal cases at pre-litigation as well as at pending litigation stage by way of conciliation, persuation and negotiation between the disputants. The disputes are settled on the basis of major human percepts of equity, good conscience, and natural justice. When statutory recognition had been given to Lok Adalat, it was specifically provided that the award passed by the Lok Adalat formulating the terms of compromise will have the force of decree of a court which can be executed as a civil court decree. The evolution of movement called Lok Adalat was a part of the strategy to relieve heavy burden on the courts with pending cases and to give relief to the litigants in a quick and economic manner.. The organization of Lok Adalats was to secure that the operation of the legal system promotes justice on a basis of equal opportunity. This is much desirable as the regular law courts are overworked with the large number of cases. There are mainly four problems faced by the regular law courts.

- The number of courts and judges in all grades are alarmingly inadequate.
- Increase in flow of cases in recent years due to multifarious Acts enacted by the Central and State Governments.
- The high cost involved in prosecuting or defending a case in a court of law, due to heavy court fee, lawyer's fee and incidental charges.
- Delay in disposal of cases resulting in huge pendency in all the courts.

These drawbacks gave further impetus to the institution of Lok Adalats as a means to provide fast and economical justice.

Cases Suitable for Lok Adalat

Lok Adalats have competence to deal with a number of cases like:

- Compoundable civil, revenue and criminal cases.
- Motor accident compensation claims cases
- Partition Claims
- Damages Cases
- Matrimonial and family disputes
- Mutation of lands case
- Land Pattas cases
- Bonded Labour cases
- Land acquisition disputes
- Bank's unpaid loan cases

3 Every State Legal Services Authority or District Legal Services Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or Taluk Legal Services Committee

- Arrears of retirement benefits cases
- Family Court cases
- Cases which are not sub-judice

Jurisdiction of Lok Adalat

A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of:

(i) any case pending before; or

(ii) any matter which is falling within the jurisdiction of, and is not brought before, any court for which the Lok Adalat is organised.

The Lok Adalat can compromise and settle even criminal cases, which are compoundable under the relevant laws.

Organisation of Lok Adalat

The State Authority and District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee and Taluk Legal Services Committee (mentioned in Section 19 of the Act) can organize Lok Adalats at such intervals and Permanent Lok Adalats as may be deemed fit.

Every Lok Adalat so organized shall consist of:

(a) Serving or retired judicial officers,

(b) Other persons, as may be specified.

The experience and qualification of "other persons" in a Lok Adalat conducted by Supreme Court Legal Services Committee shall be prescribed by the Central Government in consultation with the Chief Justice of India. At present, Rule 13 of the National Legal Services Authorities Rules, 1995 prescribes such experience and qualifications as:

A. A member of the legal profession; or

B. A person of repute who is specially interested in the implementation of the Legal Services Schemes and Programmes; or

C. An eminent social worker who is engaged in the upliftment of weaker sections of people, including Scheduled Castes, Scheduled Tribes, women, children, rural and urban labour.

The experience and qualification of "other persons" mentioned in clause (b) shall be prescribed by the State Government in consultation with the Chief Justice of High Court.

Cognizance of Pending Cases and Determination

Cognizance can be taken by the Lok Adalat in the following circumstances

A. On Application:

- When all the parties to the case agree for referring the case to Lok Adalat, or

- When one of the party to the case makes an application to court, praying to refer the case to Lok Adalat and the court is prima facie satisfied that there are chances for settlement

B. **Suo Moto:**

- Where the court is satisfied that the matter is an appropriate one to be taken cognizance of, by the Lok Adalat, then the court shall refer the case to the Lok Adalat, after giving a reasonable opportunity for hearing to all the parties. Further, the Authority or Committee organising Lok Adalat may, on application from any party to a dispute, refer the said dispute to Lok Adalat, after giving a reasonable opportunity of hearing to all the parties.
- Lok Adalat shall proceed to dispose of a case refereed to it expeditiously. It shall be guided by principles of law, justice, equity and fair play. It shall yearn to reach a settlement or compromise between parties.
- When no compromise or settlement is accomplished, the case is to be returned to the court which referred it. Then the case will proceed in the court from the stage immediately before the reference.

Nature and status of Awards

- Every award of Lok Adalat shall be deemed to be a decree of a civil court.
- Every award shall be signed by all the parties to the dispute and the panel constituting the Lok Adalat.
- Every award shall form part of the judicial records.
- Every award shall be categorical and lucid.
- Every award shall be in the regional language or in English.
- A certified copy of the award will be given free of cost, to all the parties.
- Every award made by Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.
- If a pending case is settled at Lok Adalat, any court fee already paid will be refunded as provided by the Court Fees Act, 1870.

Powers of Lok Adalat

i) The Lok Adalat shall have the powers of a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters:-

- Power to summon and enforce the attendance of any witness and to examine him/her on oath.

- Power to enforce the discovery and production of any document.
- Power to receive evidence on affidavits.
- Power for requisitioning of any public record or document or copy thereof or from any court.
- Such other matters as may be prescribed.

ii) Every Lok Adalat shall have the power to specify its own procedure for the determination of any dispute coming before it.

iii) All proceedings before a Lok Adalat shall be deemed to be judicial proceedings within the meaning of Sections 193, 219 and 228 of IPC.

iv) Every Lok Adalat shall be deemed to be a Civil Court for the purpose of Sec 195 and Chapter XXVI of Cr.P.C.

Constitutional Mandate

Our Constitution makers emphasize to ensure justice to all, even to the poorest of the poor through decentralized process and inexpensive access. The Indian Constitution as a form of social document is a significant symbol of the hopes and aspirations of the people. It is intended by the makers of the Constitution that the largees of law must belong to all, not, as now, to those who use the Constitution for unconstitutional ends. They were quite hopeful that the poor and the needy must not be at the victims end but at the consumers end. In the light of these Constitutional mandates, the modern version of Lok Adalat arose out of the concern expressed by the committees setup to report on organising legal aid to the needy and poor people and the alarm generated by judicial circle on mounting arrears of cases pending for long time at different levels in the court system. In order to achieve this holy goal, the framers of the Constitution prescribed the mandate for social, economic and political justice, in its Preamble. The philosophy of equality enshrined in Article 14 of the constitution says that the State shall not deny to any person equality before law or the equal protection of laws within the territory of India.

But, in reality, the guarantee of equality before law does not provide any satisfaction to a poor man if there is no one to tell him what the law is or that the courts are open to him on equal terms as to other rich persons. But, in fact, the principle of equality before law can really be made meaningful only when the price of admission to opportunities for justice can be equally paid. There can hardly be equal access to justice where one litigant is rich and other poor because the rich litigant may purchase justice with his heavy purse while the poor can not do so. So long as socio-economic and other forms of inequality exist, the implementation of national charter becomes impossible, until or unless we evolve the process of administration of justice where the economic differences is not a

4S.A. Khan; Lok Adalat: An Effective Alternative Dispute Resolution Mechanism, 41(2006).

factor for getting justice. Expenses, which can only be affordable by parties with strong economic capacities, create an unfortunate situation for the poor litigants where they are getting priced out of court. The dispensation of justice has thus become lopsided. As a result, millions of socially and economically exploited people of the country have badly lost their trust over the existing legal system. The basic rights as enshrined in the national character become meaningless to those people. Thus, in reality equal justice for them is nothing but a formal promise. [4]The Supreme Court of India expressed its views while interpreting the philosophy of rule of law envisaged in Article 14 of our National Charter and observed, [5]

> "*The rule of law does not mean that the protection of laws must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the rule of law is meant for them also, though today it exists only on papers and not in reality.... So far the Courts have been used only for the purpose of vindicating the rights of the wealthy and the affluent. It is only those privileged classes which have been able to approach the Courts for protecting their vested interests. It is only the moneyed who have so far had the golden key to unlock the doors of justice.... They have been crying for justice but their cries have so far been in the wilderness. They have been suffering injustice silently.... But time has now come when the Courts must become the Courts for the poor and struggling masses of this country. . . . It is true that there are large arrears pending in the Courts, but that cannot be any reason for denying access to justice to the poor and weaker section of the community. No State has right to tell its citizens that because a number of cases of the rich and the well-to-do are pending in our courts, we will not help the poor to come to the courts for seeking justice until the staggering load of cases of people who can afford, is disposed of."*

Judicial Response

The Supreme Court in plethora of cases [6] directed to the judicial system as

5 See *People's Union for Democratic Rights. v. Union of India*, AIR 1982 SC 1473 at 1478*; Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802

6 See *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675 and AIR 1980 SC 1579; *Babu Singh v. State of U.P.*, AIR 1978 SC 527; *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1369; *Raghubir Singh v. State of Haryana*, AIR 1980 SC 1087; *People's Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473 and *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

well as to the legal profession of the country to mould their character in order to fulfil the aspirations of the weaker sections of society and for the long survival of the judicial system as an effective instrument of equal justice. In this regard Article 38 of the Constitution refers to social, economic and political justice. This article emphasizes that the State should strive to promote the welfare of people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political, shall be implemented in all the institutions of the national life. The State has been directed, in particular, to strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. The spirit of Article 38 intends to secure to all its citizens, triology of justice-social, economic and political. The framers of the Constitution wished to secure triology of justice because they knew that political freedom without socio-economic justice is meaningless. The true meaning of triology of justice can be construed in its three wings, social justice demands eradication of social inequalities based on caste, colour, race, creed, etc., economic justice rules out distinction from man to man formed on the basis of economic conditions, and political justice refers to the absence of arbitrary treatment of citizens in the political spheres.

In the case of *Hossainara Khatoon v. State of Bihar*, [7]the Apex Court held that the right to free legal services is an essential ingredient of reasonable, fair and just procedure to an accused. The court directed to the Central Government and the State Government to introduce the comprehensive legal service programme in the country. Because, it is not only a mandate of equal justice implicit in Article 14 and right to life and personal liberty conferred by Article 21, but also the compulsion of the Constitutional directive embodied in Article 39-A. Similarly, several land mark judicial pronouncements [8] have been made by the Apex Court in which the Court declared the right to free legal aid and speedy trial as fundamental rights under Article 21. The principles of equal justice and right to live with human dignity, therefore, can only be implemented when the law works in favour of weak and can afford him an opportunity to have an access to courts. Access to courts does not mean to give permission to enter into court rooms but in reality it means to provide an opportunity to seek justice to all irrespective of their socio-economic differences. Although Article 14 and 21 do not directly state about establishment of Lok Adalats but it is as interpreted by the Apex Court, directing the State to create such conditions whereby existing

7 AIR 1979 SC 1369

8 See *M.H. Hoskot v. State of Maharashtra*, AIR 1978 SC 1548; *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *State of Haryana v. Darshana Devi*, AIR 1979 SC 855; *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579; *Khatri v. State of Bihar*, AIR 1981 SC 928; *Gopalanachari v. State of Kerala*, AIR 1981 SC 674; *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378; *Sukhdas v. Union Territory of Arunachal Pradesh*, AIR 1986 SC 991; and *A.R. Antulay v. R.S.Nayak*, (1992) SCC 225

economic inequalities are removed and justice in its true perspective is implemented through effective justice delivery system, as Lok Adalat. Therefore, the Constitution mandates the urgent requirement of effective and even handed justice delivery machinery not only for protection of the rights of people but also for the progressive march of the Nation, its integrity and unity, its guarantee of legality and equality.

Conclusion

Lok Adalats, as it has been again and again reiterated throughout this paper, serve very crucial functions in a country due to many factors like pending cases, illiteracy etc. The Lok Adalat was a historic necessity in a country like India where illiteracy dominated about all aspects of governance. The most desired function of Lok Adalats may seem to be clearing the backlog, with the latest report showing 3 crore pending cases in Indian courts but the other functions cannot be ignored. The concept of Lok Adalat has been a success in practice. Lok Adalats play a very important role to advance and strengthen "equal access to justice", the heart of the Constitution of India. This Indian contribution to world ADR jurisprudence needs to be taken full advantage of. Maximum number of Lok Adalats need to be organized to achieve the Gandhian Principle of Gram Swaraj and "access to justice for all". During the last few years Lok Adalat has been found to be a successful tool of alternate dispute resolution in India. It is most popular and effective because of its innovative nature and inexpensive style. The facts and figures of disposals of matters in J&K is encouraging. The system received wide acceptance not only from the litigants, but from the public and legal functionaries in general. Therefore, it may be concluded that the system of Lok Adalat coupled with free legal aid to eligible persons serves very noble cause which has helped judiciary not only in speedy disposal of cases but has given some relief to the litigant, particularly to those who are poor and cannot afford to claim their right through courts of law.

Surrogacy in India: Legal and Ethical Issues

Dr. Mudasir A. Bhat*

Abstract

Surrogacy is simply an arrangement of reproduction in which a surrogate woman agrees on a fee to carry pregnancy for intended parents. A study backed by the United Nations in 2012 estimates that surrogacy is a more than $400 million annual business in India. The Indian Council of Medical Research(ICMR) which is working under the Ministry of Health and Family Welfare finalised in 2005 the National Guidelines for Accreditation, Supervision and Regulation of Assissted Reproductive Technology (ART) Clinics in India. Under these non-statutory ICMR guidelines, there was no legal bar for the use of Assisted Reproductive Technology (ART) by a single or an unmarried woman. Thereafter, draft Bills and Rules of 2008 and 2010 were extensively circulated for public opinion. However, the 2013 Bill was not circulated or placed in the public domain. The issue of commercial surrogacy is a complex which needs proper checks and balances. Till date there is no legislation regulating this complex issue. Thus, keeping in view the various moral and ethical issues relating to surrogacy, Assisted Reproductive Technology legislation needs to be enacted. This article highlights an assessment of the current availability and accessibility of surrogacy mechanisms and regulations in India.

Keywords: Surrogacy; Assisted Reproductive Technology; ICMR Guidelines, Assisted Reproductive Technology (Regulation) Bill; 228 th Law Commission Report.

Introduction

In the age of globalisation, from computer support and hotel reservations to laboratory results and radiographic interpretations, it seems everything can be outsourced. One would not think so with parenthood, especially motherhood, a fundamental activity that humans have historically preserved as personal and private. However, in this modern era, the advent and accessibility of assisted reproductive technologies and the ease with which they have traversed global borders, has fundamentally altered the meaning of childbearing and parenting. The child now is not only procreated through conception from sexual intercourse,

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gestation, or adoption, but also with the help of complex reproductive technologies. [1] Surrogate parenting is an arrangement in which one or more persons, typically a married infertile couple (the intended rearing parents), contract with a woman to gestate a child for them and then to relinquish it to them after birth. Surrogate parenting is also sometimes referred to as contract pregnancy. [2]

Conceptual Dimensions

Mythological surrogate mothers are well known in India. Yashoda played mother to Krishna though Devki and Vasudeva were the biological parents. Likewise, in India mythology Gandhari made Dhritarashtra the proud father of 100 children though he had no biological relation with them. [3]

In this modern era, glamour now promotes surrogacy. British pop star Elton John and his Canadian film-maker partner David Furnish became parents of a baby boy born to a surrogate mother in California while our own Indian film star Amir Khan and Kiran Rao obtained a child through surrogacy aided by in-vitro fertilization. [4]

Surrogacy has become an essential component of the flourishing larger fertility industry. Not surprisingly, commercial surrogacy has assumed industrial proportions and India has emerged as the global destination for not only ART procedures, but also surrogate arrangements. In the absence of any kind of regulatory and monitoring mechanism of ARTs in India, it is difficult to arrive at the exact magnitude in regard to the existing surrogacy business. Currently, there are no international and national estimates regarding the number of children born through surrogacy procedures. However, sharp rise in the number of surrogacy arrangements are significant indicators of the spread of the commercial surrogacy industry. [5]

Types of Surrogacy

Surrogacy is often portrayed by the fertility industry as a win-win situation for the intended parents (IPs) as well as the surrogate, with the clinics and providers being the nucleus of the arrangements. The transaction is seen as equitable: the commissioning couple gets the child they desperately want and the surrogate receives the amount of money that might not be otherwise possible for her or her family to obtain. [6] The surrogacy procedures are very complicated and need expertise. The assisted child conception in surrogacy clinics can be

[1] Sayantani Das Gupta & Shamita Das Gupta, *Globalisation and Transnational Surrogacy in India: Outsourcing Life*, Lexington Books, (2014), p. xiii.
[2] For details see: *http://www.iep.utm.edu/surr-par/*, (Accessed on 28.01.215).
[3] Anil Malhotra & Ranjit Malhotra, *Surrogacy in India - A Law in the Making*, Universal Law Publishing Co. Pvt. Ltd., (2013), p. 29.
[4] *Id.* at 8.
[5] *Supra* note 1 at 2.
[6] *Id.* at 3.

done in any one of the following procedures:

- **Gestational Surrogacy**

A surrogate is implanted with an embryo created by in vitro fertilisation (IVF), using the egg and sperm of the intended parents. The resulting child is genetically related to the intended parents, and genetically unrelated to the surrogate. [7]

- **Gestational Surrogacy and Egg Donation**

A surrogate is implanted with an embryo created by IVF, using intended father's sperm and a donor egg. The resulting child is genetically related to intended father and genetically unrelated to the surrogate. [8]

- **Gestational Surrogacy and Donor Sperm**

A surrogate is implanted with an embryo created by IVF, using intended mother's egg and donor sperm. The resulting child is genetically related to intended mother and genetically unrelated to the surrogate. [9]

- **Gestational Surrogacy and Donor Embryo**

A donor embryo is implanted in a surrogate; such embryos may be available when others undergoing IVF have embryos left over, which they opt to donate to others. The resulting child is genetically unrelated to the intended parent(s) and genetically unrelated to the surrogate. [10]

- **Traditional Surrogacy**

This involves naturally or artificially inseminating a surrogate with intended father's sperm via IVF or home insemination. With this method, the resulting child is genetically related to intended father and genetically related to the surrogate. [11]

Indian Council of Medical Research Guidelines

The Indian Council of Medical Research has given guidelines in the year 2005 regulating Assisted Reproductive Technology procedures. The Law Commission of India submitted the 228 [th] report on Assisted Reproductive Technology [12] procedures discussing the importance and need for surrogacy, and also the steps taken to control surrogacy arrangements. [13] The following

[7] For details see: *http://en.wikipedia.org/wiki/Surrogacy*, (Accessed on 29.01.215)
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] On 5th of August, 2009 the Law Commission of India submitted the 228th Law Commission Report titled "Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy" to the Union Minister of Law and Justice, Ministry of Law and Justice, Government of India. The report expressed the view of the Law Commission on the Indian Counsel for Medical Research Guidelines 2005 on Surrogacy, the draft Assisted Reproductive Technology (Regulation) Bill and Rules 2008 and the Seminar on "Surrogacy – Bane or Boon". The report had also made recommendations to be kept in mind while legislating on surrogacy.

observations had been made by the Law Commission of India:

- Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes. [14]
- A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of both to take delivery of the child. [15]
- A surrogacy contract should necessarily take care of life insurance cover for surrogate mother. [16]
- One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different. [17]
- Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian. [18]
- The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only. [19]
- Right to privacy of donor as well as surrogate mother should be protected. [20]
- Sex-selective surrogacy should be prohibited. [21]

The Assisted Reproductive Technology (Regulation) Bill, 2013

To regulate the mushrooming business of commercial surrogacy cases in India and the challenges that the surrogacy will face in the future, the Government of India decided to come up with a legislation which will govern the surrogacy in

[13] For details see: *http://en.wikipedia.org/wiki/Commercial_surrogacy_in_India,* (Accessed on 28.01.215)
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*

India. The Assisted Reproductive Technology (Regulation) Bill, 2013 is an amended version of the draft Bills of 2008 and 2010, which themselves were based on the guidelines, framed by the Indian Council of Medical Research (ICMR) in 2005. [22] The said bill is still pending with the government and has not yet been presented in the parliament. The proposed draft has taken into consideration various aspects of surrogacy. Some of the features of the proposed Bill are as under:

- Constitution of an authority at National level and State level to register and regulate the IVF clinics and ART clinics. [23]
- Registration and accreditation of ART clinics. [24]
- Creation of a forum to file complaints for grievances against clinics and ART clinics. [25]
- Imposing duties and responsibilities on the clinics and ART clinics. [26]
- Regulations for sourcing, storage, handling, record keeping of Gametes, Embryos and other human reproductive materials. [27]
- Placing rights and duties on patients, donors, surrogates and children. [28]
- Imposing stringent penalties for breach of the duties and regulations. [29]

The Critical Evaluation of the ART Bill, 2013

It is not wrong to say, if we call India as 'surrogate motherhood capital' of the world. India has become a favourite destination for the childless couples to get their child procreated by way of assisted reproductive techniques on cheap prices. In order to regulate the booming commercial surrogacy in India the Assisted Reproductive Technology (Regulation) Bill, 2013 is a welcome step in this direction. However, pending bill before the parliament is not free from loopholes.

First and foremost it lacks setting the standards for medical practice and completely ignores the regulation of the third party agents who play pivotal role in arranging surrogates such as surrogacy agents, tourism operators and surrogacy home operators. The present draft defines "Couple" as a relationship between a male person and female person who live together in a shared household through a relationship in the nature of marriage. Therefore, the Bill has confined itself to provision of ARTs within a hetero normative framework. It is also clear that as per the definition gay couple(s) cannot access ARTs in India, once the Bill is implemented. The current clause in the Draft Bill is discriminatory, baseless,

[22]For details see: *http://indianexpress.com/article/india/india-others/art-bill-on-ivf-may-come-up-in-winter-sess ion/,* (Accessed on 29.01.2015).
[23] Assisted Reproductive Technology (Regulation) Bill, 2013, Sections 3-12.
[24] *Id.* Section 13.
[25] *Id.* Section 16.
[26] *Id.* Sections 20-25.
[27] *Id.* Sections 26-29.
[28] *Id.* Sections 32-36.
[29] *Id.* Sections 37-42.

and a violation of rights to equality, freedom, and reproduction. The Draft Bill should clearly list the various health risks and adverse outcomes of these technologies. The present draft does mention that ART procedure carry health risks both to the mother and child, there is no listing of the risks and adverse outcomes of these technologies for children. [30]

International Perspective

The legal aspects surrounding surrogacy are complex, diverse and mostly unsettled. In most of the countries, the woman giving birth to a child is considered as the child's legal mother. However, in very few countries, the Intended Parents (IP's) are recognized as the legal parents from birth by the virtue of the fact that the surrogate has contracted to give the birth of the child for the commissioned parents. [31] The position of surrogacy laws in various countries may be summarised as under:

Australia

In all the states of Australia, the surrogate mother is considered by the law to be the legal mother of the child and any surrogacy agreement giving custody to others is void and unenforceable in the courts of Law. In addition in all states and the Australian Capital Territory arranging commercial surrogacy is a criminal offence. Usually couples who make surrogacy arrangements in Australia must adopt the child rather than being recognized as birth parents, particularly if the surrogate mother is married. The state of, Victoria changed their legislation since January 1st, 2010, under the Assisted Reproductive Treatment Act, 2008, to make altruistic surrogacy within the state legal, however commercial surrogacy is still illegal. [32]

Canada

Altruistic surrogacy remains legal in Canada. However, commercial surrogacy is prohibited under the Assisted Human Reproduction Act, 2004. [33]

France

In France, since 1994 any surrogacy arrangement whether it is commercial or altruistic is illegal, unlawful and prohibited by the law. [34]

Israel

Israel the first country in the world to implement a form of state-controlled surrogacy in which each and every contract must be approved directly by the

[30] Arti Dhar, Gaps in Surrogacy Bill, *The Hindu*, October 27, 2013.
[31] For details see: *http://www.surrogacylawsindia.com/legality.php?id=%207&menu_id=71,* (Accessed on 30. 01.2015)
[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*

state. In March 1996, the Israeli government legalized gestational surrogacy under the "Embryo Carrying Agreements Law." Surrogacy arrangements are permitted only to Israeli citizens who share the same religion. Surrogates must be single, widowed or divorced and only infertile heterosexual couples are allowed to hire surrogates. Due to the numerous restrictions on surrogacy under Israeli law, the Israeli intended parents have turned to international surrogacy. [35]

Japan

In March 2008, the Science Council of Japan proposed a ban on surrogacy and said that doctors, agents and their clients should be punished for commercial surrogacy arrangements. [36]

United Kingdom

Surrogacy arrangements have been legal in the United Kingdom since 2009. Whilst it is illegal in the UK to pay more than expenses for a surrogacy, the relationship can be recognized under Section 30 of the Human Fertilization and Embryology Act, 1990 under which a court may make parental orders similar to adoption orders. [37]

United States of America

Many states have their own state laws written regarding the legality of surrogate parenting. It is most common for surrogates to reside in Florida and California due to the surrogacy-accommodating laws in these states. With the accommodating laws of the State of California and the long overseas deployments of husbands, wives have found surrogacy to be a means to supplement military incomes and to provide a needed service. It is illegal to hire a surrogate in New York, and even embryonic transfers may not be done in New York. [38]

Legal Issues involved in Surrogacy

As of 2013, locations where a woman could legally be paid to carry another's child through IVF and embryo transfer included India, Georgia, Russia, Thailand, Ukraine and a few U.S. states. [39] The legal aspects of surrogacy in any particular jurisdiction tend to hinge on a few central questions:

- Are surrogacy agreements enforceable, void or prohibited? Does it make a difference whether the surrogate mother is paid (commercial) or simply reimbursed for expenses (altruistic)? [40]
- What, if any, difference does it make whether the surrogacy is traditional or gestational? [41]

[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*
[39] *Supra* note 7.
[40] *Ibid.*
[41] *Ibid.*

- Is there an alternative to post-birth adoption for the recognition of the intended parents as the legal parents, either before or after the birth? [42]

Ethical Issues involved in Surrogacy

Ethical issues that have been raised with regards to surrogacy procedures include:

- To what extent should society be concerned about exploitation, commodification, and/or coercion when women are paid to be pregnant and deliver babies, especially in cases where there are large wealth and power differentials between intended parents and surrogates? [43]
- To what extent is it right for society to permit women to make contracts about the use of their bodies? [44]
- To what extent is it a woman's human right to make contracts regarding the use of her body?
- Is contracting for surrogacy more like contracting for employment/labor, or more like contracting for prostitution, or more like contracting for slavery?
- Which, if any, of these kinds of contracts should be enforceable?
- Should the state be able to force a woman to carry out "specific performance" of her contract if that requires her to give birth to an embryo she would like to abort, or to abort an embryo she would like to carry to term?
- What does motherhood mean? [45]
- What is the relationship between genetic motherhood, gestational motherhood, and social motherhood?
- Is it possible to socially or legally conceive of multiple modes of motherhood and/or the recognition of multiple mothers?
- Should a child born via surrogacy have the right to know the identity of any/ all of the people involved in that child's conception and delivery? [46]

Judiciary on Surrogacy

The Hon'ble Supreme Court of India in *Baby Manji Yamada v. Union Of India*[47] took due notice that in cases of "commercial surrogacy," an intended parent may be a single male. The Court had the occasion to consider the petition of a Japanese grandmother wanting issuance of a travel document for her Japanese divorced son's daughter. In another case decided by the Gujarat High Court in *Jan Balaz v. Union of India* [48], the decision of the High Court holding that babies born in India to gestational surrogates are Indian citizens and are entitled to Indian

[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.*
[46] *Ibid.*
[47] AIR 2009 SC 84.
[48] AIR 2010 Guj 21.

passports has been stayed by the Supreme Court. However, the twin German children in the case were permitted to leave India upon the directions of the Apex Court.

The main issue of nationality and citizenship, being of grave concern, is still hanging in air. According to the guidelines issued by the Ministry of Home Affairs in July 9, 2012, surrogacy is restricted to foreign nationals; i.e. a man and a woman married for at least two years would be required to take a medical visa for surrogacy in India. As of now, even though surrogacy is an administrative concern and in the domain of the Ministry of Health, it has been decided that till the enactment of a law on the ART Bill, 2013, the guidelines issued by the MHA will prevail till then. Hence, foreign single parent surrogacy is barren. Restricting surrogacy to infertile Indian married couples only, and debarring all foreigners other than OCIs (Overseas Citizenship of India), PIOs (Person of Indian Origin) and NRI (Non-resident Indian) married couples, is a turnaround in the thought process. [49]

Very recently Supreme Court in *Stephanie Joan Becker v. State* [50] permitted a single 53-year-old lady to adopt a female orphan child aged 10 by relaxing the rigour of the guidelines of the Central Adoption Resource Authority (CARA). It said the proposed adoption would be beneficial to the child as experts were of the view that the adoption process would end in successful blending of the child in the U.S. Likewise, the court in *Shabnam Hashmi v. Union of India* [51], upheld the recognition of the right to adopt and to be adopted as a fundamental right. It held that every person, irrespective of the religion he/she professes, is entitled to adopt. The latest verdict of the Supreme Court recognising transgenders as the third gender says "discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution." Clearly, legal recognition means that they would be entitled to rights of adoption, succession, inheritance and other privileges under law. [52]

Conclusion

To sum up, it is pertinent to discuss in detail the various dimensions of the surrogacy arrangements before the parliament passes a pending bill on Assisted Reproductive Techniques. The Government of India should constitute a body of experts with the joint assistance of the Ministry of Home Affairs (MHA) and the Ministry of Health and Family Welfare besides involving legal experts to stream line the thought process in carving out a policy decision of the Government of

[49] Anil Malhotra, Ending Discrimination in Surrogacy Laws, *The Hindu*, May 3, 2014.
[50] (2013) 12 SCC 786.
[51] (2014) 4 SCC 1.
[52] *Supra* note 49.

India by taking a uniform and unanimous decision on various aspects of commercial surrogacy. [53] The ban on the mushrooming growth of the surrogacy procedures in our country is not a solution to the issue. The conception of child by way of assisted reproductive techniques is a hope of infertile couples. However, commercial surrogacy needs to be regulated in a holistic approach by enacting a law with proper checks and balances.

[53] *Supra* note 3 at 109.

Alternate Dispute Resolutions; An Appraisal

Mohd Younis Bhat *

"We are moving towards the time when it will be impossible for the courts to cope up with the dockets. If something is not done, the result will be a production of line of justice that none of us would want to see"

Magna Carta [1]

Abstract

Article 39 A of the Constitution of India enjoins that the State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity and shall in particular, provide free legal aid, by suitable legislation or schemes, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. This being said, in India arbitration and mediation have been in vogue since long. The endeavour is made for the readers to ponder over the little ideas cited in this paper. This paper is brief accumulation of perspectives only to ignite the spirit of harmonious settlement of disputes among people.

Introduction

Resolution of disputes is an essential characteristic for societal peace, amity, comity, harmony and easy access to justice. [2] Peace is *sine qua non* for development. Disputes and conflicts dissipate valuable time, effort, and money of the society. Justice is the foundation and object of any civilized society. The quest of justice has been an ideal which mankind has been aspiring for generations down the line. In every civilization, and India is no exception, pursuit of justice is instinctive. It is an individual and societal instinct and every society strives to attain it through its legal system.[3] The degree of perfection attained by legal

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[1] The Seven hundred years old clarion call of the Magna Carta- To no one will we sell, to no one will we refuse or delay the right to justice very pertinently embodies the principle of legal aid.

[2] Jitendra N. Bhatt , Round Table Justice Through Lok- Adalat (Peoples' Court) – A Vibrant- Adr- In India ,(2002) 1 SCC (Jour) 11.

[3] In California, for example, though ADR was introduced to civil trials only two decades ago, today 94% of the cases are referred for settlement through ADR and 46% of such cases are settled without contest. The Northern District of California is one of ten federal district courts authorised by 28 U.S.C. to establish a mandatory , non- binding court annexed arbitration programme. The result is that California has been able to decide civil cases within less than two years from the date of filing, compared with decades in India. Since the enactment in 1990 of the Civil Justice Reform Act in the U.S., there has been tremendous growth in the creation of ADR programs

system may be measured by the extent to which it exists in good instinct for justice system to express itself and to find its fulfilment. Not every legal system succeeds in this goal. Sometimes a legal system fails to achieve its purpose because of defects and deficiencies in its substantive laws and sometimes mainly because of its procedural rules' infirmities. Fortunately, the judicial system in India is well organised, and has been able to develop a system of alternate dispute resolution (ADR). The need for fast and equitable dispute resolution is what has lead nations around the world to adopt various manifestations of ADR [4] including India. In- deed, the emergence of ADR has become what some label as a "global necessity" as judicial backlog proliferates. Alternate dispute resolution (ADR) is assuming significance worldwide and the adversarial system of justice delivery is embracing it and substantially incorporating its features. Mediation as an ADR is not a rehearsal trial in front of a judge but a dialogue that help the parties to identify and shape their preferred outcomes. ADR procedures need to retain their distinctive features in order to gain and maintain faith and confidence of stake holders. The local legal history of Jammu and Kashmir demonstrates that mediation as an alternative to litigation has been tested a century earlier and has shown remarkable results. Integrating these local historical lessons with the modern scholarly research of adversarial jurisdiction, this paper examines in detail the legal frame work of the subject.

India has had a very strong history of ADR. In fact ADR is quite strong in Asian countries. It has developed in the west only in the recent past. The irony is that India is importing ADR techniques from west inspite of its strong history of using ADR. Lok Adalat is not a new concept in India. ADR has been an integral part of India's historical past like zero. The evolution of the system can be traced back to the Vedic times. Since times immemorial, with minor variations, there have been instances of people's courts in several Indian villages, imparting justice to myriads of people with little or no access to formal courts. References of the Lok Adalat system were found in classics of Kautilya, Gautama, Brihaspati and Yaganavalkya. Known by names such as *kula, sreni and gana*, the Lok Adalat concept was substantially the same, albeit with minor variations in the administration. The concept of Lok Adalat in India, as the very name suggests, means Peoples Court. India has a long tradition and history of such methods being practiced in the society at grass root level. These are called Panchayat and in legal terminology, these are called arbitration. These are widely used in India for resolution of disputes both commercial and non-commercial. Other alternative methods being used are Lok Adalat (Peoples Court), where justice is dispensed summarily without too much emphasis on legal technicalities.

Mediatory —Dispute resolution: Historical lesson from "the valley of Kashmir"

[4] Supra, note. 2

The local history of Jammu and Kashmir is replete with instances which amply demonstrate that ADR methods have been used in the state even after the introduction of adversarial systems of justice delivery. Use of ADR techniques have shown remarkable results in the past and people have well taken it as a part of their indigenous culture. Walter R. Lawrence- the settlement commissioner of Kashmir during the years 1890-1895 (A.D), while giving an account of his unique mediatory method of dispute resolution in Kashmir prefers ADR methods against court litigation for the following reasons: [5] -

"Since 1890 all suits connected with land, saving land situated within Srinagar and few adjoining villages have been removed from the ordinary courts and have made over to me for decision. My procedure has been to hear and decide such suits in the villages where the claim has arisen. Under a chinar tree in the presence of the assembled villagers, the claimant prefers his suit and the defendant makes his reply. Then the old men of the village and the headmen of the neighbourhood give their opinion on the case, and a brief entry is made by me which finally settles the claim. This may seem very rough and ready way of disposing of land suits, but so far no one has ever appealed against my decision. If a claimant went to the courts in Srinagar the dark side of the character would appear. Pleaders and court attendants would adulterate his simple claim and in the same way defendant would throw the candour and truthfulness inspired by the presence of his neighbours in the village, and would lie in the most ingenious and surprising manner. For five years this procedure has gone on, and I attribute much of the quiet prosperity which is now growing in the villages, to the fact that money is not spend and bad blood is not engendered by litigation. My system is the old system of the village panchayat. The commonest intellect can tell from the faces of the villagers whether the claim is just and the 'genius loci" seems to keep both claimant and defendant to the point and to the truth. The system is easy and possible in Kashmir, for one can reach any village in the valley in day's ride.

My object in alluding to this procedure is to add further testimony to the fact that Kashmiri peasants are not dishonest. If they had been the hopeless liars they are reputed to be, I could never have disposed of the many suits which have arisen. A Kashmiri will rarely lie when he is confronted in his village by his fellow villagers; he will invariably lie when he enters the murky atmosphere of Law courts…." [6]

This paper emphasizes that mediation reveals, that in the traditional adversarial system, in which lawyers both litigate and negotiate, tends to promote stalemate instead of creative dispute resolution. Consciously or otherwise, lawyers may prolong their clients' conflict for financial or reputational reasons. Litigation itself sometimes results in deterioration in communication, information distortion, lack of creativity and reinforcement of psychological biases. These factors may delay resolution of the dispute or result in settlements that are deficient in elements

[5] Walter R. Lawrence, The Valley of Kashmir, 2nd ed. 2005 (Gulshan Books Srinagar) at p.5-6
[6] M. Ayub Dar, Court –*Administered Mediation in Jammu And Kashmir*, KULR (2011)P.103

that can maximize party's interests. In court ordered mediation, disputants may be coerced or ordered to attend. They may attend not because they want to settle but because they may be afraid of being sanctioned if they fail to attend. This requires a mediator not to continue with court like practices at the initial stage but to work to dispel any feelings of coercion and obtain a commitment of parties' to put forth a good faith effort towards settlement.

To quote Ibrahim Lincoln:- [7]

"If I had six hours to chop down a tree,

I ,d spend the first hour to sharpening the tools"

Obviously the mediators have a tree to chop down in limited hours, 'while the best axe is only as good as human muscle behind it, even those with well-honed guts can sharpen their results with analytical tools and psychological debiasing. With planning, they also improve the odds of dropping the tree in the yard rather than on the house.

Legal Frame work on Non Litigative Legal Services

In the context it is desirable to mention that under the International Covenant on Civil and Political Rights, 1966, every country shall have to ensure that a citizen shall have an effective remedy for enforcing his rights and guaranteed freedom. The Constitution of India being an epitome of social justice secures to all its citizens Justice: Social Economic and Political. [8] Further the constitution as amended in 1976 reads: The State shall secure that the operation of the legal system promotes justice on the basis of equal opportunity and shall in particular provide free legal aid , by suitable legislation or schemes or in any other way, to ensure opportunity, for securing justice are not denied to any citizen by reason of economic or other disability. [9] The Industrial Disputes Act, 1947 provides for the provisions both for conciliation and arbitration. [10] The Code of Civil procedure as amended in 2002 has introduced conciliation, mediation and pre-trial settlement methodologies for effective resolution of disputes. Judgement to be ordinarily pronounced within 30 days subject to the maximum limit of 60 days is one of the amendments introduced for speedy disposal. [11] Almost every legislation in one way or the other provides that before knocking the door of judicial Courts the domestic remedies are to be availed. Culmination of all such laws was the enactment of "The Arbitration and Conciliation Act, A.C, Act, 1996 which is based on the UNICTRAL Model Law on International Commercial Arbitration, 1985 and the UNICTRAL Conciliation Rules, 1980. The Act, has now been in

[7] Joshua N. Weiss, You Didn't Just Say That! Quotes, Quips and Proverbs for Dealing in the World Conflict and Negotiation, 19 (2005) available at http://www.pon.org/downloads/quote-book.pdf, last visited on Feb.15 2015

[8] The Preamble of the Constitution of India. M.P.Jain, Indian Constitutional Law, 5th ed, vol. 1, Nagpur: Wadhwa & Company 2003, p. 16

[9] Article 39 A of the Constitution of India.

[10] Sections 4,5, &10A of ID Act, 1947.

[11] Section 89 of the Code of Civil Procedure as amended in 2002

force for almost two decades, and in this period of time, although arbitration has fast emerged as a frequently chosen alternative to the litigation, it has come to be affiliated with various problems including those of high costs and delays, making it no better than either the earlier regime which it was intended to replace; or to litigation to which it intends to provide an alternative.

Besides the foregoing legal framework, the role of arbitration as an alternative to the national courts has proved to be successful one. The significance of the study of commercial arbitration especially international commercial arbitration can be gauged from the facts that it has hardened into a general practice, parties entering into economic agreements often include arbitration clauses in their contracts, so as to ensure that any dispute can be solved without recourse to expensive and time consuming litigation. But, in proper cases, the judiciary can give remedy to the parties by setting aside arbitral award.[12] Under the Legal Services Authorities Act, 1987 the disputes which are pending before Courts of Law as well as the disputes which are on pre- litigative stage can as well be settled through Lok Adalat. It is striking to note that Sec. 66 read with Sec. 19(1) of the Act, makes it clear that for the conduct of arbitration proceeding, the conciliator is not bound by the procedure laid down in the C.P.C or the Evidence Act.

Analysis of Non Litigative Legal Services

(I) Arbitration

Arbitration is an adjudicatory dispute resolution process by a private forum, governed by the provisions of the AC Act. The said Act makes it clear that there can be reference to arbitration only if there is an 'arbitration agreement' between the parties. If there was a pre-existing arbitration agreement between the parties, in all probability, even before the suit reaches the stage governed by Order 10 of the Code of Civil Procedure, the matter would have stood referred to arbitration either by invoking Section 8 or Section 11 of the AC Act, and there would be no need to have recourse to arbitration under section 89 of the Code. Section 89 therefore pre-supposes that there is no pre-existing arbitration agreement. Even if there was no pre-existing arbitration agreement, the parties to the suit can agree for arbitration when the choice of ADR processes is offered to them by the court under section 89 of the Code. Such agreement can be by means of a joint memo or joint application or a joint affidavit before the court, or by record of the agreement by the court in the order sheet signed by the parties. Once there is such an agreement in writing signed by parties, the matter can be referred to arbitration under section 89 of the Code; and on such reference, the provisions of AC Act will apply to the arbitration, and as noticed in Salem Bar-I [13], the case will go outside the stream of the court permanently and will not come back to the court. If there is no agreement between the parties for reference to arbitration, the court cannot refer the matter to arbitration under section 89 of the Code. This is evident from the provisions of the AC Act. A court has no power, authority or

jurisdiction to refer unwilling parties to arbitration, if there is no arbitration agreement.

(II) Lok Adalat

The entire mechanism of Lok Adalats is designed and evolved with the object of promoting justice. Access to Justice means an ability to participate in the judicial process. [14] It is that human right which covers not only bare court entry but has many dimensions including time consuming factor. [15] The Lok Adalat originated from the failure of the Indian Legal System to provide fast effective and affordable justice. [16] The legal system as it operates in India, wrong is regarded as a matter of routine. [17]The common man has started looking upon legal system as foe and not as friend. For him law is always taking something away. When we go to the court, we know that we are going to win all or lose all. Whereas, when we go to any method of ADR or for informal settlement with different expectations, we know that we may not get all that we want, but we will not lose everything. The first Lok Adalat was held in 1982, in the village of Una, in the district of Junagarh, Gujrat with great preparation and remarkable simplicity. Subsequently, the Committee for implementing Legal Aid Schemes (CILAS) constituted by the ministry of Law and Justice, Government of India in 1980 recommended the establishment of Lok Adalat. Consequently, it has assumed great importance and attained a statutory recognition under the Legal Services Authorities Act, 1987. [18] The hard truth remains that except in the matter of Motor Accidents Claims, Traffic Challans and to some extent cases under Sec. 138 of Negotiable Instruments Act, Lok Adalat cannot be said to have yielded any accredited results. In fact, Justice Warren Burger, the former CJI of American Supreme Court had observed while discussing on the importance of the ADR: *"the harsh truth is that we may be on our way to society overrun by hordes of lawyers, hungry as locusts, and bridges of judges in numbers never before contemplated. The notion that ordinary people want black robed judges, well dressed lawyers, fine panelled court-rooms as the setting to resolve their disputes is not correct. People with legal problems like people with pain, want relief and they want it as quickly and inexpensively as possible."*[19] Sec. 89 is generally understood as the only provisions in the CPC which provides for out of the court settlement; but this I have to state is misconstrued notion among the legal members, as there are many other provisions under the Act, which support and promote settlement. Even prior to Sec. 89 of the CPC that gave the power to the courts to refer disputes to mediation, which sadly have not been really utilized like, Sec. 80., Sec. 107 (2), Sec. 147, Order 23, Rule 3, Rule 5B of Order 27, Order 32A and Order 36 of the CPC, 1908. A trend of this line of thought i.e provisions relating to out of court non litigative settlements can also be seen in *ONGC v. Western Co. of Northern America* [20] and *ONGC v. Saw Pipes* Ltd.[21] Similarly, when a settlement takes place before the Lok Adalat, the award is deemed to be a decree of Civil Court under Sec. 21 of the Legal Services

Authorities Act, 1987 and executable as such. The Supreme Court observed in the case of *Afcon Infrastructure Ltd. v. Cherian Varkey Constructions Pvt. Ltd.*[22]"as the Court continues to retain control and jurisdiction over the cases which it refers to conciliations or in Lok Adalat award will have to be placed before the Court recording it and disposal in terms."

(III) Mediation

It is profitable to quote observation of former Chief Justice of India, Hon'ble Justice Mr. A Ahmadi, while delivering his speech as patron-in-chief of National Legal Service Authorities, at the inauguration of International Conference on ADR at New Delhi on Oct. 1995. "Those who are practitioners particularly those who practice in the trial courts would appreciate that out of total number of cases which go to court hardly 50% requires adjudication by a court on a point of law. Most of the cases, almost 50% or more essentially involve issues of facts and they can be resolved by people of routine common sense outside the Court." [23] Coming to mediation, there is practically no difference between conciliation and mediation and quite often they are used as inter-changeable terms. Mediation is aimed at conciliation and conciliation has the elements of mediation. In the dictionary of modern legal usage by Bryan A, Garner, it is stated thus, "The distinction between mediation and conciliation is widely debated among those interested in ADR… Some suggest that conciliation is 'a non-binding arbitration,' where as mediation is merely 'assisted negotiation'. Others put it nearly the opposite way: conciliation involves a third party's trying to bring together disputed parties to help them reconcile their differences, whereas mediation goes further by allowing the third party to suggest terms on which the dispute might be resolved. Justice R.V Raveendran, former Judge, Supreme Court of India and author of the judgement in Afcon Infrastructure [24] case observed that, where the conciliator is a professional trained in the art of mediation (as contrasted from a layman friend, relative, well wisher or social worker acting as concilator) the process of conciliation is referred to as mediation. In cases where the third party assisting the parties to arrive at a settlement is not a trained professional mediator, the process is referred to as conciliation. In Afcons Infrastructure case, [25] the Supreme Court referred to the definition of mediation as given in the Model Mediation Rules, according to which "settlement by 'mediation' means the process by which mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provision of the Mediation Rules, 2003 in Part II, and in particular by facilitating discussion between the parties directly or by communicating with each other through the mediator, by assisting the parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring area of compromise, generating options in an attempt to solve the dispute and emphasising that it is the parties' own responsibilities for making decisions which affect them". [26]In short mediation is a process of dispute resolution by which the mediator assists and persuades the disputing parties to arrive at an amicable settlement.

(IV) Conciliation

Conciliation is a non-adjudicatory ADR process, which is also governed by the provisions of the Arbitration and Conciliation Act, 1996. There can be a valid reference to conciliation only if both parties to the dispute agree to have negotiations with the help of a third party or third parties either by an agreement or by the process of invitation and acceptance provided in section 62 of AC Act followed by appointment of conciliators as provided in section 64 of AC Act. If both parties do not agree for conciliation, there can be no 'conciliation'. As a consequence, as in the case of arbitration, the court cannot refer the parties to conciliation under section 89, in the absence of consent by all parties. As contrasted from arbitration, when a matter is referred to conciliation, the matter does not go out of the stream of court process permanently. If there is no settlement, the matter is returned to the court for framing issues and proceeding with the trial.

(V) Judicial Settlement

Judicial settlement on the other hand means a compromise entered by the parties with the assistance of the Court adjudicating the matter or another to whom the court has referred the dispute. In Blacks Law Dictionary, "judicial settlement" is defined as "the settlement of a civil case with the help of a judge who is not assigned to adjudicate the dispute." It will not be possible for a court to formulate the terms of the settlement, unless the judge discusses the matter in detail with both parties. The court formulating the terms of settlement merely on the basis of pleadings is neither feasible nor possible. The requirement that the court should formulate the terms of settlement is therefore a great hindrance to courts in implementing section 89 of the Code. Supreme Court therefore diluted this anomaly in Salem Bar (II) [27] by equating "terms of settlement" to a "summary of disputes" meaning thereby that the court is only required to formulate a `summary of disputes' and not `terms of settlement'.

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Conclusion

In the course of time, in every kind of disputes other than those which could be resolved only by the courts, there can be settlement of the cases at the threshold and thereby putting a lasting and final solution to such disputes. This would enable the parties to concentrate on their regular avocation without being disturbed by such litigations, which would otherwise be lingering on in the Courts for years together. In the present legal system ADR has apart from being legalized, also being institutionalized. Institutionalisation of concept is hall mark of authenticity. Time has come, when people, for health of individual peace, domestic harmony and economic growth, are required to adopt the culture of settlement and facilitate it. But, the attitude and mindset of the litigants and arbitrators is to be cultivated in order to bear the fruit of this innovative mechanism of justice delivery.

Juvenile Justice in India: Historical Retrospect

Khair-Ul-Nisa [1]

Abstract

The Juvenile Justice System seeks to deal with children apart from adults in the matters of investigation, trial and correctional process as the children need to be separately treated from the adults. In order to prevent the child from the stigma of crime, a special procedure is required to be laid down for the juvenile offenders. These are not to be punished but treated as helpless children in need of care and attention, as well as, socialization. Besides, it becomes imperative to bring them back in society, as decent law-abiding citizens through a specialized judicial process.

The idea of juvenile courts emerged out of a general movement directed towards removing juvenile from the penal process of the criminal law and creating protective and corrective programs for dependent, neglected and delinquent children. The need to handle the juvenile offenders differently, as compared to adults or grown up criminals, has been acknowledged since long by most of the societies. This has been reflected in the concept of differential responsibility for prohibited acts in case of young and mature violators of law, the obvious reason being that persons of very young age do not possess sufficient maturity to understand the nature and consequence of their acts and it would consequently be unjust to deal with them in the same manner as those who do not have similar disabilities.

Key Words

Delinquency, Juvenile Delinquent, Juvenile Justice.

Introduction

The problem of juvenile delinquency is of great importance in its social significance, since upon its solution depends the future of newer generation. The penological research and prison statistics reveal , that in dealing with juveniles, the traditional criminal courts and the prisons are no answer to the problem and probably make the situation worse, as the atmosphere in the police lock-ups and jails **expose** them to a 'highly obnoxious sub-culture of the criminal

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underworld'. Punitively tempered methods of adult courts inflict injury and improve no one. Therefore, other corrective and rehabilitative measures are called upon to replace the routine disposal of children by the regular courts. [2]

Historically despite this special criterion for juveniles, the court applied the same procedures and penal sanctions to all who were charged with wrong doing. Under criminal jurisprudence the fundamental thought was not reformation, but punishment - punishment as expiration for the wrong, and also as a warning to potential criminals. The juveniles were handcuffed and incarcerated along with the hardened criminals even for trivial offences. The procedure involved all the formalities of the traditional criminal law, with the aim of first ascertaining whether he had committed an offence and if he had then punishment was inflicted upon him. [3]

The early reformers were appalled by the facts that the procedures and penalties applicable to adult offenders were being applied to the young offenders and that the children of impressionable age were being dumped in jails and thus thrown into the corruptive company of potential offenders. The reformers were convinced that the age old methods of incapacitation and deterrent punishment based on the concept of retribution were to be replaced by human understanding and compassion. It came to be realized that the child was to be 'treated' and 'rehabilitated' and the procedure and disposition were, therefore, to be 'clinical' rather than 'punitive'. In the case of a child the present rigidities, technicalities and harshness in both substantive and procedural law were considered extraneous to his treatment.

The concept of juvenile justice is a phenomenon that developed in the 19th century. In the past, the concept of 'no rights for children' was followed, i.e., people used to live in joint families and there was a proper supervision over the child. With the passage of time, industrialization and the capitalist mode of production a very big change was brought in the society. Industrialization led to the nuclear family system that ultimately led to fragmentation of the society. The child and the adult came to be treated equally[4] i.e., 'Economic mode of production' and hence while delivering justice the distinction between the adult and the child was not made.

By the middle of 19th century, the sufferings and claims of children started drawing social attention. Various legislations were passed for safeguarding the interests of the child. It became well recognized that children coming in conflict with law could not be equated with adult offenders in view of various physical, mental and social conditions relevant or unique to their tender age. The concept of juvenile justice gained momentum with the changing concept of childhood

2Sethi,T.C., The Juvenile Court: Its Genesis, Philosophy & Characteristics, Social Defense, Vol.III, 1982,P.33.

3 Bloch,H.A., & Geis,G., Man,Crime & The Criminal,3rd Ed., N.M.Tripathi, Pvt.Ltd., Bombay, 1971,P.329.

4 Malhotra,Saurabh, Juvenile Justice system, indian Bar Review, Vol.27(3&4), 2000, P.205.

during the 17 th and 18 th centuries.

After the new penology, based on reformative and rehabilitative ideals, came to be applied, it was realized that the traditional courts, procedures and prisons meant for adult criminals could hardly do justice in juvenile cases. The religious organizations, humanitarians and professional penologists joined forces to bring about reform-first in establishing separate institutions for the juveniles and then in adopting physically separate court proceedings and finally in altering the very philosophy underlying the judicial handling of children. Consequently, Juvenile Courts came into existence providing a special type of procedure and practice for juvenile offenders. [5]

Two ancient English common law concepts provided a legal and philosophical foundation for the Juvenile Court and its process. The first concept is *'parens patriae'* and the second is *'in loco parentis'*. *'Parens Patriae'* contains the English common law notion that the Monarchy stands in the relationship of parent to the country. *'In locoparentis'* refers to the obligation of the state to all children. It means that the state stands in the shoes of parents in relationship to the welfare of children. These two doctrines provided a source of authority and justification for the intrusion of the state into family affairs. In particular, it justified the States interposition into the relationship between parent and child. [6]

The characteristic features of the Juvenile Court System of today are mainly:

i. Informality of procedure;
ii. De-emphasis of deterrent or retributive justice;
iii. Protection and Rehabilitation of juveniles;
iv. Use of socialized treatment measures (Probation, Psychological and Psychiatric services, etc.,) and
v. It's distinctive place in the judicial hierarchy. [7]

The object of the juvenile court unlike that of the "criminal court is not to punish or control but to investigate, diagnose and treat the problems of the young people who are brought before it". [8]

1. Origin and Development of Juvenile Justice in U.S.A.

In America, there is a difference of opinion among scholars and historians regarding the origin of Juvenile Courts [9]. Under the English Laws of Equity, the

5 Kaul,Archana, Juvenile Court: Policy & Perspectives, Social Defense, Vol.32, 1993, P.18.
6Edelstein,C.D. & wicks, R.s., An Introduction to Criminal Justice, McGrew Hill, Inc., New York, 1997, P.159.
7A Report on Juvenile Delinquency in India, The Bureau of Delinquency Statistics & Research, The Children's Aid Society, Bombay, 1956, p.60.
8Galliher.J.H., & McCartney,J.L., Criminology: Power, Crime & Criminal Law, The Dorsey Press, Illinios, 1977.
9Some argue that its beginning can be traced to the English feudal courts of High Chancery. See for details, Pursley, R. D., Introduction to Criminal Justice, 3rd Ed., Macmillian Publishing Company, New York, 1984, p. 587.

courts of High Chancery were given the responsibility by the crown to serve as parens patriae (in place of the parent) to protect the interest of the child whose property was in Jeopardy. Later, these courts extended their protection to other areas of general child welfare and incorporated the neglected and dependent child within their jurisdiction. [10]

The other view suggests that juvenile courts sprang from the common law of crimes. Under the common law, a child under 7 years of age was considered incapable of developing the criminal intent and a child between the ages of 7 and 14 was also deemed incapable of developing the required intent unless it could be shown by his maturity and understanding that he was aware of the consequences of his actions [11]. Besides, the adult criminal courts were unable to deal effectively with youthful offenders; special quasi-judicial tribunals began to develop to deal with children. Eventually the administrative and procedural guidelines that grew out of these tribunals became commonly accepted policies, which were then institutionalized into practice as a way to deal with delinquent youth. [12]

The early 19 th century witnessed efforts for reform and rehabilitation of juvenile delinquents, when reformation centers were established in some states. Realizing the short-coming in the Criminal Justice System concerned reform groups in Boston., New York and Philadelphia were prompted to create special institutions for juveniles. These three institutions were the only organized efforts to reform juvenile delinquents until 1847, when state institutions were opened in Massachusetts and New York [13].

The guiding premise of these early reformatories was that children should not be cruelly punished but corrected. Thus a regime of work, study and imposed discipline was adopted in which they would be taught the habits of piety, honesty, sobriety and hard work. These early reformatories were required by their character to receive destitute and orphan children as well as those convicted of crime - sometimes no greater than vagrancy, idleness or stubbornness. [14]

These early institutions immediately faced problem of overcrowding and they had to deal with large numbers of children without adequate financial support. To make both ends meet, they began entering into contractual agreements with private business organizations to provide child labour. This soon led to scandalous instances of brutality and neglect by private entrepreneurs who exploited the children. Thus, on economic grounds the time devoted to schooling could no longer be justified.Another problem that contributed to the failure of the refuges was the indiscriminate grouping of serious offenders with children who were not delinquents or who had committed only minor offences. Inevitably, the youthful serious offenders began exerting their influence, and the refuges became miniature

10 Ibid

11 See for details: section 82 and 83 of IPC based on common law recognizes this principle.

12 Pursley,R.D., Introduction to Criminal Justice, 3rd Ed., Macmillan Publishing Company, New York, 1984, P.588.

13 Mennel,M.Robert., Origin of Juvenile Court, 1972,Crime & Delinquency, P.70.

14Ibid

schools of crime. [15]

The basic idea of development of juvenile courts was that the juveniles and adults should be separately institutionalized before and during the trial. In 1861, the Mayor of Chicago appointed a special commission to hear and decide cases that involved boys from ages 6 to 17 who were charged with committing minor offences. In 1867, this commission was empowered to place the delinquents who came before it on probation or to sentence them to a special institution meant for delinquent children. Boston in 1870, passed a law, which required that the cases of children should be heard separately and an authorized State agent should be appointed to investigate cases, attend trials, and protect children's interest. [16]

Chicago is credited with the first true juvenile court in the United States due to the efforts of civil society. In April 1899, the Legislature passed the Act to Regulate, Treatment and Control of Dependent, Neglected and Delinquent Children and on July 1st, 1899, the Juvenile Court of Cook County was established in Chicago. It marked the first time that a specific court had the responsibility for dependent, neglected and delinquent children. [17]

With the assistance of the Cook County Women's Clubs, which had mounted an intensive campaign, the Chicago Bar prepared a bill that was passed by the Illinois Legislature finally established the juvenile court. [18]

The early Juvenile Justice Reform efforts were heavily promoted by a number of penologists, philanthropists and women's organizations - a group who has become known as the *"child savers"*. [19] The child saver movement crystallized in the passage of the Illinois Juvenile Court Act in 1899, which establishment eventually resultedthe first statewide Juvenile Court System in the United States. [20]

The Illinois statute mandated a system that was to "secure for each minor such care and guidance, preferably in his own home, as will serve the emotional, mental and physical welfare of the minor and the best interests of the child; to preserve and strengthen the minor's family ties whenever possible". Only when necessary, was the court to provide 'custody, care and discipline as nearly as possible equivalent to that which should be given by his parents'. [21]

In place of these legal guarantees and rights, the courts employed behavioral scientists, particularly social workers, psychologists and psychiatrists, because

15Supra Note 12, p. 589.
16President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime, U.S. Government Printing Office, 1967, p.3.
17Supra Note 12, p. 590.
18Neil, C. Chamelin and Vemon, B. Fox, Introduction to Criminal Justice, 2ndEd., Prentice Hall, Inc. Englewood cliffs, New Jersey, 1985, p. 427.
19Child savers - The civic minded and humanitarian citizens who become concerned about the problem of juvenile misconduct inthe nineteenth century have become popularly known as the "child savers".
20James A. Inciardi, Criminal Justice, 2nd Ed., University of Delaware, Harcourt Brace Jovanovich Publishers, U.S.A, 1987, p. 683.
21Illinois Juvenile Court Act, Illinois Statutes, 1899, Section 131.

delinquency was considered a disease that needed expert diagnosis and treatment. This use of treatment method had been a unique characteristic of the entire juvenile process since its inception. [22]

With the advent of Juvenile Court System a new legal vocabulary developed within the framework of criminal justice [23].

Although Juvenile Courts vary greatly in their organization and staffing, generally the states adopted the basic philosophy and principles of the Chicago court and the Illinois Act as well as many of the legal features associated with these pioneer efforts. [24]The Juvenile Court was founded upon several admirable directives [25].

By 1945, every State had enacted special legislation focusing on the handling of juveniles, and the juvenile court movement had become well established. [26]

The juvenile court movement was based upon five philosophical principles which can be summarized as follows:

i. The belief that the state is the "higher or ultimate parent" of all the children within its borders;
ii. The belief that children are worth saving, and that non-punitive procedure should be used to save the child;
iii. The belief that children should be nurtured. While the nurturing process is underway they should be protected from the stigmatizing impact of formal adjudicatory procedures;
iv. The belief that justice, to accomplish the goal of reformation, needs to be individualized, that is, each child is different, and the needs, aspirations, living conditions, and so on, of each child must be known in their individual particulars if the court is to be helpful;
v. The belief that the use of non-criminal procedures is necessary in order to give primary consideration to the needs of the child. The denial of due process could be justified in the face of constitutional

22Supra Note 12, p. 590

23This legal vocabulary was adopted by the juvenile court to symbolize the difference between its proceeding and criminal proceedings. Among the terms that gained popularity in this context were: Petition instead of compliant; Summons instead of warrant; Intake interview instead of preliminary hearing; Initial hearing instead of Arraignment; Finding of involvement instead of conviction; and Disposition instead of sentence.

24Supra Note 12.

25 According to an eminent jurist Clemens Bartollas, the directives for juvenile courts rests on the following considerations:

That the court should function as a social clinic designed to serve the best interests of children in trouble; That the children brought before the court should be given the same care, supervision and discipline provided by a good parent; That the aim of the court is to help, to restore, to guide and to forget, that the children should not be treated as criminal; andThat the rights to shelter, protection and proper guardianship are the only rights of children.

26Frank Schmalleger, Ph. D Justice Research Association Forward by Joan Petersilia, Ph.D., Criminal Justice Today, 4th ed. 1997, Prentice Hall, Upper Saddle River, New Jersey, 07458, p. 529.

challenges because the court acted not to punish, but to help. [27]

1.1. Juvenile Rights and Role of Courts

Although, juvenile justice was based on equity and good conscience, few questioned the necessity for the sweeping powers of juvenile justice officials. With the due process revolution expanding the rights of adult defendants especially during the early 1960's, lawyers and scholars began to criticize the extensive discretion given to juvenile justice officials. In essence these critics believed that the Juvenile Justice System had failed to fulfill its promise. [28] The role of the courts in the sphere of juvenile justice has thereafter steadily increased. Appeals of juvenile court decisions even went to the U.S. Supreme Court. In the remarkable decision ***Kent v. United States,*** [29] the court extended due process rights to children. This is the first case, which ended the "hands-off" era in juvenile justice. This case focused upon the long-accepted concept of *parenspatriae* and signaled the beginning of the court's systematic review of all lower court practice involving delinquency hearings.

Although it focused only on a narrow issue, the Kent decision was especially important because for the first time, it recognized the need for at least minimal due process in juvenile court hearings. The Kent decision set the stage for what was to come, but it was the Gault decision, that turned the Juvenile Justice System upside down.

In ***Re Gault*** [30] the court extended due process rights to juveniles. In 1964, Gerald Gault and a friend, Ronald Lewis, were taken into custody by the Sheriff of Gila County, Arizona, on the basis of a neighbor's complaint that the boys had telephoned her, making lewd remarks. At the time, Gault was on probation for having been in the company of another boy who had stolen a wallet.

When Gault was apprehended, his parents were both at work. No notice was posted at their house to indicate that their son had been taken into custody, a fact which they later learned from Lewi's parents. Gault's parents could learn very little from authorities. Although they were notified when their son's initial hearing would be held, they were not told the nature of the complaint against him. Nor could they learn the identity of the complainant, who was not present at the hearing.

At the hearing the only evidence presented were statements made by young Gault and testimony given by the juvenile officer as to what the complainant had alleged. Gault was not represented by counsel. He admitted having made the phone call, but stated that after dialing the number he turned the phone over to

27Robert G. Caldwell, The Juvenile Court: Its Development and Some Major Problems, in Rose Giallombardo, ed., Juvenile Delinquency: A Book of Reading, New York: John Wiley 1966, p 358.
28George F. Cole, University of Connecticut, Christopher E. Smith, Michigan State University, An International Thomson Publishing Company, 1998, The American System of Criminal Justice, 8th Ed., p 595.
29383,U.S., 541(1966)
30387 U.S. 9(1967).

his friend Ronald. After hearing the testimony, Judge McGhee ordered a second hearing, to be held a week later. At the second hearing Mrs. Gault requested that the complainant be present so that she could identify the voice of the person making the lewd call. Judge McGhee ruled against her request. Finally, Young Gault was adjudicated delinquent and remanded to the State Industrial School until his 21st birthday.

On appeal, eventually to the U.S Supreme Court, Gault's attorney argued that his constitutional rights were violated because he had been denied due process. The appeal focused specifically on six areas:

i. *Notice of charges* - Gault was not given enough notice to prepare a reasonable defense to the charges against him.

ii. *Right to counsel* - Gault was not notified of his right to an attorney or allowed to have one at his hearing.

iii. *Right to confront and to cross-examine witnesses* - The court did not require the complainant to appear at the hearing.

iv. *Protection against self-incrimination* — Gault was never advised that he had the right to remain silent, nor was he informed that his testimony could be used against him.

v. *Right to a transcript* - In preparing for the appeal, Gault's attorney was not provided a transcript of the adjudicatory hearing.

vi. *Right to appeal* - At the time, the state of Arizona did not give juvenile the right to appeal.

The Supreme Court ruled in Gault's favor on four of the six issues raised by his attorneys. The majority opinion was as follows:-

In ***Kent v. U.S.,*** we stated that the juvenile court Judge's exercise of the power of the state as parens patriae was not unlimited. Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded. The probation Officer cannot act as counsel for the child. His role in the adjudicatory hearing, by statute and in fact is as arresting officer and witness against the child. There is no material difference in this respect between adult and juvenile proceeding of the sort here involved. A proceeding where the issue is whether the child will be founded to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope up with the problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings and to ascertain whether he has a defense and to prepare and submit it.

The Court did not agree with the contention of Gault's lawyers relative to appeal, or with their arguments in favor of transcripts. Right to appeal, which, is usually granted by statute or by the state constitution - not by the constitution of the United States. Similarly, the court did not require a transcript because

i. There is no constitutional right to a transcript and
ii. No transcripts are produced in the trials of most adult misdemeanants. [31]

Today the impact of Gault is widely felt in the Juvenile Justice System. Juveniles are now guaranteed many of the same procedural rights as adults. Most precedent - setting Supreme Court decisions which followed Gault further clarified the rights of juveniles, focusing primarily on those few issues of due process that it had not explicitly addressed. [32]

In ***McKeiver v. Pennsylvania,*** [33] - the court opined that the case like Gault have not extended all adult procedural rights to juvenile charged with delinquency. For example, juveniles do not have the constitutional right to trial by a Jury of their peers. The case of *McKeiver V Pennsylvania* reiterated what earlier decisions had established and legitimized some generally accepted practices of juvenile courts. The court was not willing to give juveniles every due process right.

But in ***Breed v. Jones*** [34], the court extended the protection against double jeopardy to juveniles by requiring that before a case is adjudicated in juvenile court, a hearing must be held to determine if it should be transferred to the adult court.

Although the court decisions seem to have placed the rights of juveniles on a par with those of adults, critics have charged that the states have not fully implemented these rights. The law on the books is different from the law in action. Most notably, *"In many states half or less of all juveniles receive the assistance of counsel to which they are constitutionally entitled"*. [35]

Another area of change concerned status offenders - juveniles who have committed acts that are not illegal if they are committed by an adult. Such as skipping school or running away from home. In 1974, Congress passed the Juvenile Justice and Delinquency Prevention Act, which included provisions for taking status offenders out of correction to divert such children out of the system, and to reduce the possibility of incarceration and to rewrite status offence laws.

As juvenile crime rates continued to raise during the 1970's, the public called for tougher approaches in dealing with delinquents so that stricter sanctions were imposed on adult offenders.

Policies on juvenile crime have shifted since 1980 to an emphasis on crime control with public demanding a "crackdown on crime". Legislation's have responded by changing the system. Greater attention is now being focused on

31Under due constitution the condition of being a boy does not justify a Kangaroo court.
32In Re Gault, It was held that juvenile have the right to counsel, to confront and examine accusers and to have adequate notice of charges when there is the possibility of confinement as a punishment.
33403 U.S., (1971).
34421 U.S. 519 (1973)
35 Feld,Berry C., The Right To Counsel in Juvenile Court: Fulfilling Gault's Promise, Center for the study of Youth Policy, University of Michagan, School of Social wprk, 1989.

repeat offenders, with policy makers calling for harsher punishment for juveniles who commit crime.

In ***Scholl v. Martin*** [36], the Supreme Court significantly departed from the trend towards increased juvenile rights. George Martin, age 14 was arrested in New York City charged with robbery and weapons possession and detained for more than two weeks in a secure detention facility until his hearing. The detention order drew its authority from the New York Preventive DetentionLaw, which allowed for the jailing of juveniles posing a high risk of continued delinquency.

Martin was adjudicated delinquent. His case eventually reached the U. S. Supreme Court, on the claim that the New York detention law had effectively denied Martin's freedom prior to conviction and that it was therefore in violation of the 14th amendment to the U. S. constitution.

The U.S. Supreme Court upheld the constitutionality of the New York statute. The court ruled that States have a legitimate interest in preventing future delinquency by juveniles thought to be dangerous. Preventive detention, the court reasoned, is non-punitive in its intent and is therefore, not a punishment.

While the Scholl decision upheld the practice of preventive detention, it seized upon the opportunity provided by the case to impose procedural requirements upon the detaining authority. Consequently, preventive detention today cannot be imposed without (1) Prior notice, (2) An equitable detention hearing, and (3) A statement by the Judge setting forth the reasons for detention.

The Scholl decision reflects the ambivalence permeating the Juvenile's Justice System. On one side are the liberal reformers, who call for increased procedural and substantive legal protections for juvenile's accused of crime. On the other side, are conservatives devoted to crime control policies and alarmed by the rise in juvenile's crime.

The present crime control policy has led many more juveniles to be tried in adult courts. Data from the office of juvenile justice and delinquency prevention showed a 68% increases between 1988 and 1992 of cases adjudicated in the adult criminal courts. [37]

In spite of the increasingly tough policies directed at juvenile offenders, changes that occurred in Juvenile Rights Period continue to have a profound impact. Lawyers are now routinely present at court hearing and other stages of the process, adding a note of formality that was not present 20 years ago. Status offenders seldom end up in secure, punitive environments, such as, training schools. The Juvenile Justice System looks more like the adult justice systems than it did, but it still is less formal. Its stated intention is also less harsh to keep juveniles in the community whenever possible.

Public support for a tough stance towards older juveniles seems to be

36467 U.S. 253 (1984).

37U.S department of Justice, Office of Juveniles Justice and Delinquency Prevention, Juvenile Justice Bulletin - July 1996.

growing. The juvenile courts, where the use of discretion and the desire to rehabilitate were uppermost, have become a system of rules and procedures similar to adult courts. With deserved punishment more prominent as a correctional goal, more severe sentences are being given to juveniles who are repeat offenders. [38]

2. Origin and Development ofJuvenile Justice in England

The criminal law in England was noted for its harshness. There was no separate system of Justice for Children. In 1831, a boy aged 13 years was hanged in Maid stone prison for theft. In 1833, a boy of 9 years was convicted at the old Bailey of putting stick through a shop window and, though afterwards reprieved, was likewise sentenced to death. A year later two children, aged 10 and 11 years, found guilty at Stafford of stealing clothing, were sentenced to the transportation for 7 years.

In 1960, the Ingleby Committee reviewed the development of the Juvenile Justice system. The Committee recommended as under:

The court remains a criminal court in the sense that it is a magistrates court, that it is principally concerned with trying offences, that its procedure is a modified form of ordinary criminal procedure and that, with few special provisions, it is governed by the laws of evidence in criminal cases. Yet the requirement to have regard to the welfare of child, and the various ways in which a court may deal with an offender, suggest a jurisdiction that is not criminal. It is not easy to see how the two principles can be reconciled. [39]

The committee recommended that the age of criminal responsibility should be raised to 14 years. Identifying the community of offences by children with social and psychological problems, the report called for the courts to move away from their traditional legal role and encouraged the notion that they should be closely concerned with deciding the best means of helping children. [40]

Apart from raising the age of criminal responsibility the Children and Young Person's Act, 1963 which followed the Ingleby report did none of these things. The confusion over the court's function and the ideological confrontation embedded in the legislation remained.

The most comprehensive and radical proposals to reform the penal system were set out in 1964 by the report of the Labour Party's Study Group "crime - a challenge to us all". [41] Locating its philosophy within the context of a socialist philosophy, the report under the chairmanship of Lord Langford stressed society's responsibility to its members and pointed out the need to improve the conditions of the poorer sections of the community as a means of establishing a better society. It focused on the family as the central institution of control and proper social adjustment and recommended action on this basis. [42]

38Supra Note 29, p. 397.
39Report of the Committee on Children and Young Persons (Ingleby), 1960.
40Ibid.
41Report of the Labour Party's Study Group, [Langford Report] London, Labour Party, 1964, p. 6.
42Ibid.

The new proposals for reorganizing juvenile justice were radical. The Juvenile Courts were to be replaced by a new style of family courts which in turn would be linked to a family service, thereby providing family service was to bear the major responsibility for looking after the needs of children within the family itself. Only those cases of children were to be brought to the family service that were seen in need of 'care, protection and treatment' and a solution was sought in discussion with their parents. The judicial machinery was to be used in minority of cases where the agreement could not reach to ensure that the child receives the social and educational training he needs and that his individual liberty is protected. The family court was to have a wide range of powers extending to school, care and family matters. Besides, it was too with criminal charges against young offenders under the age of 14 years, thus keeping them out of count altogether on such charges. [43]

In 1965, the Labour Government issued a white paper, 'the Child, the Family and the Young Offender'. [44] Its purpose 'was to invite discussion of possible measures to support the family, forestall and prevent delinquency, and revise the law and practice relating to young offenders in England and Wales'. Among other things it contained proposals for establishing 'family councils', and for setting up a new kind of court for the trial and treatment of offenders between the ages of 17 and 21. But this white paper was criticized by Magistrates, Lawyers, Social workers and men and women of all political persuasions. Their main ground for doing so was that the proposals, if adopted, would abrogate the ancient principle that no subject of the Crown, however young or undistinguished, may be deprived of his liberty except by order of a properly constituted court of law. In face of those criticisms the 1965 white paper made a dignified retirement and there was interval of nearly three years while its sponsors the Labour Government, thought again over it. [45]

The most recent changes in English Juvenile Justice System were brought about by the 1969 Children and Young Persons Act which amended the 1933 Act, which is still referred to as Principle Act. Its main purpose was to give effect to the proposals in the white paper, 'Children in Trouble' [46].The Children and Young Offenders Act, 1969, represents a series of retreats from both the idea of family service and that of family councils. The white papers which immediately preceded it, 'Children in Trouble', 1968 identified the social control of harmful behaviour with welfare measures to aid and protect the young. Protection and guidance could be provided by the local authority social service department and would, it was said 'be most effectively done on an informal basis'. The white paper provided its own attempt to subsume criminality within the orbit of 'Care',

43Children Act, 1948, Halsbury Statutes of England, 3rd Ed., P. 539.
44Supra Note 41.
45Parsloe, Plyllida: Juvenile Justice in Britian and the United States: The Balance Of Needs And Rights [Library Of Social Work], Routledge and Kegan Paul London, 1978, p 137 - 38.
46Supra Note, 41.

but this time a Juvenile Court structure was retained. The age of criminal responsibility was to be raised to 14 and any child under this age could only be brought to court for committing an offence if it could also be shown that he was in need of care, protection and control. At the same time a reorganization of resources was proposed. Detention and attendance centers were to remain in existence but approved schools were to be renamed 'community homes' and incorporated within the jurisdiction of the local authority.

At present in England there is a Juvenile Justice System in which two views of delinquency and two philosophical orientations to the legal process are represented. The Juvenile court is a court of criminal jurisdiction with modified powers, a former legal structure operating as a social agency, a welfare oriented institution in a judicial setting, an agent of social control acting, at the same time, in the interest of the individual. The courts are charged with the double duty of protecting the community and assisting the child who threatens it. [47]

3. Origin and Development ofJuvenile Justice in India

When almost all the civilized countries of the world recognized the fact that proper guidance and training towards rehabilitation would develop children into socially normal citizens, India equally followed the suit. Several juvenile institutions were established for juveniles at different places for their rehabilitation and reformation. Prior to that children were tried and convicted of violations of the law in the same way as adults, except that a child below 7 years of age was not regarded as capable of committing any crime. It was during the first quarter of the 20th century that separate courts for the hearing of Juvenile offenders were widely established, the age span ranging all the way from 10 to a maximum of 16, 17, 18 or even 21 years. [48]

In India before the advent of the British rule, Hindu and Muslim laws were in force. Neither of the two had any special provisions to deal with Juvenile offenders. [49]The idea of special treatment of Juvenile offenders by the State was later introduced in India during the British rule.

3.1. Emergence of Separate Institutions

The western world in the 19th century was surged with a wave of reformation, which created some ferment in India also. Its emerging trend was first evidenced in 1843, when Buist an Englishman found the ragged school at Sewri, which formed the nucleus of a juvenile reformatory in Bombay. This was the first separate institution for juveniles to provide an asylum for the care and protection of orphans and vagrants and took itself the task of reforming the Juvenile offenders. The institution has since undergone many a vicissitude and

47Supra Note 43.
48Madam, G. R., Indian Social problems. Vol. I, Allied publishers Pvt. Ltd. 1981,. New Delhi, p 99
49Sethi, T. D. Precursors of Juvenile courts in India, Journal of India law Institute, Vol. 25, Oct. - Dec., 1983, p 502-503.

is today known as the David Sassoon Industrial School. [50]

Prior to 1924,[51]in addition to the two reformatory schools at Bombay[52] and Pune [53], the Borstal Jail [54] at Dharwar was established to accommodate boys between the ages of 16 and 21 years who were non-habitual offenders and were sentenced for periods not less than 12 months. Here these adolescents were given trade instructions. The Borstal jail authorities tried to secure employment for those boys who had acquired certain skills. The trouble however was that of majority of boys were destined to drift as on their release from the institution there was none who could give those proper help or guidance. [55]

A Juvenile Jail also was set up at Alipore in Bengal around the same period. In this institution, the star class system was introduced with some good results. Only those boys among juvenile offenders were selected who gave an indication of a good adjustment to the institutional programme. A feature of this Jail was the opening of an undertrial section for boys awaiting trial at the Calcuttacourt. The Alipore Jail could not yield the results obtained at the juvenile jails at Borstal in England. At Borstal encouraging results were possible because of the continuing work done by the after care organizations which took great pains to secure work for the boys on release.

After six decades, a juvenile jail was instituted at Bareilly in the United Provinces (now U.P.) where non-habitual offenders were confined. By and large, institutions of this kind alone provided for special treatment to the Juvenile and adolescent offenders. But otherwise, as was the case in other countries, prior to special legislation, children in India were also tried by adult courts and incarcerated in jails. [56]

3.2. Growth of Significant Legislation

The establishment of the juvenile courts in India was set, inter alia by a number of legal reforms providing for special treatment of juveniles. While studying the growth of special legislation on the treatment of Juvenile delinquency which led to the creation of juvenile courts in India, this fact has to be born in mind that the country was ruled by the British until 1947. Consequently, a marked influence of the ruling power is reflected in the legislation and administrative practices in India. India has closely adopted the British pattern before and after independence. [57]

50Supra Note 8, p 10
51Before the implementation of the Bombay Children Act, 1924 providing for the establishment of Juvenile Courts.
52David Sasoon Industrial School.
53Yeravda Industrial School.
54Borstals are institutions where adolescent offenders receive, in lien of imprisonment training designed to reform-them in conditions as different from those of prisons as possible. These institutions are named after the first reformatory of the kind at Borstal - a suburb of Rochester in England
55Supra Note 8, p. 12.
56Ibid
57Supra Note 8, p. 504-505.

The first legislation dealing with children, which came in 1850, was the Apprentice Act[58] which provided that children in the age group of 10-18 convicted by courts were intended to be provided with some vocational training which might help their rehabilitation. This Act applied throughout British India [59].

A pro-juvenile attitude can be seen in the Indian Penal code, 1860 where sections 82 and 83 provided a special consideration for children of immature understanding. Moreover, the Code of Criminal Procedure, 1898 contained sec. 29 (b) which restricted the Jurisdiction of ordinary courts in the trial of Juvenile delinquents. Sec. 399 provided that when any person under the age of 15 years was sentenced by any criminal court to imprisonment for any offence, the court might direct that such person instead of being imprisoned in a criminal jail would be sent to any reformatory school established by the State Government.

In fact, the first special law dealing directly with the treatment of juvenile delinquents was the Reformatory schools Act, 1876, which was modified later in 1897. Till 1920, under this Act Reformatory Institutions were established in some of the states for delinquent boys less than 16 years of age in the Bombay province and under 15 years elsewhere. Under this Act no boy over 15 years was to be detained in such an institution. The juvenile offenders could be segregated from adult prisoners and safeguarded against their future perversion. However all these measures did not have the desired effect and separate Children Acts had to be passed to deal effectively with problem children.

Later on, the Indian Jail Committee Report (1919 - 1920) [60] criticized the sending of Juvenile offenders to prisons. It was headed by Sir Alexander Cardew. The committee gave many recommendations after visiting not just Indian jails but also those of Japan, Hong Kong and Britain. In its recommendations, the committee emphasized on the importance of reformative approach towards prison inmates, rather than a deterrent one. The report was responsible for laying down the basic frame work for the juvenile correctional system and establishing separate mechanisms for the trial, conviction and treatment of juvenile offenders.

The real impetus for a separate comprehensive legislation to deal with children was given by the following recommendations of the Indian Jail Committee 1919-1920.

The creation of a Children's Court for the hearing of all cases against children and young persons is desirable and procedure in such courts should be as informal and elastic as possible.

It is often desirable to leave a child offender to his parents, if the home is at all decent one. The commitment to a prison of children and young persons, whether after conviction or while on remand or under trial, is contrary to public

58Williams, Glanville, The Criminal Responsibility of Children, Criminal Law Review, 1954, p 494.
59The Apprentice Act was replaced by the Reformatory Schools Act, 1876 which was subsequently amended as the Reformatory Schools Act, 1897.
60Malhotra, Saurabh., Juvenile Justice System. An Overview, Central Law Quarterly 14(2001) p. 232.

policy and sentence of imprisonment should in cases of children and young persons, be made illegal as in England. [61]

In pursuance of the recommendations of the committee, the year from 1920, onwards witnessed legislation in the form of Children Acts in several provinces providing for the establishment of juvenile courts.With the passing of the Children Act, 1960, other States in India passed their own children Acts. The nomenclature of these Children Acts was almost the same as that of the Children Act of 1960. Thus the institution of juvenile courts in the country was established only after the enactment of the Children Acts.

Despite the growth of Children Acts in the country, there were many States which had not established a single juvenile court and the children in these states were tried in the normal criminal courts - usually by especially empowered Magistrates. Further, the Children Acts passed by the States were not uniform and due to this non uniformity of the Children Acts the entire country could not be brought under a common Act with uniform coverage.

The Government of India appointed an All India Jail Reforms Committee in 1980 with Justice A. N. Mulla as its Chairman. It submitted its report on 31st March 1983. It recommended a total ban on the heinous practice of clubbing together juvenile offenders with the hardened criminals in prisons.

Likewise voicing its concern in this regard *Chief Justice Bhagwaiti and JusticeRangnath Misra* in ***Sheela Barse v. Union of India*** [62]observed:

> Instead of each state having its own Children's Act different in procedure and content from the children's Act in other states, it would be desirable if the Central Government initiates Parliamentary legislation on the subject so that there is complete uniformity in regard to the various provisions relating to children in the entire territory of the country.

The need of a Uniform Legislation regarding Juvenile Justice for the whole country was being expressed in various fora, including Parliament, and to bring the operations of the Juvenile Justice System with the UN Standard Minimum Rules for the Administration of Juvenile Justice, [63] parliament exercised its powers under Article 253 [6464]Article 253 of the Indian Constitutions Reads as:of the constitution read with Entry 14 of the Union List [65] to make law for the whole of

61 Najmi, M., Juvenile Court laws in India, Social Defense, Vol. XVI, No. 64, April 1981, p.7, The Madras Children Act, 1920

62(1986)3 SCC 596

63The Beijing Rules adopted by the General Assembly in Sept. 198S.

64Article 253 of the Indian Constitutions Reads as:

India for implementing any Notwithstanding anything in the foraging provision of this chapter, parliament has the power to make any law for the whole or any part of the territory of treaty, agreement or convention with another country or countries or any decisions made at any International Conference, Association or other body

65Entry 14, Union list, *7A*,schedule of the Indian Constitution Reads as:

Entering into treaties and agreements with foreign countries and implementing of treaties, agreement and convention with foreign countries

India to fulfill international obligations. On 22nd August 1986, the Juvenile Justice Bill, 1986 was introduced in the Lok Sabha.

In 1986, the Parliament passed the Juvenile Justice Act [66], which provides uniform standard to deal with juvenile delinquents throughout the country. This Act has fulfilled the long standing demand for a uniform legislation. All the earlier Children Acts passed by the parliament and States except the Jammu and Kashmir Children Act, 1970 stand repealed since the enforcement of Juvenile Justice Act, 1986. This Act aims at giving effect to the guidelines contained in the Standard Minimum Rules for the Administration of Juvenile Justice adopted by U.N. in November, 1985 [67]. This Act provided for care, protection, treatment, development and rehabilitation of neglected and delinquent juveniles and for adjudication of certain matters relating thereto and deposition of delinquent juveniles. At the outset it becomes necessary to mention that this Act is having different nomenclature. The '*child'* has been renamed as *'juvenile'* while the '*Children Court'* as '*Juvenile Court'*. No change has been made by the present Act so far as the definition of a '*Juvenile'* [68] and '*Delinquent Juvenile'* [69] is concerned. It is same as had been provided under the Children Act, 1960. This Act incorporated almost all the ideas necessary for achieving 'Juvenile Justice' [70].

Since the enactment of Juvenile Justice Act, 1986, many new international legal documents on the rights of the child have emerged such as the Convention on the Rights of the Child, 1990 and the United Nations Rules for the Protection of Juveniles deprived of their liberty, 1990. A number of national consultations were also held concerning Juvenile Justice Administration during 1999 – 2000 to improve the existing unsatisfactory state of affairs [71]. In this connection the Parliament enacted the Juvenile Justice (Care and Protection of Children) Act

66 Act No.53 of 1986, w.e.f. 1st December, 1986

67Assembly,UN General. United Nations Standard Minimum Rules adopted by the General Assembly., 29 November 1985. Available at: http://www. unhcr nimum Rules for the Administration of Juvenile Justice (" The Beijing Rules"): resolution. org

68 According to the Juvenile Justice Act, 1986:

Section 2(h) reads as:

'Juvenile' means a boy who has not attained the age of 16 years or a girl who has not attained age of 18 years.

69 According to the Juvenile Justice Act, 1986:

Section 2(e) reads as:

'Delinquent Juvenile' means a juvenile who has been found to have committed anoffence.

70The Act covers major premises of the Children Acts and Convention for Rights of the Child.

71Namely, National Consultations Meet on the Juvenile Justice System & the Rights of Child held by the National Institute of Public Cooperation & Child Development, Delhi, 20-21 January,1999; National Consultations on Juvenile Justices, National Law School of India University, Bangalore on 11-13 February 1999; National Seminar on Juvenile Justice held by Butterflies, Delhi, 8-9 April, 1999; National Consultations on Juvenile Homes held by Prayas Institute for Juvenile Justice, Delhi, 29-30 July, 1999. There were also regional consultations held in Madras, Hyderabad & Patna. Available at:

2000[72]. The Act provides for proper care, protection and treatment by catering to their development needs and by adopting a child- friendly approach in the adjudication and disposition of matters in the best interest of children and their ultimate rehabilitation through various institutions [73]. This Act has been enacted as a consequence of the major shift in policy from Welfare to Rights of children with India's ratification of the Convention on the Rights of the child [74]. This Act has replaced the words *'Delinquent Juvenile'* and *'Neglected Juvenile'* by the expressions *'Juvenile in conflict with law'* [75] and *'Child in need of care and protection'*[76] This Act caters to the administration of justice to two different types of children, with different thrust and peculiarity [77]. A significant change has been

72 The parliament in 2000 has passed the Juvenile Justice (Care & Protection of Children) Act which replaces the Juvenile Justice Act, 1986 with a view to consolidate and amend the law relating to Juvenile in conflict with law and Child in need of Care and Protection. Act No. 56 of 2000, 30th December, 2000.

73 It is provided under the Act that rehabilitation & social reintegration shall begin during the stay of the child in an Observation Home or Children's Home or special Home & it shall be carried out alternatively by Adoption, Foster Care, Sponsorship & After-Care Organization.[sections41-45]

74 Kumari, Ved., The Juvenile Justice System in India: From Welfare to Rights, Oxford Dictionary Press, 2004, p.92

75According to the Juvenile Justice (Care and Protection of Children) Act, 2000:
Section 2 (L) reads as:
"Juvenile In conflict with Law" means a Juvenile who is alleged to have committed an offence.

76 According to the Juvenile Justice (Care and Protection of Children) Act, 2000:
Section 2 (d) reads as:
"Child in need of care and protection" means a child:

1. Who is found without any home or settled place or abode and without any ostensible means of subsistence;
2. Who resides with a person (Whether a guardian of the child or not) and such person: a) Has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or b) Has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person.
3. Who is mentally or Physically challenged or ill children or children suffering from terminal disease or incurable disease having no one to support or look after;
4. Who has a parent or guardian and such parent or guardian is unfit or in capacitated to exercise control over the child;
5. Who does not have parent and no one is willing to take care of or whose parents have abandoned him or who is missing and run away child and whose parents cannot be found after reasonable inquiry;
6. Who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts;
7. Who is found vulnerable and is likely to be induced into drug abuse or trafficking;
8. Who is being or is likely to be abused for unconscionable gains;
9. Who is victim of any armed conflict, civil commotion or natural calamity

77 The Act deals with children through two different bodies. One is Juvenile Justice Board & theother is Child Welfare Committee.The former deals with Juvenile in conflict with law; while as the later deals with Child in need of care & Protection.

made inthe definition of *'Juvenile' or 'Child'* [78]. This Act prescribes a uniform age for both boys and girl.

The Juvenile Justice Act 2000 continued to be in operation for some years when it was felt that some important changes need to be effected to make this Act more viable and effective. The Center for Child & Law concluded that the Act, 2000, though having a few redeeming features, is ill conceived as it fails completely to engage with crucial conceptual questions on the area of juvenile justice, leaving aside the questions of a deeper engagement. For example, the law as it exists fails to comply with existing International Human Rights Standards, which it invokes in its preamble. The Act remains a merely rhetorical gesture in the direction of a more child friendly enactment [79].

The Juvenile Justice (Care and Protection of Children) Amendment Act came into existence in 2006 [80]. This Act has inserted a new sub-clause in section 2, which provides the definition of '*Child in need of care and protection'* [81] Under sub-clause (v) of this Act, after the word '*abandoned'* the words '*or surrendered'*

78 According to The Juvenile Justice (Care and Protection of Children) Act,2000:
Section 2(k) reads as: "Juvenile" or "Child" means a person who has not completed 18 years of age.
79The Act, 2000: A Critique, In Engaging With Policy & Law Reform Concerns Pertaining To Juvenile Justice Issues, Centre for Child & the Law & its partners, National Law School of India University. National Consultation on Justice for Children held during 18-19 March, 2001, New Delhi.
80 The Act, 2000 was drafted in a hurried & secretive manner without any participation of the children would be affected by it.While considering the importance of Juvenile Justice System in India, someimportant changes were incorporated by amending the previous law. The Act has amended sections 1,2,4,6,10,14,15,20,29,33,34,39,41,59 & 64 of the Juvenile Justice (Care & Protection of Children) Act,2000. The Act has inserted two new sections, i.e., sections 7A & 62A. See for details: the Juvenile Justice (Care & Protection of Children) Amendment Act,2006.
81According to The Juvenile Justice (Care and Protection of Children) Amendment Act, 2006:
Section 2 (d) reads as:
"Child in need of care and protection" means a child:

i) Who is found without any home or settled place or abode and without any ostensible means of subsistence;
ii) Who resides with a person (Whether a guardian of the child or not) and such person: a) Has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or b) Has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person.
iii) Who is mentally or Physically challenged or ill children or children suffering from terminal disease or incurable disease having no one to support or look after;
iv) Who has a parent or guardian and such parent or guardian is unfit or in capacitated to exercise control over the child;
v) Who does not have parent and no one is willing to take care of or whose parents have abandoned him or who is missing and run away child and whose parents cannot be found after reasonable inquiry;
vi) Who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts;
vii) Who is found vulnerable and is likely to be induced into drug abuse or trafficking;
viii) Who is being or is likely to be abused for unconscionable gains;
ix) Who is victim of any armed conflict, civil commotion or natural calamity

has been inserted. A change has also been made under clause (L) of section 2, which provides the definition of '*Juvenile in conflict with law'* [82]. So far as the definition of *'Juvenile'* [83] is concerned, it is same as has been provided under the Juvenile Justice (Care and Protection of children) Act, 2000.

The Delhi Gang Rape case [84] in December, 2012 had tremendous impact on public perception of the Juvenile Justice Act in operation. One of the accused was found to be few months away from being 18, so was tried in a Juvenile Court and sentenced to 3 years in a Reform Home. [85] In order to meet the public demand to have more effective and stringent law to prevent sexual abuse by resorting to the plea of juvenility, the new Act is proposed by the Parliament to answer the growing menace of sexual abuse [86]. The proposed Bill aims to replace the present Act, so that juvenile delinquents in the age group of 16-18 can be tried as adults for serious crimes [87]. It was passed on 7 th May 2015 by the Lok Sabha but is now pending in the Rajya Sabha [88].

4. Origin and Development of Juvenile Justice in Jammu and Kashmir

The position of Jammu and Kashmir State is unique in the Indian union. The laws which are passed by the Parliament are not applicable to the State unless ratified by the State Legislature [89].

Prior to 1960, there was no separate legislation for children in the State. The State Legislature enacted the Jammu and Kashmir Children Act, 1970 [90] on the pattern of the Central Act, 1960.The Act provided for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected and delinquent children. [91]

In the State, 25 years of conflict has led to considerable social problems across the State, particularly in the Kashmir Valley region. The people of the region have been witness to the highest levels of violence and civil unrest since

82 According to the Juvenile Justice (Care and Protection of Children) Amendment Act,2006: Section 2(L) reads as:
Juvenile In conflict with Law" means a Juvenile who is alleged to have committed an offence.
83According to the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006: Section 2(K) reads as:
"Juvenile" or "Child" means a person who has not completed 18 years of age.
84 Delhi gang rape: Teenager found guilty, BBC News, 31 August 2013, available at:bbcnews.bbcnews.com, Retrieved on 1st June, 2015.
85 TNN,31 August 2013, Nirbhaya gang rape case and murder, The Times of India, Retrieved on 1st June, 2015. Available at timesofindia.timesofindia.com
86 Proposed Juvenile Justice (Care & Protection of Children) Bill, 2014
87 16 year olds to be tried as adult in extreme crimes, says Lok Sabha, NDTV, 7th May, 2015, retrieved on 1st June, 2015.
88Juvenile Justice Bill introduced in Lok Sabha, The Indian Express, 12th August 2014, retrieved on 1st June, 2015.
89See for details: Anand, A.S., the Constitution of Jammu & Kashmir.
90 Act No. 20 of 1970.
91 The Act has adopted the Scheme and Special features of the Central Act, 1960.

the insurgency erupted in 1989.In the same year, India became a signatory to the United Nations Convention on the Rights of the Child (UNCRC) [92]. Subsequently, the Government of India enacted the Juvenile Justice Act, 2000. The State of J & K followed suit by enacting the 'Jammu and Kashmir Juvenile Justice Act, 1997. [93] The1970 Act, was made applicable in the cities of Jammu and Srinagar only while as, it had no application in rest of the state. So, a need was felt for a uniform legislation regarding Juvenile Justice for the whole of the State.The Jammu and Kashmir Juvenile Justice Act, 1997 fulfilled this need. This Act brings uniformity at the State level; it also takes care of the districts where Juvenile Justice was not implemented before. [94]This Act brought about a thorough change in the existing juvenile correctional system and shifted the focus from the formal institutions of Police, Judiciary and Jails to the basic institutions including family, community, welfare boards and special homes besides special courts. Specialized functions have been entrusted to various institutions and homes envisaged under the Act to ween away children of tender age from illegal activities and to make them law abiding citizens.

A long standing demand for the children of Jammu and Kashmir who were subjected to arbitrary use of Special Laws like, Public Safety Act, POTA, and AFSPA etc. due to the lesser age limit provided under the 1997 Act [95] and could not get benefits at par with children in rest of the country. This could only be achieved by amending the existing State Act, 1997. [96] On 2013, the State Legislation enacted the Act which replaced the Jammu & Kashmir Juvenile Justice Act, 1997 with a view to amend the laws relating to Juvenile in conflict with law and Child in need of care and protection. One of the major developments in the Act of 2013 is the increase in age of juvenility and parity between male and female juveniles. The Act provides for proper care, protection and treatment by catering to their development needs and by adopting a child- friendly approach in the adjudication and disposition of matters in the best interest of children and their ultimate rehabilitation through various institutions. The Act is very similar to the Central Act, 2000 except that it does not contain any provision on adoption[97].

92WWW.Childlineindia.org.in/United Nations
https:/en.m.Wikipedia.org/wiki/Juvenile Justice
93WWW.childline.org.in/1098/Juvenile
94The Act, 1997 has the similar provisions as that of Juvenile Justice Act, 1986 discussed earlier.
95According to the Jammu & Kashmir Juvenile Justice Act, 1997:
Section 2(h) reads as:
'Juvenile' means a boy who has not attained the age of 16 years or a girl who has not attained age of 18 years.
96 A report of Asian Center for Human Rights (ACHR) 2011 in which they claimed that the State has been illegally detaining minors under Public Safety Act.
97Under Section 41 of Juvenile Justice (Care & Protection of Children) Act, 2000, the rehabilitation and social reintegration of children shall be carried out alternatively by i) Adoption, ii) Foster Care, iii) Sponsorship, & iv)After- care Programmes.

5. Conclusion

It may be stated that prior to 19th century Criminal Justice System of U.S.A. and England treated child offender at par with adult offenders. The law applicable to adult offenders was equally applied to child offenders as well. Gradually special attention was paid towards children and by 19th century, a watershed in the history of criminal Justice was reached when the rule that a child under 7 is presumed incapable of committing crime was well established.

We find that India legal system has been influenced by the English system. At the time when India was under the rule of the English they made all such reforms, as they thought fit to Indian system. A study of their law would show that most of the legal provisions to Indian Juvenile Justice System have been inspired by their system.

The above review of the history reveals that the delinquency among the children was there in every society and every society tried to introduce changes as per the needs of the society from time to time.

Sexual Harassment At Workplace: An Overview

Shaista Amin

Abstract

Sexual harassment at the workplace is a growing concern for women. Employers abuse their authority to seek sexual favours from their female co-workers or subordinates, sometimes promising promotions or other forms of career advancement or simply creating an untenable and hostile work environment. Women who refuse to give in to such unwanted sexual advances often run the risk of anything from demotion to dismissal. But in recent years more women have been coming forward to report such practices — some taking their cases to court. The aim of this paper is to highlight the problem of sexual harassment of women at workplace which is a growing concern for women and also to discuss various International and National measures relating to Sexual Harassment.

Keywords: ***CEDAW, Discrimination, Sexual Harassment, Physical Advances ,Workplace.***

Introduction

Sexual harassment at the workplace is a growing concern for women. Employers abuse their authority to seek sexual favours from their female co-workers or subordinates, sometimes promising promotions or other forms of career advancement or simply creating an untenable and hostile work environment. Women who refuse to give in to such unwanted sexual advances often run the risk of anything from demotion to dismissal. But in recent years more women have been coming forward to report such practices — some taking their cases to court. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) stressed that sexual harassment constitutes a form of sex discrimination. "It not only degrades the woman", the report noted, "but reinforces and reflects the idea of non-professionalism on the part of women workers, who are consequently regarded as less able to perform their duties than their male colleagues." Empowerment of women means equipping women to be economically independent and self-reliant in a society in which they act as economic providers and participate in all-developmental activities like their fellow

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men. There is rise in social consciousness of the status of women on account of their education and' employment, raised intellectual and economic independence, self-confidence and self- sufficiency. An increasing number of women leave the security of their home and venture out in search of work depending upon their socio —economic status. Sharing of economic activity by women is neither a new phenomenon nor a new development, but the magnitude of their involvement is correlative to the given socio- economic and political conditions prevalent in the country. With the change in the outlook, attitude and approach towards life, it has now become necessary, by and large, for the families to supplement their requirements through additional earnings. For this reason, women have recorded impressive gain in employment as is evident from the economic survey [1]. As per the Economic survey; the share of women in organized-sector employment was 20.4 per cent in 2010 March end and has remained nearly constant in recent years[2]. As per Census 2011, the workforce participation rate for females at the national level stands at 25.51% compared with 53.26% for males. In the rural sector, females have a workforce participation rate of 30.02% compared with 53.03% for males. In the urban sector, it is 15.44% for females and 53.76% for males[3]. As per National Sample Survey (68th Round), the worker population ratio for females in rural sector was 24.8 in 2011-12 while that for males was 54.3. In Urban sector, it was 14.7 for females and 54.6 for males. Among the States/UTs, worker population ratio for females in the rural sector was the highest in Himachal Pradesh at 52.4% and in the urban sector, it was the highest in Sikkim at 27.3%. But these figure do not cover the unorganized sector, which constitute ninety two percent of the total labour force wherein majority of them are women. Globalization has accelerated the ways and means for women to enter the field of employment to lead a dignified life [4].Nevertheless, at different levels in employment, the working-women are thereby exposed to twin problems. On the one hand, they have to face adverse publicity and problem of adjustment in the family due to lack of time; on the other, they are exposed to economic exploitation and sexual harassment at work place.

Definition

The phrase sexual harassment was made in America, by women[5].It appeared

1 Manju Jamwal, 'Sexual Harassment of Women at work: Need For a Comprehensive Legislation'(2008)15 KULR. At 101

2 Economic Survey 2011-2012.

3 Women and Men in India , Central Statistics Office ,National Statistical Organisation Ministry of Statistics and Programme Implementation Government of India, 15th Issue,2013.

4 Supra note 1 at 101

5 Early instances of the term sexual harassment appear in the writings of the Working Women United Institute, the Alliance Against Sexual Coercion, and CARROLL BRODSKY, THE HARASSED WORKER (1976). See CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 27-28 & n.13 (1979).Catherine McKinnon is a renowned American feminist, author, scholar, lawyer, teacher and activist.

simultaneously in theoretical writing and the popular media. Before the phrase emerged, Redbook magazine published a questionnaire asking women about sexual intimidation at work; nine thousand women responded, beginning a nationwide discussion that continues to deepen and spread [6]. Soon Catharine MacKinnon, in her path breaking book, connected sexual harassment with sex discrimination law [7]. 'It was in 1975 that college students in USA first coined the term to describe their experience of having lost jobs as a result of refusing to respond to male co worker sexual attentions [8].As a result the term came to be used in public media only from the year 1975 onwards [9]. Two years later, McKinnon published "Sexual Harassment of Working Women", arguing that sexual harassment is a form of sex discrimination under Title VII of the Civil Rights Act of 1964 (United States) and any other sex discrimination prohibition. A sustained campaign in the USA brought amendments to the law, recognizing that sexual harassment at the workplace was a form of gender discrimination and therefore an actionable wrong.

"Sexual harassment is a complex issue involving men and women, their perceptions and behaviour, and the social norms of the society. Sexual harassment is not confined to any one level, class, or profession. It can happen to executives as well as factory workers. It occurs not only in the workplace and in the classroom, but even in parliamentary chambers and churches. Sexual harassment may be an expression of power or desire or both. Whether it is from supervisors, co-workers, or customers, sexual harassment is an attempt to assert power over another person [10]."

General Recommendation 19 to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) [11] defined sexual harassment as:

> "*Such unwelcome sexually determined behavior as physical contact and advances, sexually colored remarks, showing pornography and sexual demands, whether by words or*

6 The questionnaire was published in the January 1976 issue of Redbook. See Wendy Pollack, Sexual Harassment: Women's Experience vs. Legal Definitions, 13 HARV. WOMEN'S L.J. 35, 42 (1990) (citations omitted); see also Eliza G.C. Collins & Timothy B. Blodgett, Sexual Harassment: Some See It... Some Won't, HARv. Bus. REV., Mar.- Apr. 1981, at 76 (joint survey by Harvard Business Review and Redbook).

7 Supra note 5.

8 Morgan Phoebe A., "Sexual Harassment" in Encyclopedia of women and crime by Nichole Hahn Rafter(Editor-in-Chief)(Arizona: Oryx Press, 2000) at p .24.

9 International Labour Organisations (ILO),Conditions of Work Digest, Vol11,1/1992,"Combating Sexual Harassment at Work". at p. 160.

10 Arjun P. Aggarwal And Madhu M. Gupta, *Sexual Harassment In The Workplace*,(Toronto: Butterworths, 1987 Ist Ed) At p. 1

11 CEDAW Committee, General Comment No 19: Violence Against Women, 11th sess, UN Doc A/47/ 38, 1992. Available online at http://www.refworld.org/docid/453882a422.html assessed on 20 March 2014

> *actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment*".

The International Labor Organization (ILO) has addressed sexual harassment as a prohibited form of sex discrimination under the Discrimination (Employment and Occupation) Convention (No. C111) [12]. India ratified this document on 3 June 1960. It defines discrimination to include

> *"any distinction, exclusion or preference made on the basis of . . . sex . . . which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation [13]."*

Section 2(n) of The Sexual Harassment of Women at Workplace (Prevention, Protection, Redressal) Act, 2013 defines sexual harassment as under: *'sexual harassment' includes any one or more of the following unwelcome acts or behaviors (whether directly or by implication) namely:*

i. Physical contact and advances; or
ii. Demand or request for sexual favors; or
iii.Sexually colored remarks; or
iv. Showing pornography; and
v. Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Manifestations of Sexual Harassment:

The Supreme Court had the chance to give definition of the term Sexual Harassment which it said is of two kinds, in a landmark judgment of *Visakha* v. *State of Rajasthan.*[14]The petition was filed by a number of women's organisations following the gang rape of Bhanwari Devi, a *Sathin* in Rajasthan during the course of her work of preventing child marriage. The Supreme Court pointed out that each "incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate and the urgency for safeguards by an alternative mechanism in the absence of legislative measures.

12 International Labour Organization (ILO), Discrimination (Employment and Occupation) Convention, C111,25 June 1958, available at: http://www.refworld.org/docid/3ddb680f4.html . assessed on 20 March 2014

13 International Labour Organization (ILO), Discrimination (Employment and Occupation) Convention, C111,25 June 1958, available at: http://www.refworld.org/docid/3ddb680f4.html ,Art. 1(a) assessed on 20 March 2014.

14 (1997) 6 SCC 241.

Each such incident results in the violation of the fundamental rights of "Gender Equality" and "The Right to Life and Liberty" [15]. The violations are under articles 14, 15 and 21 and as it was pointed out that "one of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(g) to practice any profession or to carry out any occupation, trade or business". The responsibility for ensuring the safety and the dignity of the woman is through legislation and the executive taking action but the court did not abandon its responsibility but felt that "some guidelines should be laid down for the protection of these rights to fill the legislative vacuum" [16].

The court said: "The power of the Court under Article 32 for the enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the woman from sexual harassment and to make their fundamental rights meaningful. Gender equality includes protection from sexual harassment and the right to work with dignity which is a universally recognized basic human right" [17]. The international conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose. The government has ratified the recommendation of CEDAW and the relevant article 11 - "Equality in employment can be seriously impaired when women are, subjected to gender specific violence such as sexual harassment". The international conventions and norms for construing domestic law when there is no inconsistency between them, and there is a void in the domestic law, is now an accepted rule of judicial construction.

The supreme Court had provides protection to the victims of sexual harassment and as such recognises two forms of sexual harassment, namely:

1. Quid pro quo sexual harassment, and
2. Harassment that creates a hostile work environment.

Quid Pro Quo Sexual Harassment (Sexual Blackmail):

Quid pro quo is a Latin phrase meaning 'something for something'. This type of harassment refers to a demand of sexual favour and the threat of adverse job consequences if the demand is refused. It is characterized by the denial of economic benefit to punish the victim by rejecting a sexual overture or demand [18]. This form of sexual harassment is often exploited by a woman's superior at the workplace – someone with control over her standing as an employee. The superior will ask for, or demand, sexual indulgences and will promise promotions, pay raises, and genera] job security in return. Should the victim choose not to consent to the deal, she may suffer job loss, demotion or transfer [19].Examples of 'quid pro

15 *Id.* at 247.
16 Ibid.
17 *Id.* at 249.
18 Alok Bhasin, *Sexual Harassment at Workplace* (Lucknow:Eastem Book Company,2007) at p.5.
19 Tom Dannenbaum and Keya Jayaram, *Combating Sexual Harassment at the Workplace* (2005) at p.33.

quo' sexual violations include [20]:

a) attempts to influence a co-worker or subordinate to submit to unwelcome sexual advances;
b) either implicitly or explicitly making verbal or physical contact or physical conduct of a sexual nature a condition of employment;
c) either implicitly or explicitly tying evaluations, promotions, job transfers and other benefits to verbal or physical conduct of a sexual nature; and
d) threatening professional retribution unless the victim takes part in verbal or physical conduct of a sexual nature.

Hostile Work Environment Sexual Harassment;

Sexual harassment also occurs when an individual experiences unwelcome sexual advances, requests for sexual favours or other verbal or physical conduct of a sexual nature where such conduct has the purpose or effect of unreasonably interfering with that individual's work performance or creating an intimidating, hostile, or offensive working environment [21]. This type of sexual harassment does not include a demand for an exchange of sex for a job benefit. It is the creation of an uncomfortable environment. Examples of 'Hostile Work Environment' sexual violations include [22]:

a) co- worker/supervisor/any other person or persons engaging in unwelcome and inappropriate sexually based behaviour, rendering the workplace atmosphere intimidating, hostile or offensive;

Pervasive nature of sexual harassment at workplace

A study done by the International Labour Organisation in 1992 found that sexual harassment of women is acquiring a menacing dimension the world over compelling many of its victims to quit jobs or suffer humiliation. 23 countries were surveyed (but it did not include any of the South Asian countries). The picture, as the report said, was a disquieting one - 15 to 30 per cent of the women who were working had been subjected to sexual harassment. The sexual harassment they were subjected to varied from explicit demands for sexual intercourse to offensive remarks and one out of 12 women had to quit her job or had been fired [23].

In the USA, the Equal Employment Opportunity Commission in 2006

20 ibid.
21 National Human Rights Commission, Supra Note 6, p.2.
22 Dannenbaum and Jayaram, Supra Note 13.
23 Reproduced in Noorani, A.G; 'Sexual Harassment and the Law'. *Span*, 17 (August 1993).

received over 12,000 complaints of sexual harassment, which marked a 100% increase in just 5 years.

Data from NCRB[24] revealed that a total of 8,570 cases of Sexual Harassment were reported in the country during the year 2011 showing a decrease of 14.0% as compared to the previous year (9,961 cases). 5-year trend analysis showed a decrease of 20.8% over the average of 2006 – 2011. *Andhra Pradesh reported 42.7% of total cases reported in the country during the year 2011*.

There are, however, a few cases where the woman has taken up her fight seriously and also been able to win. Suman, a *Doordarshan* producer in Hyderabad took her boss Chawla to court. She had complained about his behaviour to the DD Welfare Association saying she was being harassed and teased by him for over three months. The only outcome of her complaint was that she was transferred to Lucknow. But she pursued the case and filed two separate cases in the metropolitan magistrate's court; the first one charged Chawla with outraging her modesty.

The second case is where a clerk in the pay and accounts office in Hyderabad complained to an NGO association against two male superiors who had tried to molest her during office hours. Though her complaint was followed by a series of *dharnas*, an inquiry committee headed by a woman exonerated the guilty officer. But under pressure from the activists the government was forced to transfer them[25].

The third case is one which should be given a great deal of publicity so that women who are being harassed will pick up courage to fight back. Shehnaz Sani, a Saudi Arabian Airlines employee was fired after she protested against her senior's sexual advances. The Bombay High Court had ordered that she be reinstated and paid 13 years' foregone wages- Her courage in fighting this case was tremendous as what added to her problems was the fact that her husband worked in Saudi Arabia and was threatened with retrenchment if his wife took an aggressive stand against the airlines. But, as she said, she could not submit and she "fought this battle entirely on my own" [26].

Sujata Kohli, an advocate in the Sessions Court, was allegedly assaulted by the secretary and a senior member of the Delhi Bar Association. Even the police in the police post in the compound refused to intervene. The case filed under section 354 and section 506 is still continuing and she is fighting a lone battle. [27]

Gita Kariekar, a typist in a private firm in Mumbai lost her job for refusing to have an affair with her boss. She told the labour court about this reason for her termination but could not convince the judge who said "Why should any man want to chase you" [28]. Chaula Karuva, the public relations officer at the Gujarat Tourism Development Corporation was dismissed for having lodged a formal

24 National Crime Records Bureau Report 2011 available at www.ncrb.in.
25 Shama Chatterjee, *The Free Press Journal* dated 29.11.1997 reproduced in *ROWS Newsletter*.
26 Namita Devidayal, *The Times of India* dated 29.11.1998 reproduced in *RCWS Newsletter* 10.
27 Laxmi Murthy, *Business Line* dated 15.9.1997.
28 Shama Chatterjee, *The Free Press Journal* dated 29.11.97.

complaint against the misconduct of her IAS officer boss. She took the case to court and the Gujarat High Court ordered her department to reinstate her with full back wages and her boss was transferred following an inquiry. One of the few cases where the woman had the courage to take the case to court and also win, but the IAS fraternity on her return to work continued to harass her for her crusade against one of their colleagues. [29] Another case was that of an officer in the nationalised bank in Delhi who had complained of harassment by her boss who insisted she stay back till late hours and tried to get physically intimate. She was charge sheeted and asked to explain why she talked about this to others and brought a bad name to the bank. When she complained to the grievance committee she was charge sheeted again [30].

Recently Tarun Tejpal, editor of the investigative journalism magazine Tehelka, has been accused of attempting to rape a young female colleague. In a graphic email leaked to the media, the victim accused Tejpal of assaulting her in a hotel lift during a festival in Goa. There has been much introspection about how a man like Tejpal could have assaulted a young woman. There has been even more angst about how a respected female journalist, and feminist, could argue that sexual assault was simply an internal matter.This kind of behaviour happens not just at Tehelka; most Indian workplaces are completely ill-equipped to deal with working women. Often a culture prevails where powerful men escape punishment. Recently, a supreme court judge has been accused of sexual assault by a young female intern, who allegedly remains too intimidated to file a case [31].

A survey conducted by Sakshi, a Delhi based NGO, in a few major cities reported that 65 per cent of women lawyers interviewed were always or often subjected to, or had observed, verbal or physical sexual harassment from other lawyers. The harassment would take various forms according to the survey. These would include use of stereo-typed role characterisation, sexual innuendo, devaluation of women's work, use of obscene or vulgar language, and comments on appearances and character. The bar report narrates two incidents. In one case, a woman lawyer was openly punched by a male colleague in the High Court premises for refusing to join him for a cup of coffee. When she tried to report the incident, a senior member of the bar dissuaded the police from registering it, on the ground that "it would tarnish the reputation of the Bar". Forty-eight per cent of the women lawyers surveyed also stated that they had heard or experienced remarks or jokes that were demeaning to women [32].

29 Ibid.
30 Ibid.
31 Kavita roa Friday 29 Nov 2013, The guardian .
the Tarun Tejpal case shows sexual harassment is a problem India has to face up to Maltreatment occurs not just in slums, but in workplaces too. This must be addressed – and not by ceasing to hire women
32 Rameshan G, The Hindu, July 19, 1998.

A CNN survey in New Delhi pointed to the fact that 50% of all working women claimed that they were sexually harassed in the workplace [33].

Measures at international level for prevention of sexual harassment at workplace

International Labour Organisation

ILO Convention 111 against 'Discrimination in employment' deals with sexual harassment at work, and for women workers it is a major form of discrimination. In 2003, the ILO's Governing body adopted a Code of practice on workplace violence in services sectors, offering guidance, including against sexual harassment. The ILO's 'Campaign for Decent Work' includes sexual harassment as an aspect of health and safety, discrimination, and a violation of workers' basic rights.

United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), declares that States should eliminate discrimination against women at work. Sexual harassment in the workplace is a growing concern for women. The Convention stressed that sexual harassment constitutes a form of sex discrimination. "It not only degrades the woman", the report noted, "but reinforces and reflects the idea of non-professionalism on the part of women workers, who are consequently regarded as less able to perform their duties than their male colleagues."

Platform for Action of the Fourth World Conference on Women in Beijing, 1995

The Conference Platform for Action recognized that all governments, irrespective of their political, economic, and cultural systems, are responsible for the promotion and protection of women's human rights including outlawing sexual harassment at work.

Regional Measures Europe

The European Union's 1991 'Code of Practice' called on Member States to promote awareness of sexual harassment and take measures against it, and a Directive prohibiting sexual harassment was adopted in 2002.

Organisation of American States

The 'Inter-American Convention on Violence Against Women' says that

33 Radhika Coomaraswamy, The varied contours of violence against women in South Asia, Fifth South Asia Regional Ministerial Conference, Celebrating Beijing Plus Ten Islamabad, Pakistan, 3- 5 May 2005, p 9.

States must promote and protect women's rights to be free from violence. It suggests legal measures to prevent this occurring and ensure victims have access to "just and effective" remedies.

Judicial response to Sexual harassment at workplace

In *Rupan Deol Bajaj Vs. K PS.Gill* [34], a senior IAS officer, Rupan Bajaj was slapped on the posterior by the then Chief of Police, Punjab- Mr. K P S.Gill at a dinner party in July 1988. Rupan Bajaj filed a suit against him, despite the public opinion that she was blowing it out of proportion, along with the attempts by all the senior officials of the state to suppress the matter.

The Supreme Court in January, 1998 fined Mr. K P S. Gill Rs.2.5 lacs in lieu of three months Rigorous Imprisonment under Sections. 294 and 509 of the Indian Penal Code.

In *N Radhabai Vs. D. Ramchandran* [35], when Radhabai, Secretary to D Ramchandran, the then social welfare minister for state protested against his abuse of girls in the welfare institutions, he attempted to molest her, which was followed by her dismissal. The Supreme Court in 1995 passed the judgment in her favour, with back pay and perks from the date of dismissal.

It was in 1997 in *Visakha Vs State of Rajasthan and others* [36] the Supreme court took cognizance of the fact, that for realizing the concept of gender equality, it is necessary that sexual harassment of working women in all working places must be prevented. A working woman is exposed to various hazardous situations which may lead to any kind of depravity. This means it leads to violation of her rights under Articles-14, 15, 19 & Article 21 of the constitution. In this case for the first time sexual harassment had been explicitly- legally defined as an unwelcome sexual gesture or behaviour whether directly or indirectly through

1. Sexually coloured remarks
2. Physical contact and advances
3. Showing pornography
4. A demand or request for sexual favours
5. Any other unwelcome physical, verbal/non-verbal conduct being sexual in nature.

It was in this landmark case that the sexual harassment was identified as a separate illegal behaviour. The critical factor in sexual harassment is the unwelcomeness of the behaviour. Thereby making the impact of such actions on the recipient more relevant rather than intent of the perpetrator- which is to be considered.

In the above mentioned case, the judgment was delivered by J.S. Verma. CJ, on behalf of Sujata Manohar and B.N. Kirpal, JJ., on a writ petition filed by 'Vishaka'- a non Governmental organization working for gender equality by way

34 1998 S.C
35 1995 S.C
36 AIR ,1997 S.C 3011

of PIL seeking enforcement of fundamental rights of working women under Article.21 of the Constitution.

The immediate cause for filing the petition was the alleged brutal gang rape of a social worker of Rajasthan. The Supreme Court in absence of any enacted law to provide for effective enforcement of basic human rights of gender equality and guarantee against sexual harassment, laid down various guidelines:

1. All the employers in charge of work place whether in the public or the private sector, should take appropriate steps to prevent sexual harassment without prejudice to the generality of his obligation, he should take the following steps:
    a. Express prohibition of sexual harassment which includes physical contact and advances, a demand or request for sexual favours, sexually coloured remarks, showing pornographic or any other unwelcome physical, verbal/ non-verbal conduct of sexual nature should be noticed, published and circulated in appropriate ways
    b. The rules and regulations of government and public sector bodies relating to conduct and discipline should include rules prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.
    c. As regards private employers, steps should be taken to include the aforesaid prohibitions in the Standing Orders under the Industrial Employment (Standing Orders) Act, 1946.
    d. Appropriate work conditions should be provided in respect of work leisure, health, hygiene- to further ensure that there is no hostile environment towards women and no woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.
2. Where such conduct amounts to specific offences under the Indian Penal Code or any other law the employer shall initiate appropriate action in accordance with the law, by making a complaint with the appropriate authority.
3. Victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

As stated by the Supreme Court, these guidelines are applicable to:

a) The employer or other responsible persons or other institutions to prevent sexual harassment and to provide procedures for the resolution of complaints;
b) Women who either draw a regular salary, receive an honorarium, or work in a voluntary capacity- in the government, private or organized sector come under the purview of these guidelines.

Preventive Steps:

1. Express prohibition of sexual harassment should be notified and circulated.
2. Inclusion of prohibition of sexual harassment in the rules and regulations of government and public sector.
3. Inclusion of prohibition of sexual harassment in the standing orders under the Industrial Employment (Standing Orders) Act, 1946 by the private employers.
4. Provision should be made for appropriate work conditions for women.

Procedure pertaining to filing of complaints:

1. Employers must provide a Complaints Committee which is to be headed by a woman; of which half members should be women.
2. Complaints Committee should also include an NGO or other organization- which is familiar with sexual harassment.
3. Complaints procedure should be time bound.
4. Confidentiality of the complaints procedure has to be maintained.
5. Complainant or witnesses should not be victimized or discriminated against- while dealing with complaints.
6. The Committee should make an annual report to the concerned Government department and also inform of the action (if any) taken so far by them.

Miscellaneous Provisions:

1. Guidelines should be prominently notified to create awareness as regards the rights of the female employees.
2. The employers should assist the persons affected, in cases of sexual harassment by outsiders or third parties.
3. Sexual harassment should be discussed at worker's meetings, employer-employee meetings and at other appropriate forums.
4. Both Central and State governments are required to adopt measures including legislations to insure that private employers also observe these guidelines.

In *Apparel Export Promotion Council Vs. A.K. Chopra* [37], on 12.8.1988, the respondent tried to molest a woman employee of the Council, Miss X (name withheld by us) who was at the relevant time working as a Clerk-cum- Typist. She was not competent or trained to take dictations. The respondent, however, insisted that she go with him to the Business Centre at Taj Palace Hotel for taking dictation from the chairman and type out the matter. Under the pressure of the respondent, she went to take the dictation from the chairman. While Miss X

37(1999) 1 SCC 759.

was waiting for the Director in the room, the respondent tried to sit too close to her and despite her objection did not give up his objectionable behaviour; and tried to molest her physically in the lift while coming to the basement but she saved herself by pressing the emergency button, which made the door of the lift to open. On a complaint made by Miss 'X' a departmental enquiry committee was set up to investigate into the said allegations. The Enquiry Officer after considering the documentary and oral evidence and the circumstances of the case arrived at the conclusion that the respondent had acted against moral sanctions and that his acts against Miss X did not withstand the test of decency and modesty, and that the respondent had tried to touch her person in the Business Centre with ulterior motives despite reprimands by her. The Disciplinary Authority agreeing with the report of the Enquiry Officer, imposed the penalty of removing him from service with immediate effect on 28th June, 1989.

The respondent moved the Delhi High court against the order of dismissal. The High Court while entertaining the petition noted that the petitioner had 'tried to molest', but 'had not infact molested her' as the offence was under Section 354 IPC, for an attempt to "outrage the modesty" of a woman (an offence that can be brought regardless of whether the conduct takes place within an employment context) necessitates the establishment of physical contact. The high court set aside the conviction on the ground that physical contact had not been established and disposed of the petition with a direction to reinstate him without the benefit of back wages and that the respondent be posted in any other office outside Delhi at least for a period of two years.

In appeal the Supreme Court reversed the order of High Court and reinstated the sentence imposed by the lower court, holding that sexual harassment does not necessarily involve physical contact. Where a supervisor has harassed and made unwelcome sexual advances to his clerk, a reduction of sentence merely because the supervisor made no physical contact is inappropriate when there is no factual dispute. In the Court's words, the supervisor's conduct "did not cease to be *outrageous for want of an actual assault or touch…*" it matters whether the conduct is "unwanted." While the conduct must be assessed from the victim's standpoint, in the Indian context there is a danger of under protection when determining whether a certain conduct was "unwanted" as a victim's past sexual history and conduct may be introduced as relevant evidence to erode her credibility. In the present case, for instance, the clerk's ignorance of sexual matters and the fact that she was unmarried, although irrelevant, helped to establish that the conduct of her superior was "unwanted."

The court further said in a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression "molestation". They must examine the entire material to determine the genuineness of the complaint. The statement of the victim must be appreciated in the background of the entire case.

Where the evidence of the victim inspires confidence, as is the position in the instant case, the courts are obliged to rely on it. Such cases are required to be dealt with great sensitivity. Sympathy in such cases in favour of the superior officer is wholly misplaced and mercy has no relevance. The High Court overlooked the ground realities and ignored the fact that the conduct of the respondent against his junior female employee, Miss X, was wholly against moral sanctions, decency and was offensive to her modesty. Reduction of punishment in a case like this is bound to have demoralizing effect on the women employees and is a retrograde step. There was no justification for the High Court to interfere with the punishment imposed by the departmental authorities. The act of the respondent was unbecoming of good conduct and behaviour expected from a superior officer and undoubtedly amounted to sexual harassment of Miss X and the punishment imposed by the appellant, was, thus, commensurate with the gravity of his objectionable behaviour and did not warrant any interference by the High Court in exercise of its power of judicial review.

In December 2012, in *Medha Kotwal Lele & Ors Vs. Union of India & Ors*[38], the court expressed its anguish at the non implementation of the guidelines laid down in the *Vishakha vs State of Rajasthan and others* [39] judgment. The Court stated that the attitude of neglect in establishing effective and comprehensive mechanisms in letter and spirit of the guidelines by the State as well as the employers in private and public sector had defeated the very objective and purpose of the guidelines.

STATUTORY PROVISIONS

Before the passing of the Sexual Harassment of women at workplace(prevention, prohibition and redressal) Act 2013, Sexual Harassment of women was dealt under section 294, 354 and 509 of Indian Penal Code, 1860.

Section 294 of IPC: Obscene acts and songs

Whoever, to the annoyance of others-

a) does any obscene act in any public place, or
b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Section 354 of IPC: Assault or criminal force to woman with intent to outrage her modesty

Whoever assaults or uses criminal force to any woman, intending to outrage

38 [Writ Petition (Criminal) Nos. 173-177 of 1999] / [With T.C. (C) No. 21 of 2001] / [Civil Appeal No. 5009 of 2006] / [Civil Appeal No. 5010 of 2006]
39 AIR ,1997 S.C 3011

or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 509 of IPC : Word, gesture or act intended to insult the modesty of a woman

Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Simultaneously with the passing of the Sexual Harassment of Women at workplace (prevention, prohibition redressal) Act , 2013 necessary were made to the Indian Penal Code

Section 354A IPC [40]**:** which made Sexual Harassment a criminal offence for the first time, was introducd and provided as under:

354A: Sexual harassment and punishment for sexual harassment.-

(1) A man committing any of the following acts-
   (i) physical contact and advances involving unwelcome and explicit sexual overtures; or
   (ii) a demand or request for sexual favours; or
   (iii) showing pornography against the will of a woman; or
   (iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine or with both.

Nearly 16 years after the *Visakha Vs State of Rajasthan and others* [41] the judgment, in April 2013 Parliament enacted a civil legislation as well as brought in amendments to the criminal law to address the issue of sexual harassment at the workplace. Parliament also enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 which gave statutory force to many of the guidelines laid down by this Hon'ble Court in the *Vishakha*

40 Introduced vide Criminal law Amendment Act ,2013.
41 AIR ,1997 S.C 3011

Vs State of Rajasthan and others [42] the judgment and subsequently.

Salient Features Of The Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013

Sexual harassment is considered as a violation of the fundamental right of a woman to equality as guaranteed under Articles 14 and 15 of the Constitution of India and her right to life and to live with dignity as per Article 21 of the Constitution. It has also been considered as a violation of a right to practice or to carry out any occupation, trade or business under Article 19(1)(g) of the Constitution, which includes a right to a safe environment free from harassment. The Sexual Harassment Act stipulates that a woman shall not be subjected to sexual harassment at any workplace. As per the statute, presence or occurrence of circumstances of implied or explicit promise of preferential treatment in employment; threat of detrimental treatment in employment; threat about present or future employment; interference with work or creating an intimidating or offensive or hostile work environment; or humiliating treatment likely to affect the lady employee's health or safety may amount to sexual harassment.

- The definition of sexual harassment in the Sexual Harassment Act is in line with the Supreme Court's definition in the *Vishaka* Judgment and includes any unwelcome sexually determined behaviour (whether directly or by implication) such as physical contact and advances, demand or request for sexual favours, sexually coloured remarks, showing pornography, or any other unwelcome physical verbal or non-verbal conduct of sexual nature. Additionally it recognises the promise or threat to a woman's employment prospects or creation of hostile work environment as 'sexual harassment' at workplace and expressly seeks to prohibit such acts.

- The definition of 'employee' under the Sexual Harassment Act is fairly wide and covers regular, temporary, ad hoc employees, individuals engaged on daily wage basis, either directly or through an agent, contract labour, co-workers, probationers, trainees, and apprentices, with or without the knowledge of the principal employer, whether for remuneration or not, working on a voluntary basis or otherwise, whether the terms of employment are express or implied.

- The ambit of the Sexual Harassment Act is very wide and is applicable to the organized sector as well as the unorganized sector. In view of the wide definition of 'workplace', the statute,inter alia, applies to government bodies, private and public sector organisations, non governmental organisations, organisations carrying on commercial,

42 Ibid.

vocational, educational, entertainmental, industrial, financial activities, hospitals and nursing homes, educational institutes, sports institutions and stadiums used for training individuals. As per the Sexual Harassment Act, a workplace also covers within its scope places visited by employees during the course of employment or for reasons arising out of employment - including transportation provided by the employer for the purpose of commuting to and from the place of employment [43].

- The Act provides protection not only to women who are employed but also to any woman who enters the workplace as a client, customer, apprentice, and daily wage worker or in ad-hoc capacity. Students, research scholars in colleges/university and patients in hospitals have also been covered.

- The Sexual Harassment Act requires an employer to set up an 'Internal Complaints Committee' ("**ICC**") at each office or branch, of an organization employing at least 10 employees. The government is in turn required to set up a 'Local Complaints Committees' ("**LCC**") at the district level to investigate complaints regarding sexual harassment from establishments where the ICC has not been constituted on account of the establishment having less than 10 employees or if the complaint is against the employer. This twin mechanism would ensure that women in any workplace, irrespective of its size or nature, have access to a redressal mechanism. The LCCs will enquire into the complaints of sexual harassment and recommend action to the employer or District Officer. The Sexual Harassment Act also sets out the constitution of the committees, process to be followed for making a complaint and inquiring into the complaint in a time bound manner.

- The Sexual Harassment Act empowers the ICC and the LCC to recommend to the employer, at the request of the aggrieved employee, interim measures such as (i) transfer of the aggrieved woman or the respondent to any other workplace; or (ii) granting leave to the aggrieved woman up to a period of 3 months in addition to her regular statutory/ contractual leave entitlement.

- Employers who fail to comply with the provisions of the proposed Act will be punishable with a fine which may extend to 50,000.

43 Section 2(o), Sexual Harassment Act, 2013

- Since there is a possibility that during the pendency of the enquiry the woman may be subject to threat and aggression, she has been given the option to seek interim relief in the form of transfer either of her own or the respondent or seek leave from work.

- The Complaint Committees are required to complete the enquiry within 90 days and a period of 60 days has been given to the employer/ District Officer for implementation of the recommendations of the Committee.

- The Act provides for safeguards in case of false or malicious complaint of sexual harassment. However, mere inability to substantiate the complaint or provide adequate proof would not make the complainant liable for punishment.

- Implementation of the Act will be the responsibility of the Central Government in case of its own undertakings/establishments and of the State Governments in respect of every workplace established, owned, controlled or wholly or substantially financed by it as well as of private sector establishments falling within their territory. Besides, the State and Central Governments will oversee implementation as the proposed Bill casts a duty on the Employers to include a Report on the number of cases filed and disposed of in their Annual Report. Organizations, which do not prepare Annual Reports, would forward this information to the District Officer.

- Through this implementation mechanism, every employer has the primary duty to implement the provisions of law within his/her establishment while the State and Central Governments have been made responsible for overseeing and ensuring overall implementation of the law. The Governments will also be responsible for maintaining data on the implementation of the Law. In this manner, the Act create an elaborate system of reporting and checks and balances, which will result in effective implementation of the Law.

Conclusion

To conclude it can be said that sexual harassment of women at a workplace is a form of gender discrimination against women which needs to be curbed by taking appropriate measures. Notwithstanding the *Vishaka* judgement, and Sexual Harassment Act, sexual harassment continues to characterise the working conditions of many women in the workplace. What is required, appropriate implementation mechanisms that recognise the obstacles posed by power imbalances and gender norms in empowering women to make a formal complaint

on the one hand and in receiving appropriate redress on the other. Prevention is the best tool for the elimination of sexual harassment. Thus a good training program will prepare workers to recognize sexual advances and developing strategies to deal with them. Hence training programs might best be utilized as a catalyst and intervention in removing harassment from the workplace. Finally it is not the sole responsibility of the management but also the employee's responsibility to speak up and not allow them to be victimized. Meanwhile it is also the society's moral responsibility to involve in the awareness-raising sexual harassment programs. In sum, there should be concerted effort by governments, employers, employees and women's organizations to help to create zero tolerance towards sexual harassment at workplace. Law alone is not enough to root out this social evil. Society has to change its attitude so that women can come out and participate in public life without feeling threatened. What needs to be done is to inculcate a sense of mutual respect between women and men. In this regard, the following belief of Swami Vivekananda in deference to a woman is more than self-explanatory:

> *"All nations have attained greatness by paying proper respect to women; those countries which do not respect women have never become great, nor will ever be in future [44]."*

44 T. Bhagyamma, 'Empowerment of Female Agricultural Laborers through Rural Development Programme's : A Micro Level Analysis', in Empowering Women through information and knowledge, papers presented at the international conference at Paud, Pune, 30 May-2 June 2003, Vol. II, p. 540.

An Analysis of the Registration of Designs Under Design Act, 2000

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Abstract

Eye catching look or appearance enhances the market appeal, and hence the marketability of an article. Useful articles must also be visually attractive, if they are to catch the attention of potential buyer and this marketing strategy has always been recognized since long before the advent of the Industrial Age. Industrial design is an applied art whereby the aesthetics and usability of mass products may be improved for production and marketability. The artisan and craftsman who make his wares manually employing his personal skill does pay, and has always paid attention to the aesthetic aspects of his creations. He chooses a shape and pattern to make them pleasing or attractive to the eye of the beholder. At the time of purchase people are attracted by design, which has an artistic merit and articles with a particular design may attract the public, increasing the sales and hence profits. In fact, this designing involves much thought, time and funds. Thus, the object of design registration is to see that the creator of a profitable design is not deprived of his reward by others who may apply it to their goods without his permission. The object of this article is to overview the Design Act 2000, to find out the loopholes in the said Act and also suggest some remedies.

Key Words: *Designs, Registration of Designs, International Position, Purpose of Design Act, Protection of Designs.*

1. Introduction

Industrial design is an applied art whereby the **aesthetics** and **usability** of mass products may be improved for production and marketability. The role of industrial designer is to create and execute design solutions towards problems of form, usability, user ergonomics, engineering, marketing, brand development and sales. For example an iPod, is an industrially designed product? [1] Eye catching

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1 Available at: http://en.wikipedia.org/wiki/industrial_design_rights.

look or appearance thus enhances the market appeal, and hence the marketability or sale of the product. Useful articles must also be visually attractive, if they are to catch the attention of potential buyer. This marketing strategy has always been recognized since long before the advent of the industrial age. The artisan and craftsman, who make his wares manually, employing his personal skill does pay, and has always paid attention to the aesthetic aspects of his creations. He chooses a shape and pattern to make them pleasing or attractive to the eye of the beholder. [2] Many people choose the article, which catches their eye by appearance. Those who wish to purchase an article for use are often influenced in their choice not only by practical utility and efficiency but also by its appearance. Whatever the reason may be, one article with a particular design may sell better than one without it.[3]

Producers, therefore, hunt for an attractive design, which will increase sales. Some intellectuals do hard work by putting much thought, time and funds to find a design for a particular article which will increase sales. [4] Thus, in order to see that the creator of a profitable design is not deprived of his reward by others who may apply it to their goods without his permission, it becomes obligatory for the former to register the design, so as to avail the protection under law. [5]

Although the concept and usage of designs were in practice from time immemorial, the idea of protecting it was not dominant; many designs consisting of various features were used from ancient period, but the concept of protecting it came only in the context of industrial design. Statutory attempts were made from 18th century to protect design, particularly industrial designs. Industrial design rights are Intellectual Property rights that protect the visual design of objects that are not purely utilitarian.

Design of an article is an intellectual property of a person who creates it. A design of an article has a commercial value in the world of business or trade. [6] A person who creates a design has exclusive right over his design, which is termed as his intellectual property right. In fact the law encourages people to create new designs without any fear of any unauthorized application of his design and ensure fair competition in the market. The protection is granted only when the design is registered under the Design Act. In order to qualify for registration, it is necessary that there is a design. The term 'Design' has been defined in Section 2(d) of the Designs Act, 2000, which provides that:

2 K.Ponnuswami, "Design Protection in India" The Design Act, 1911, WIPO/IP/ DEL/91/17.
3 P.Narayanan, "Intellectual Property Law" Eastern Law House, New Delhi, Second Edition, 1999, at p. 105.
4 P.Narayana, "Copyright and Industrial Designs" Eastern Law House, New Delhi, Third Edition, 2002, at p.309.
5 Bharat, "Law and Practice of Intellectual Property in India" Bharat Law House, New Delhi, Third Edition, 2006-2007, at p. 1049.
6 Meenu Paul, "Intellectual Property Law", Allahabad Law Agency, Faridabad (Haryana),Second edition, 2006, at p. 457.

> *"Design" means only the features of shape, configuration, pattern ornament or composition of lines or colours applied to any article whether in two dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchants Marks Act, 1958 or property mark as defined in Section 479 of the Indian Penal Code or any artistic work as defined in Clause (c) of Section 2 of the Copyright Act, 1957".* [7] *(Italics Supplied)*

The new definition to the term 'design' resulted in many conflicts in giving protection to the artistic works. This was explained by the Delhi High Court in *Microfibers Inc. v. Girdhar Co. & Another*[8] that the artistic works which are excluded from designs protection are the piece of art by itself in the form of painting. The court further observed that the artistic work with an object to put them into industrial use are not excluded from the section 2(d) of the Designs Act and they need to be registered to get protection. The court clearly explained in that case that "The exclusion of an 'artistic work' as defined in Section 2(c) of the Copyright Act from the definition of 'design' under Section 2(d) of the Designs Act, 2000 is only meant to exclude the nature of artistic works like painting of M.F. Hussain. It is, thus, the paintings, sculptors and such works of art which are sought to be specifically excluded from the new Act".

In another important case namely, *Bharat Glass Tube Ltd. v. Gopal Glass Works Ltd* [9] the Supreme Court held that "Design" means a feature or a pattern which is registered with the registering authority for being produced on a particular article by any industrial process whether manual, mechanical or chemical or by any other means which appears in a finished article and which can be judged solely by eye appeal.

The definition of Design under the new Act has been widened. Under the previous law, [10] the Design registration was granted only for the visual appearance of an article which included shape, configuration pattern, and ornamentation whether in two or three dimensions. Under, the Designs Act 2000, a Design

7 *In Dover v. Nurnberger Celluloid Warner Fabrik Gebruder Wolff, (1910) 27 RPC 489*, Buckley LJ said: "Design means, therefore, a conception or suggestion or idea of a shape or of a picture or of a device or of some arrangement which can be applied by some manual, mechanical or chemical means. It is a conception, suggestion, or an idea, not an article, which is the thing capable of being registered. It is a suggestion of form or ornament to be applied to a physical body".
8 2009(40) PTC 519(Del).
9 AIR 2008 SC 2520.
10 Designs Act, 1911.

registration can now be obtained for new or original features of shape, configuration pattern, ornamentation or composition of lines or colours as applied to an article, whether in two or three dimensions or both. A Design is something which determines the appearance of an article, or some part of an article. Designs are applied to an article with the objective of ornamenting and beautifying the article. If a particular feature is so applied on an article that it does not appeal to the eye at all and is incapable of attracting a prospective consumer in any manner for the purchase thereof, then such feature will not fall within the scope of a design.[11] A visual characterization of an article which influences a person to purchase an article in preference to other articles which are identical in function but differ in appearance, such characterization would also meet the criteria of a design.[12] A design must be applied in the article itself as in the case of a shape or configuration which is three-dimensional, *e.g.*, shape of a bottle or flower vase or the case of design which is two dimensional, *e.g.*, design on a sari, bed sheet, wallpaper which serves the purpose of ornamentation. It should be one which catches the eye of the purchaser.

In *Delhi Metro Plastic Industries v. Galaxy Footwear case*, [13] it was held that the definitions of "design" in Section 2(5) of the 1911 Act and Section 2(d) of the 2000 Act were slightly different and the present definition had certain additional features. The legislation has amplified the definitions of article and design to conform them with international accepted definitions for providing wider protection. The definition of article has been broadened to include parts of articles sold separately within its scope. The definition of Design has also been amplified to incorporate the composition of lines and colors to avoid overlapping with Copyright Act, 1957 regarding the definition of design with respect to artistic work.[14]

The definition under the Act of 2000 is an improved one and more comprehensive.[15] The inapplicability of copyright law to the fashion industry has not caused any instability, nor has it adversely affected the incentive to innovate and create. It is beyond doubt that the fashion industry needs to regulate dissemination of designs and art to reduce if not curb unauthorized use and appropriation of creative artistic works.[16]

11 *Re. Stenor Ltd v. Whitesides (Clitheroe) Ltd.,* 63 RPC 81.
12 *Samsonite Corporation v. Vijay Sales* 1998 (18) PTC 372 [Del].
13 2000, PTC 920 (Del).
14 Sreekumar. C. Nair, "An Overview of Design Protection in India Under the Designs", available at: http://www. http://www.lawyersclubindia.com/articles/an-overview-of-design-protection-in-india-under-the-designs-1583.asp#. vbunxpmqqko.html. (Visited on November 14, 2014).
15 Reshma Abraham, "A Comparative Analysis of the Designs Act 1911 and the Designs Act 2000", available at: http://www.legalserviceindia.com/article/l269-Designs-Act-1911-&-the-Designs-Act-2000.html. (Visited on March 21, 2014).
16 Pranjal Shirwaikar, "Fashion Copying and Design of the Law", 14 Journal of Intellectual Property Rights, at p.113 (2009).

International Position

Efforts for the protection of Design have been made at the International level as well as the national level. [17]

(a) ***United Kingdom***

Before discovering the history and the evolution of the Designs Act in India, it will be better to see the history of the Designs Act in United Kingdom, as they are the pre-runners in protecting the Industrial Designs and our laws relating to industrial designs are based on their legislations during the colonial period. The law of designs has a long history dating back to the latter part of 18th century. Its origin can be found from the United Kingdom in 1787 with the Designing and Printing of Linen Act. It was originally introduced to protect the designing and printing of linens and cottons, design law has been extended over the years to cover functional as well as decorative articles.18 This Act gave only a limited copyright protection to the designs, but it effectively begins with a design registration scheme which took recognizable form in the 1830s and 1840s.19 The Copyright and Design Act was passed in the year 1839 and increased the protection given to fabrics and textiles by extending the law according to the modern design. This Act only introduced the system of registration to avail benefits under the Act. Then the Act of 1842 consolidated all earlier Acts and provided a higher level of protection and increased the remedies for infringement. Thereafter in the year 1883 a single consolidated and amendment Act was passed by the parliament of the United Kingdom, clinching designs, patents and trademarks. At these times the importance of protection of designs was considered by most countries and they started enacting legislations to protect the industrial designs. [20] The right in registered design can last up to 25 years subject to the payment of maintenance fees.

(b) ***United States***

In the United States, a **design patent** is a form of legal protection granted to the ornamental design of a functional item. Design patents are a type of industrial design right. Ornamental designs of jewellery, furniture, beverage containers and computer icons are examples of

17 Available at: http://wikipediafoundation.org. (Visited on January 29, 2014).

18 Available at: http://www.ipo.gov.uk/types/design/d-about/d-whatis/d-history.htm. (Visited on March 1, 2014).

19W. Cornish, D LLewelyn and et.al., "Intellectual Property: Patents, Copyright, Trademarks and Allied Rights", Sweet & Maxwell, London, Seventh Edition, 2010, at p.601.

20 Balaji P Nadar, "Evolution of Designs Act in India & Protection of Industrial Design under International IPR Regime", available at: http://www.Evolution-of-Designs-Act-in-India-&-Protection-of-Industrial-Designs-under-International-IPR-Regime.html. (Visited on December 15, 2014).

objects that are covered by design patents. A US design patent covers the ornamental design for an object having practical utility. An object with a design that is substantially similar to the design claimed in a design patent cannot be made, used, copied or imported into the United States. The copy does not have to be exact for the patent to be infringed. It only has to be substantially similar. Design patents with line drawings cover only the features shown as solid lines. Items shown as dotted lines are not covered. This is one of the reasons Apple was awarded a jury verdict in the US case of ***Apple v. Samsung***. Apple's patent showed much of their iPhone design as broken lines. It didn't matter if Samsung was different in those areas. The fact that the solid lines of the patent were the same as Samsung's design meant that Samsung infringed the Apple design patent. Both novel fonts and computer icons can be covered by design patents. Icons are only covered; however, when they are displayed on a computer screen, thus making them part of an article of manufacture with practical utility. Screen layouts can also be protected with design patents. In United States, a design patent application is not published and is kept secret until granted.[21] Design patents cover the ornamental non-functional design of an item. Design patents can be invalidated if the design has practical utility (e.g. the shape of a gear). Design patents are valid for 14 years from the date of issue if filed prior to May 13, 2015, or 15 years from the date of issue if filed on or after

21 In 1842, George Bruce was awarded the first design patent, U.S. Patent D1. The design patent was for a new font, In 1879, Auguste Bartholdi was awarded design patent U.S. Patent D11, 023 for the Statue of Liberty. This patent covered the sale of small copies of the statue. Proceeds from the sale of the statues helped raise money to build the full statue in New York Harbor, In 1919, three design patents were granted for the badge of the American Legion, U.S. Patent D54,296; the badge of the American Legion Women's Auxiliary, U.S. Patent D55,398; and the badge of the Sons of the American Legion, U.S. Patent D92,187. The original terms of these patents were to have expired in 1933, but Congress has continually extended their protection. The patents were extended for an additional fourteen-year term by an amendment to the National Defense Authorization Act in 2007 that passed the Senate on June 22, 2006, In 1936, Frank A. Redford was awarded U.S. Patent D98,617 for the Wigwam Motel, Apple Inc. owns various patents regarding the design of the iPhone smart phone line and its related products.

May 13, 2015. [22]

(c) ***Canada***

Canada's Industrial Design Act, 1985 affords 10 years of protection to industrial designs that are registered; there is no protection if the design is not registered. The Industrial Design Act (R.S.C., 1985) defines "design" or "industrial design" to mean features of shape, configuration, pattern or ornament and any combination of those features that in a finished article appeal to and is judged solely by the eye. During the existence of an exclusive right, no person other than the registered owner can "make, import for the purpose of the trade or business, or sell, rent or offer or expose for sale or rent, any article in respect of which the design is registered".

(d) ***Europe***

In Europe, registered and unregistered community designs are available which provide a unitary covering in the European Community. Protection for a registered community design is for up to 25years, subject to the payment of renewal fees every 5years. The unregistered community design lasts for 3years after a design is made available to the public and infringement only occurs if the protected design has been copied.

(e) ***Japan***

Article 1 of the Japanese Design law states: "This law was designed to protect and utilize designs and to encourage creation of designs in order to contribute to industrial development". The protection period in Japan is 15years from the date of registration.

22 *Copyright*: Copyright prevents non-functional items from being copied. To show copyright infringement, the plaintiff must show the infringing item was copied from the original. The copyrighted artistic expression must either have no substantial practical utility (e.g. a statue) or be separable from the useful substrate (e.g. picture on a coffee mug). Design patents, on the other hand, cover the ornamental aspects of functional items from being infringed. One does not have to show that the infringing item was copied from the original. Thus a design that was arrived at independently can still infringe a design patent. Many objects can be covered by both copyright and design patents. The Statue of Liberty is one such example. *Trademark and trade dress:* Trademarks and trade dress are used to protect consumers from confusion as to the source of a manufactured object. To get trademark protection, the trademark owner must show that the mark is not likely to be confused with other trademarks for items in the same general class. The trademarks can last indefinitely as long as they are used in commerce. Design patents are only granted if the design is novel and not obvious for all items, even those of different utility than the patented object. An actual shield of a given shape, for example, can be cited as prior art against a design patent on a computer icon with a shield shape. The validity of design patents is not affected by whether or not the design is commercialized. Items can be covered by both trademarks and design patents. The contour bottle of Coca-Cola, for example, was covered by a now expired design patent, U.S. Patent D48, 160, but is still however protected by at least a US registered trademark.

(f) ***Paris Convention, 1833***

The Paris convention (1883) for the *Protection of Industrial Property* was the first international convention which discusses the concept of industrial property and its protection including general standards of protection for industrial designs to be provided by the member states. India is a contracting party to the convention. Article 5 of the Paris Convention provided that industrial designs shall be protected in all contracting countries however; the scope for such protection was not defined. The 1967 Paris Convention deals with industrial designs that are novel and therefore subject to patenting. [23]

(g) ***Berne Convention, 1886****:*

The Berne Convention (1886) for the *Protection of Literary and Artistic Works*, commonly referred to as the Berne Convention, is an international agreement governing copyright. India is a party to the convention and recognizes the copyright of works of authors from other members of the Berne Union in the same way as it recognizes the copyright of its own nationals. The 1971 Berne Convention provides that the artistic features of industrial designs may be protected by copyright for a minimum term of 26years. [24]

(h) ***Hague Agreement***

The Hague Agreement concerning the International deposit of industrial design came into existence in 1925. The Agreement was revised in London in 1934 and in Hague in 1960, and has been complemented by the additional Act of Monaco of 1967, by the complementary Act of Stockholm 1967 and by a protocol signed at Geneva in 1975. The Hague Agreement was amended in 1979 and is administered by the WIPO. The London Act 1934 and the Hague Act 1960 of the Hague Agreement are implemented by regulations last amended in 2001 and by administrative instructions.

On 2nd July, 1999, a new Act of the Hague Agreement was adopted in Geneva together with its regulations and a number of agreed statements: the Geneva Act of the Hague Agreement concerning the International Regulations of Industrial Designs (The Geneva Act 2001. The Assembly of the Hague Union at its twenty second session in September 2003 adopted common Regulations under the 1999 Act, the 1960 Act and the 1934 Act of the Hague Agreement. The assembly decided that, the said Regulations would

23 Available at: http://www.asialaw.org, (Visited on March, 2014).

24 Meenu Paul, "Intellectual Property Laws", Allahabad Law Agency, Faridabad (Haryana),Second Edition,2006, at p.2.

enter into force on 1 st April, 2004 replacing as from that date, the Regulations under the 1934 and the 1960 Act and the Regulations under the 1999 Act. [25]

(i) ***The Locarno Agreement (1979)***

The Locarno Agreement (1979) establishes the international classification for industrial designs and solely an administrative tool and does not bind the member states with regard to the nature of protection afforded by a design so classified. India has not signed the agreement. However, India follows the international classification for industrial designs based on the Locarno Agreement.

(j) ***TRIP'S (Trade related Intellectual Property Rights)***

The Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS) came into force on the 1st of January 1995, with the establishment of the World Trade Organization (WTO). TRIPS provide for minimum norms and standards with respect to different categories of intellectual property rights including Industrial Designs. Given the lack of one harmonizing convention in the field of industrial design, the GATT 1994 TRIP'S Agreement makes no reference to any convention as forming the base-line principles of protection. Instead, Article 25 and 26 simply set forth a few basic principles with a fair degree of flexibility in meeting the minimum obligations. It obliges members to provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations. [26]

It contains a special provision aimed at taking into account the short life cycle and sheer number of new designs in the textile sector. Requirements for securing protection of such designs, in particular in regard to any cost, examination or publication, must not unreasonably impair the opportunity to seek and obtain such protection. Members are free to meet this obligation through Industrial Design law or through Copyright law. [27] It requires members to grant the owner of a protected industrial design the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or

25 International Encyclopedia Of Intellectual Property Treaties edited by Alford Ilardi and Michale Blakeney, Oxford University press, First published 2004 at p. 398.
26 Article 25.1 of the TRIPS Agreement 1994.
27 Article 25.2 of the TRIPS Agreement 1994.

embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purpose. [28]It allows members to provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of the third parties. [29]

The duration of protection available shall amount to at least 10 years. The wording "amount to" allows the term to be divided into, for example, two periods of 5 years. [30]

Position in India

"A thing of beauty is a joy forever", these golden words have a very great significance in today's materialistic world, where the appearance of an article counts more than its utility or quality. Many people blindly choose an article, which catches their eye by the beauty in its design. The concepts of globalization & liberalization have flooded the Indian markets with large variety of products. The consumers are provided with numerous alternatives for any single product. This has made the Indian consumers more selective. Nowadays the producers have to not only prove their product's reliability but they also have to satisfy the aesthetic appetite of the consumers. The producers spend huge capital in developing innovative designs for catching the recognition of consumers by enhancing the appearance of their products. There are professional designers who put great intellectual effort in creating new & attractive designs. [31] The rationale for design protection is clear from US Supreme court's decision in the case, *Gorhan Mfg .Co .v. White*, [32] in which the court stipulated that the essential rationale for design Law are that the design right may enhance the design's "saleable value", "may enlarge the demand for it" and may be a "meritorious service to the public". Design protection will play an important role in the product market, increasing the competitiveness of the manufacturer or vendor of the product, and enhancing quality of societal life. Hence it is necessary to protect designs so as to reward the designer's creativity and to encourage future contributions. To this end, industrial designs are protected by legislations.

In India, textile designs were first to receive legal protection as early as in Year 1797 under the Act enacted for the design protection in Great Britain for the encouragement of arts or designs and printing linens, cotton, calicoes and

28 Article 26.1 of the TRIPS Agreement 1994.
29 Article 26.2 of the TRIPS Agreement 1994.
30 Dr. B.L.Wadehara, "Law Relating To Intellectual Property", Universal Law Publication Co., New Delhi, Fourth edition, 2007, at p. 527.
31 Sreekumar.c.nair, "An Overview of Design Protection in India under the Designs", available at: http:/ /www.lawyersclubindia.co/articles/details.asp?mod_id1583. (Visited on 25 January, 2015).
32 81U.S. (14 WALL) 511(S.Ct.,1872).

muslin's by vesting proprietors thereof in the designers, printers and properties for a limited period. This was an experimental measure extending protection for a limited period. In 1839 the protection was enlarged to cover designs for printing woven fabrics. A consolidating and updating legislation was enacted in 1842, which repealed all earlier statutes. 1n 1859, the Governor-General of India in Council for the first time made provisions for granting, the inventors of "new manufacture", the exclusive privileges of making, selling and using the invention in India or authorizing others to do so. This was supplemented by the first legislation in India on the subject of designs i.e; the Patent and Designs Protection Act 1872. The 1872 Act was passed to extend similar privileges to the inventors of new patterns and designs in British India, though for a much shorter duration. The Act included the concept "any new and original pattern or design or the application of such pattern or design to any substance or manufacture" in the term "new manufacture". The 1872 Act relating to the protection of inventions and designs was consolidated and amended by the Inventions and Designs Act, 1888. In 1911, the Indian Patent and Design Act were enacted. The provisions relating to patent principles contained in the Patent and Designs Act 1911 were repealed by the Patent Act 1970. The provisions with respect to designs in the Act continued to govern the designs law in India until the Designs Act was passed in 2000. The Designs Act, 2000 contains substantially the same provisions as were contained in the 1911 Act except some changes from the perspective of progress in the field of science and technology. The Act has enlarged the scope of definition of 'article' and 'design' and introduces the definition of 'original'.

The Designs Act, 2000 extends to the whole of India. This is an Act to consolidate and amend the law relating to protection of Designs. The Act was enforced on 11th May2001, published in the official gazette of India Extraordinary, Part 2nd, section 3(2) dated 11 th May 2001.

Purpose for Bringing the Designs Act, 2000

The purposes of bringing the Designs Act, 2000 were detailed in the statement of objects and reasons of the Bill. These purposes were:

1 To enlarge the scope of "prior publication";
2 to incorporate the provisions for delegation of powers of the controller to other officers and duties of examiners;
3 to contain provisions for identification of non-registrable design;
4 to contain provisions for substitution of application before registration of a design;
5 to introduce internationally followed system of classification in the place of Indian classification;
6 to contain provisions for restoration of lapsed design;
7 to contain provisions for appeal against order of controller before the High Court instead of central Government;
8 to revoke the period of secrecy of 2years of a registered designs;

9 to provide for compulsory registration of any document for transfer of right in the registered designs;
10 to introduce additional grounds in cancellation proceeding and to make provision for initiating the cancellation proceedings before the controller instead of the High Court;
11 to enhance the quantum of penalty imposed for infringement of a registered design;
12 to contain provisions for grounds of cancellation to be taken as defence in the infringement proceeding to be initiated in any court not below the court of the District Court;
13 to enhance initial period of registration from 5 to 10 years, to be followed by a further extension of a period of 5 years;
14 to contain provisions for allowing of priority to other convention inter-governmental organization apart from United Kingdom and other commonwealth countries;
15 to contain specific provisions to protect the security of India.

In view of the extensive amendments necessitated in the Patent and Designs Act, 1911, it was thought fit to repeal it and bring this re-enacted Act into operation incorporating the necessary changes. [33] Therefore, it is in nature of protection of the intellectual property right.

Schedule II of the Designs Act, 2000 provides that the following classes are relevant and designs can be registered in such classes, in respect of various articles [34]

CLASS	ARTICLES
1	Food stuff.
2	Articles of clothing etc.
3	Travel goods etc.
4	Brush ware.
5	Textile piece goods, artistic and natural sheet material.
6	Furnishing.
7	Household goods.
8	Tools and hardware.
9	Packages and containers for transport.
10	Clocks, watches.
11	Articles of adornment.
12	Means of transport and hoisting.
13	Equipments of production etc.
14	Recording communication equipment.

33 Dr. B.L. Wadehre, "Law Relating to Intellectual Property", Universal Law Publishing, New Delhi, 2013, at p. 412.
34 Dr. Ramesd, "Registration of Designs: Needs a fresh look", Indian Bar Review, Vol. 32(1&2) 2005.

15 Machineries.
16 Photographic, cinematographic apparatus.
17 Musical instrument.
18 Printing and office machine.
19 Stationary, teaching material etc.
20 Sales and advertising equipment.
21 Games and toys.
22 Arms pyrotechnic articles etc.
23 Medical and laboratory equipment.
24 Pharmaceutical and cosmetic products etc.
25 Lighting apparatus.
26 Tobacco and smokers supplies.
27 Building units and construction elements.
28 Devices and equipment against fire hazards.
29 Care and handling of animals.
30 Fluid distribution equipment.
31 Machines and applications for preparing food or drink.

Essential Requirements for Registration of Design

The essential requirements for the registration of Design under the Design Act, 2000 are

1 It must be applied to an article;
2 The design should be new or original;
3 Not previously published or used in any country before the date of application for registration;
4 The novelty may reside in the application of a known shape or pattern to new subject-matter;
5 A Design must have eye appeal.

The Design of industrial plans, layouts and installations are not registrable under the Act. The Design should be applied or applicable to any article by any industrial process. Normally, designs of artistic nature like painting, sculptures and the like, which are not produced in bulk by any industrial process are excluded from the registration under the Act. Industrial Designs consist of features of shape, configuration, and pattern or ornament that give manufactured articles eye appeal. When different industrial designs are applied to similar articles, those articles may work identically, but they differ from each other in their appearance. Examples of designs can be seen in clothing and fashion accessories, in automobile bodies and interiors, in furniture, appliances, office equipment and essentially, in just about all types of manufactured goods. Industrial designs derive their value from making articles attractive. While the subject-matter of industrial design is relatively straightforward, the legal issues that come into play in protecting new designs are among the most complex in the intellectual property

field. Like other works of art, industrial designs are fundamentally expressions of style or form. However, designs that involve utilitarian articles must also incorporate functional considerations. Industrial designs are thus properly associated with copyright, but they tend to spill over onto the subject area of patents as well. [35]

Procedure for Registration

In India any person claiming to be the proprietor of any new or original design not previously published in any country and which is not contrary to public order or morality can make an application to the controller for the registration of design. [36]A person can also file his application through a professional person (that is a Patent Agent, Legal Practitioner). However for the applicant not resident of India an agent has to be employed. The applicantion should be in the prescribed form and should be accompanied by the prescribed fee. [37]

The controller may, on the application of any person as said above claiming to be the proprietor of that design register the design under this Act, provided all the requirements prescribed under other sections are strictly adhered to. The controller may also consider the report of the examiner on such reference. Further, the controller may if he thinks fit, refuse to register any design presented to him for registration; but any person aggrieved by any such refusal may apply to the High Court. [38]

The registrar of a design confers upon the registered proprietor a copyright in the design for the period of registration. A copyright (in design) means the exclusive right to apply a design to the article belonging to the class in which it is registered.

The duration of the registration of a design is initially 10 years from the date of registration, but in case where claim to priority has been allowed, the duration is 10 years from the priority date. [39] This initial period of registration may be extended by a further period of 5 years on an application made in the

35 http://en.wikipedia.org/wiki/industrial_design_rights

36 Section. 5 of the Designs Act, 2000.

37 Section 24 of the Designs Act, 2000.

38 Section 5 of the Design Act, 2000.

39 It often happens that many people are working at the same time to find solution(s) to a particular technical problem. However, only one of them can be granted a patent for the same invention and most countries follow the so-called first-to-file-system in granting that patent to the one who filed the application first. When you are seeking patent protection for the same invention in several countries, the principle of priority is very useful since you do not have to file your application in several countries at the same time. The Paris Convention for the Protection of Industrial Property provides that once you file an application in one country party to the Convention, you are entitled to claim priority for a period of twelve months and the filing date of that first application is considered the “priority date.” Therefore, when you apply for protection in other member countries (of the Paris Convention) during those twelve months, the filing date of your first application is considered to have “priority” over other applications filed after that date. In such a case, you still succeed in being the first-to-file in other member countries, even if there are other applications filed before the filing date of your application in those countries.

prescribed form before the expiry of the said period of copyright. [40] The date of registration except in the case of priority is the actual date of filing of the application. In case of registration of design with priority, the date of registration is the date of making an application in the reciprocal country.

1 Application for the International Registration

Apart from filing an application for the registration of industrial designs in India a proprietor of an industrial design may also make an application for the International registration. The procedures, effect of International registration under Geneva Act, 1999 are briefly discussed as follow:

1.1 Any person who is a national of Member State or of a State member of an intergovernmental organization that is a member State, or that has a domicile, habitual residence or commercial establishment in a member State, may file an International application. [41] The international application may be filed; at the option of the applicant either directly with the International Bureau or through the Office of the applicant's contracting party. However, member states may prescribe that the international application must not be filed through its administration.

2 The filing date of the international application is allocated as follows:

2.1 In case the international application is filed with the international bureau directly, the filing date is the date on which the international Bureau receives the international application.

2.1 In case the international application is filed through the intermediary of administration of the applicant's member state, the filing date is the date on which the international application is received by the national administration, provided that, thereafter, the application is received by the International Bureau Within one month. The one-month period may be replaced by six Months by another member state whose legislation requires security Clearance.

3 The international application must be in the prescribed language and must contain or be accompanied by:

3.1 A request for international registration;

3.2 The prescribed particulars concerning the application;

3.3 The prescribed number of copies of the reproduction of the design;

3.4 An indication of the product or products constituting the design or in relation to which the design is to be used;

3.5 The prescribed fees.

40 Section 11of the Designs Act, 2000.

41 Art. 3 0f the Geneva act 1999.

4 In addition to these requirements, a member state whose office is an examining office may prescribe the following additional elements.

4.1 Indications concerning the identity of the creator of the design;

4.2 A brief description of the characteristic features of the design;

4.3 A claim.

Furthermore, the international application may contain any additional elements as prescribed in the regulations. [42]

The international Bureau publishes the international Registration six months after the date of registration. The applicant may, however, request that the publication be deferred. The administration of any member state may refuse in part or in whole the effect of the international registration when the conditions for the grant of protection under the legislation of that state are not met. The refusal is communicated by the administration to the International Bureau within six months from the date on which the International Bureau sends a copy of the publication of the international registration to the administration concerned. The International registration has in each member state, from the date of registration the same effect as an application regularly filed under the legislation, of the state.

The initial-term of the International registration is 5years from the date of registration. It may be renewed for an additional terms of 5years, subject to the payment of the prescribed fees. Subject to renewal, the maximum duration is 15years from the date of registration. Where the legislation of a member state provides for duration of protection of more than 15years for registration of industrial designs granted under that law, the International registration may be renewed in respect of that state for additional periods of 5years up to the expiry of the total duration of protection provided for under the law of that State.

Any member State of WIPO may become party to the Geneva Act. Any inter-governmental organization, which maintains an office, authorized to Grant protection to industrial designs in the territory of the treaty constituting the inter -governmental organization might become party to the Geneva Act, provided that at least one member state of the organization is a member state of WIPO. India being a party to the Geneva Act, 1999 has provided reciprocal arrangement not only with the United Kingdom and other convention countries but also with group of countries and inter-governmental organizations. [43]

The registered proprietor of a design has the copyright in the design. Copyright is defined as the exclusive right to apply a design to any article in any class in which the design is registered. The term of the copyright in design can last for a maximum period of 15years. Thereafter anybody can freely use the design. In other words the design consists of several parts and registered without

42 Article 5, Rule 7 of the Geneva Act 1999.

43 Rule 44 of the Designs Rules 2001.

limitation or explanation the exclusive right conferred is limited to the design as a whole and not to the individual parts even if they are capable of separate registration. [44]

Further a design is registered for goods covered by a particular class. Although the design might be intended for and actually applied only to one particular article, the protection extends to the articles covered by the whole class. The monopoly conferred by a registered design extends to all articles covered in the class in which the design is registered.

However, the rights conferred by registration are subject to the following requirements. Before delivery or sale of any article to which a registered design has been applied the proprietor should comply with the following requirements:

(i) He should supply specimen of design to the controller. If this is not done the controller may erase his name from the register and thereafter the copyright in the design will cease; and

(ii) The articles on which the design is applied should be marked with the word **"Registered", or "Regd" or RD** with the number of the registered design.

If the proprietor fails to apply the markings as above he will not be entitled to recover any penalty or damages in respect of any infringement of copyright in the design unless he shows;

(a) that he has taken all proper steps to ensure the marking of the articles, or

(b) that the infringement took place after the infringer has known or had notice of the existence of the copyright in the design.

The following persons could be infringers of a copyright in designing

1 A person who has applied a design or a fraudulent or obvious imitation thereof to the article for the purpose sale without the license or consent of the proprietor;

2 A person who has caused to be applied the design or its imitation as aforesaid;

3 A person who has done anything with a view to enable the design to be applied as aforesaid;

4 A person who has imposed for the purpose of sale pirated articles without the consent of the registered proprietor;

5 A person who has published or exposed or caused to be published or exposed for sale a pirated article knowing that it is a pirated article.

44 Holdsworth v\s Mcrea (1861) LR2 HL30.

The remedy available to the registered proprietor and the use against the piracy of the registered design is to file a suit for [45]

1 An injunction.
2 Damages or compensation and
3 Delivery up of infringing articles.

The court may, while granting the injunction grant a decree for damages against the infringer in a sum not exceeding Rs.25, 000 for every offence to the registered proprietor, subject to a maximum of Rs.50, 000 recoverable as a contract debt in respect of any one design.

The suit shall be instituted not below the court of district judge. If the defendant raises in his defense grounds the proof of which may result in the cancellation of a design, the district judge shall transfer the case to the High court.

Cancellation of Registered Design

The registration of a design may be cancelled at any time after the registration of design on a petition for cancellation in the prescribed form to the controller of design on the following ground:

1 That the design has been previously registered in India; or
2 That it has been published in India or in any other country prior to the date of registration; or
3 That the design is not new or original; or
4 That the design is not registrable under the Act; or
5 That it is not a design as defined under clause (d) of Section 2 of the Designs Act, 2000.

Besides, every ground on which a registered design may be cancelled under Section 19 (as above) of the Act would be available by way of defense to a suit of infringement. In addition the following are also available to the defendant. They are -

1 Denial of infringement or intention to infringement.
2 Invalidity of registration.
3 Plaintiff is not the registered proprietor or is otherwise not entitled to sue.
4 acquiescence and latches.

Some important principles discovered by the courts while deciding some important cases are as follows

1 Unless there is something new or original in a design, a person

45 Dr.B.L.Wadehara, "Law Relating to Intellectual Property", Universal Law Publication Co, New Delhi, fourth edition, 2007, at p.413.

claiming right in such a design by reason of its registration may not claim or obtain any protection.

2 Even if a design, which is original but is published earlier than the date of registration the registration may be revoked.

3 The registration certificate does not establish a conclusive right. It has to be tried and tested on the laboratory of Courts.

4 Where a design has been pre-published it cannot claim protection.

5 The entries made on the Register book maintained by the controller office are not ultimate.

6 Pre-published-disclosure of a design by the proprietor to any other person in good faith is not deemed to be a publication of design sufficient to invalidate the copyrights thereof if the registration is obtained subsequently to the disclosure.

7 Lack of originality and novelty shall be the reason for cancellation of registration.

8 The District Court has the power to grant the various reliefs' but it has no power to cancel the registration.

9 If both the parties are pirators cannot seek injunction against another pirator.

Position in J&K

So far as the State of Jammu and Kashmir is concerned it does not have its own Designs Act. So we have to relay on Indian Designs Act, 2000 for seeking redressal against the piracy of Registered Design, which is supported by Art.253 which reads as Parliaments power to legislate for giving effect to Treaties and International Agreements.

Art. 253 empower the parliament to make any law for the whole or any part of the territory of India for implementing treaties and international agreements and conventions. In other words, the normal distribution of powers will not stand in the way of Parliament to pass a law for giving effect to an international obligation even though such law relates to any of the subject in the state list. Art.253 enables the Government of India to implement all international obligations and commitments. Treaties are not required to be ratified by Parliament. They are, however, not self-operative. Parliamentary legislation will be necessary for implementing the provisions of a treaty. But laws enacted for the enforcement of treaties will be subject to the constitutional limits, that is, such a law cannot infringe fundamental right. [46]

Entry 14 of the union list confers on the union Parliament exclusive power to make laws with respect to "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign

46 *Sri Krishna Sharma v. State of W.B,AIR 1954 SC 591; In re Indo-Pakistan Agreement, AIR 1960 SC 845.*

countries". Also Entry 10 of that list provides for "Foreign affairs", all matters which bring the union into relation with any foreign country. This Article is intended to make it clear that the power to enter into treaties conferred on parliament, carries with it, as incidental thereto, a power to invest the union with power to implement the treaty. Thus a law passed by parliament to give effect to an international convention shall not be invalidated on the ground that it contained provisions relating to the state subjects. But other provisions of the constitution, e.g., the fundamental rights, cannot be overridden by a law made under Art.253.

For quite some time after the commencement of the constitution not much use was made of this Article. But for some time past it is being invoked from time to time. Almost all legislations on environment since mid 1970s have been enacted under this provision. Legislations relating to T.R.I.P.S, ensuring India's conformity to international obligations also come within its provisions. This widening application of the provision has raised doubts whether it is consistent with the federal structure provided in the constitution.

Questions are also being raised about the legal tradition in our country under which treaties become operative and binding without prior or subsequent participation of parliament in their making. They can be entered into and implemented by the union executive in the exercise of its executive power under Art. 73. As treaties may severely impinge upon the powers of the states as well as upon the national policies, ways and means are being discussed for the involvement of people's representatives in parliament in the exercise of treaty making power.

Under the Government of India Act, 1935, the federal legislature was empowered to pass laws for the purposes of implementing treaties and agreements with other countries. But such laws, if they affected provincial matters, were not to apply to a province unless the Governor thereof had given his previous assent for making them.

The effect of Art.153 is that if a treaty, agreement or convention with a foreign state deals with a subject within the competence of the state legislature, parliament alone has, notwithstanding Art.246 (3), the power to make laws to implement it. [47] However, the laws enacted for the implementation of the International treaties will be subject to the constitutional limits. [48]

Improving design of everyday objects is an ongoing challenge. In the recent past eco-design is also gaining interest all over. Because sustainable development is becoming a buzzword in design, with considerations such as recycling materials, reducing waste in production, increasing energy efficiency, eliminating toxins and extending product life, all feeding into the design concept. Many highly successful, individual designers fuse traditional and modern elements in their design. Hence we can conclude that hi-tech to low-tech, from luxuries to life

47 *In re Berubari union and exchange of enclaves, AIR 1960 SC 845; Maganbhai Ishwarbhai Patel v. U.O.I, AIR 1969 SC 783; P.B.Samant v. U.O.I, AIR 1994 Bom. 323.*
48 Krishan Sharma v. State of W.B, AIR 1954 SC 591.

necessities, from east to west innovative product design will continue to make all the difference.

It is an acknowledged fact that the essential purpose of design law is to promote and protect the design element of Industrial production. It is also intended to promote innovative activity in the field of industries. The existing legislation on industrial designs in India is contained in the new Designs Act, 2000 and this Act serves its purpose well in the changing global technology and international developments. India has achieved a mature status in the field of Industrial Designs and in view of globalization of the economy; the present legislation is aligned with the changed technical and commercial scenario and made to conform to international trends in design administration.

Conclusion and Suggestions

To conclude, we can say that, the Industrial Design registration helps in safeguarding the ornamental or aesthetic elements of the article and it gives exclusionary rights to the holder or proprietor of the registered designs against unauthorized use like replicating or copying by a person without his consent. The protection to the industrial designs helps the economic development, which promote creativity in the industrial arena. The various arguments extended to seek protection for design are grounded on the role of designs in maintaining and promoting competition within a market economy. "Like patent and copyright, design rights have a reward and incentive function, but the objective is different. The objective of granting an exclusive right in an industrial design can be defined as providing the possibility of obtaining a return for investment made, and progress achieved, in the field of aesthetics in order to stimulate overall research and development of the aesthetic features of technical or functional product". The definition of Design under the new Act has been widened. Under the previous law, the Design registration was granted only for the visual appearance of an article which included shape, configuration pattern, and ornamentation whether in 2 or 3 dimensions. Under new law, a Design registration can now be obtained for new or original features of shape, configuration pattern, ornamentation or composition of lines or colors as applied to an article, whether in 2 or 3 dimensions or both. A provision claiming priority from a Design application filed in any Convention country has been introduced. India is a member of WTO, Paris convention and has also signed Patent Co-operation Treaty. As a result members to these conventions can claim priority rights. International classification based upon Locarno classification has been adopted wherein the classification is based on articles -the subject matter of design. Under the previous law a 'Design' was classified on the basis of the material of which the article was made. A concept of "absolute novelty" has been introduced whereby a 'novelty' would now be judged based on prior publication of an article not only in India but also in other countries. Under the previous law, the position was ambiguous. As soon as a Design is registered and is entered in the register, it is to be disclosed to the

public. Any member of public can take inspection of the records and obtain a certified copy of the entry. In the previous Act, there was a 2-year confidential period -post registration -which prohibited taking inspection/certified copy of any entry in the records. A Design registration would be valid for 10 years (from the date of registration which is also the date of application) renewable for a further period of 5 years. Under the previous law, period was 5 years which was extendable for 2 terms of 5 years each. A Design registration can be restored within a year from its last date of expiry. Under the previous law, no provision relating to restoration upon expiration of the Design registration was provided. Cancellation of a Design registration under the new law is possible only before the Controller and there are a couple of additional grounds which have been recognized:- (a) The subject matter of Design not registrable under the Act (b) The subject matter does not qualify as a 'Design'. Under the previous Act, the cancellation was provided for before the Controller within 12 months from registration on limited grounds and in the High Court within 12 months or thereafter. Under the new Act, a District Court has been given power to transfer a case to the High Court -having jurisdiction -in the event the defendant challenges the validity of Design registration. It has increased the quantum of penalty imposed for infringement of a registered design.

A rationale basis for the protection of designs is to reward the designer's creativity and to provide incentives for future contributions, however a balance must be maintained between such reward and the long term goal of promoting competition within a market based economy. [49] The owner of the registered design right will be in a position to oppose infringement in relation to goods in respect of which the design has been registered. Designs which appeal to the eye can be of a tremendous commercial value. So there is a real need to register the design as a registered design. It is the only way to prevent piracy of designs and to encourage the origin of new and original ones. The Designs Act 2000 to a great extent serves as an umbrella protection for Industrial Designs.

Suggestions

In the light of the foregoing discussion, the following suggestions are made to make the existing law effective and purposeful

1 At present, the term of Design protection is 10years plus 5years after filing an application for extension. In the era of commercialization and growing industrial design demands, the term of Design protection should be extended to 20years.

2 In India, neither Designs Act 1911, nor Designs Act, 2000 incorporates any provision for delivery up or destruction of infringing articles. Therefore, some provisions should be made in the Designs Act, 2000 to expressly incorporate provisions regarding delivery up

49 Uma Suthersenan, "Design Law: Creativity And Competition", Intellectual Property Rights A Global Vision, ILI,at 41.

or destruction of infringing articles.

3 It is suggested that a council for registration of designs should be made and any enterprise dealing in or desirous of dealing in the sale or import for the purpose of sale or expose or cause to be published for the purpose of sale of that article, would be allowed to do so only after obtaining a registration certificate from the council, whose branches would, to start with, be set up in major cities, so that design proprietor becomes more and more famous and earn or make more money for his hard work and labour which he has put in making such design or designs.

4 Special anti piracy cells should be formed, which would deal with design piracy only.

5 Special courts for enforcing intellectual property rights should be formed (Specially Design rights) at District or at least state level.

6 A Design council should be set up, which would monitor Design violations and provide help in case of Design infringement.

7 Special training programmes should be organized for police personnel and judges who should have exclusive jurisdiction to deal with the issues which have been generated by the Design infringement/ piracy.

8 Awareness programmes should be created among designers about their rights and remedies available to them.

9 Though the powers and functions of the controller are wide, a separate controller should be appointed instead of the controller General of Patents, Designs and Trade Marks under the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, who will act independently as a Controller of Designs.

10 Steps should be taken to promote Design Law consciousness among people. This would entail organization of seminars, debates etc.

11 Design law forms a very important part of Intellectual property law which is being taught as an optional subject in the universities at LL.B level. It is suggested that the subject be made compulsory for all the students who take admission in LL.B.

12 The Government must enact a new Designs Act for the State of Jammu and Kashmir, so that the designers can assert their rights at ground level and know much more about their rights and remedies.

13 Some points of International registration seem to be very vague and ambiguous. For instance, the administration of any member State may refuse the registration of a design in part or in whole, the effect of International registration of a design, e.g. when the conditions for grant of protection under the legislation of that state are not clear regarding what is the effect of such refusal (as above) at the International level. Therefore, it must be made clear that such refusal will affect the validity of the design at the International level as the

case may be. It must also mention what are the rights of an aggrieved person whose design has been refused under the State laws and where he can appeal.

14 The minimum penalty amount for piracy of registered designs should be enhanced from 25,000 to 50,000 but must not exceed 75,000.

15 There is no provision for initiating a criminal proceeding against piracy of designs. Therefore, it is suggested that a provision should be incorporated for initiating a criminal proceeding against pirators.

Incorporation of the aforesaid suggestions in the Design Act, 2000, will serve the purpose of Design system and strike a balance between design law and public interest and also provide benefit to Designers at large.

Rights of Prisoners under Article 21 of Indian Constitution

Dr. Rehana Shawl [1]
Syed Samim Hamdani [2]

Abstract

Being in a civilized society organized with law. It is essential to ensure for every citizen a reasonable dignified life. A society cannot be recognized as a civilized society unless it treats the prisoners with sympathy and affection. This is not possible till the society recognizes and accepts their basic human rights and fundamental rights including the right to life guaranteed to him under constitution. The U.D.HR. 1948. stipulates that "No one shall be subjected to torture or the cruel, inhuman or degrading treatment or punishment. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners shall retain the residue of the constitutional rights.

Key Words: Prisoners, Human Rights, Article 21, Prison Reform, Prisoners Rights UDHR 1948.

Introduction:

Prison has been defined as "a place properly arranged and equipped for the reception of persons who by legal process are committed to it for safe custody while awaiting trial or for punishment". The origin of prison is inter-linked with the system of imprisonment which originated in the first quarter of nineteenth century. Initially, persons who were guilty of some political offences or war crime or who failed to pat their debts or fines were lodged in prison cells with the view of extracting confession or securing the payment of debts. Subsequently, with the march of time and advancement of knowledge and civilization, the condition of prisons also improved considerably. Since the present day penology considers imprisonment as a measure of rehabilitation of offenders, the prison are no longer mere detention house for offenders, but they seek to reform inmates for their future life [3].

The history of prisons in India clearly reflects the change in society's reaction to crime from time to time. Traditionally prisons have been considered

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as somewhat isolated, mysterious and frightful institutions where the offenders are confined for having committed an offence. But during the last few years it has realized by the administrators and social reformers alike that prisons are not isolated institutions but are a part of our social system which should not only be understood by the community properly but should also arouse public interest and support. India discarded a long time back the old forms of punishment such as exile, mutilation and torture in favour of imprisonment. Now the prisoners are provided certain material comforts and some reformative influences also have been introduced in order to remove the old repressive tendencies of the prisons.

Thus prison or jail is a facility in which individuals are forcibly, confined and denied a variety of freedoms under the authority of state as a form of punishment. The most common use of prisons is as part of an organized governmental justice system, in which individuals officially charged with or convicted of crimes are confined to a jail or prison until they are either brought to trial or complete the period of incarceration they were sentenced to after being found guilty at their trial. Outside of their use for punishing civil crimes, authoritarian regimes also frequently use prisons and jails as tools of political repression to punish political crimes, often without trial or other legal due process, this use is illegal under most form of International law governing fair administration of justice [4].

Therefore, the real purpose of sending criminals to prison is to transform them into honest and law abiding citizens by inculcating in then distaste for crime and criminality. This objective can be successfully achieved through the techniques of probation and parole. The sincerity, devotion and tactfulness of the prison officials also help considerably in the process of offender's rehabilitation.

Prison reform in India _ a brief background and overview:

The modern prison in India was originated by T. B. Macaulay in 1835. A committee namely Prison Discipline Committee was appointed, which submitted its report in 1838. The committee recommended increased rigorousness of treatment while rejecting all humanitarian needs and reforms for the prisoners. Following the recommendations of the Macaulay Committee between 1836-38, central prisons were constructed from 1846. The contemporary prison administration in India is thus a legacy of British rule. It is based on the notion that the best criminal code can be little use to a community unless there is good machinery for the infliction of punishment. In 1864, the Second Commission of Inquiry into Jail Management and Discipline made similar recommendation as the 1836 committee. In addition, this commission made some specific suggestions regarding accommodation for prisoners, improvement in diet, clothing, bedding and medical care. In 1877, a Conference of Experts met to enquire into prison

4 http:en.wikipedia.org/wiki/prison

administration. The Conference proposed the enactment of a prison law and draft bill was prepared. In 1888, the Fourth Jail Commission was appointed. On the basis of its recommendation, a consolidated prison bill was formulated. Provisions regarding the jail offences and punishment were specifically examined by a Conference of Experts on Jail Management. In 1894, the draft bill became law with assent of the Governor General of India [5].

Prison Act, 1894:

It is the Prison Act, 1894, on the basis of which the present jail management operates in India. This Act has hardly undergone any substantial change. However, the process of review of the prison problems in India continued even after this. In the report of the Indian Jail Committee 1919-20, for the first time in the history of prisons, 'reformation and rehabilitation' of offenders were identified as the objectives of the prison administrators. Several committees and commissions appointed by both Central and State governments after Independence have emphasized humanization of the conditions in the prisons. The need for completely overhauling and consolidated the laws relating to prison have been constantly high light. [6]

The Government of India Act, 1935, resulted in the transfer of the subject of jails from the centre list to the control of provincial governments and hence further reduced the possibility of uniform implementation of a prison policy at the national level. State governments thus have their own rules for day to day administration of prisons, up keep and maintenance of prisoners and prescribing procedures.

In 1951, the Government of India invited the United Nations expert on correctional work, Dr. W. C. Reckless, to undertake a study on prison administration and to suggest policy reform. His report titled 'Jail Administration in India' made a plea for transforming jails into reformation centers. He also recommended the revision of outdated jail manuals. In 1952, the Eighth Conference of the Inspector Generals of Prisons also supported the recommendations of Dr. Reckless regarding prison reform. Accordingly, the Government of India appointed the All Indian Jail Manual Committee in 1957 to prepare a model prison manual. The committee submitted its report in 1960. The report made forceful pleas for formulating a uniform policy and latest methods relating to jail administration, probation, and after-care, juvenile and remand homes, certified and reformatory schools, barstools and protective homes, suppression of immoral traffic etc. The report also suggested amendments in the Prison Act, 1894 to provide a legal base for correctional work.

5 Prof. N. V. Paranjape- Criminology and Penology- Central Law Publications, Allahbad- 13th Edition 2007, page no.384-385

6 Ahmad Siddique- Criminology Problems and Perspective- Eastern Book Company- 4th Edition, Page no. 48-149

The Model Prison Manual:

The committee prepared the Model Prison Manual (MPM) and presented it to the Government of India in 1960 for implementation. The MPM 1960 is the guiding principle on the basis of which the present Indian prison management is governed.

On the basis of Model Prison Manual, the Ministry of Home Affairs, Government of India in 1972, appointed a working group on prisons. It brought out in its report the need for a national policy on prisons.

The Mulla Committee:

The Government of India appointed an All India Jail Committee in 1980 with Justice A. N. Mulla as its chairman. The committee suggested setting up a National prison commission as a continuing body to bring about modernization of prisons in India.

The committee recommended a total ban on the heinous practice of clubbing together juvenile offenders with hardened criminals in prison. It also recommended segregation of mentally disturbed prisoners and their placement n mental asylum. Some other recommendations were as follows [7]:

- The conditions of prisons should be improved by making adequate arrangements for food, clothing, sanitation, ventilation etc.
- The prison staff should be properly trained and organized into different cadres.
- After-care rehabilitation and probation should constitute an integral part of prison service.
- The media and police men should be allowed to visit prisons and allied institutions so that public may have first hand information about conditions inside prisons.
- Lodging of under trials in jail should be reduced to bare minimum and they should be kept separate from the convicted prisoners.

The Krishna Iyer Committee:

In 1987, the Government of India appointed the Justice Krishna Iyer Committee to undertake a study on the situation of women prisoners in India. It has recommended inclusion of more women in the police force in view of their special role in tackling women and child offenders.

Subsequent Developments:

Following a Supreme Court direction (1996) in *Ramamurthy V. State of Karnataka* to bring about uniformity nationally of prisons laws and prepare a draft model prison manual, a committee was set up in the Bureau of Police

7 Justice Mulla Committee submitted its report on jail Reforms to Home Ministry on 30th March 1983

Research and Development (BPR&D). The jail manual drafted by the committee was accepted by the Central Government and circulated to State Governments in late December 2003.

In 1999, a draft Model Prison Management Bill (The Prison Administration and Treatment of Prisoners Bill- 1998) was circulated to replace the Prisons Act 1894 by the Government of India to the respective states but this time it is yet to be finished. In 2000, the Ministry of Home Affairs, Government of India, appointed a committee for the Formulation of Model Prison Manual which would be a pragmatic prison management and administration.

The All India Committee on Jail Reforms (1980-1983), the Supreme Court of India and the Committee of Empowerment of Women (2001-2002) have all high lighted the need for a comprehensive revision of the prison laws but the pace of any change has been disappointing. The Supreme Court of India has however expanded the horizons of prisoner's rights of jurisprudence through a series of judgments [8]

Prisoner – Meaning:

A prisoner, also known as an inmate, is a person who is deprived of liberty against their will. This can be by confinement, captivity, or by forcible restraint. The term applies particularly to those on trial or serving a prison sentence. In other words, a person confined in prison under the order of a competent authority. Prisoner may also be defined as a person duly committed to custody under writ, warrant or order of any court or authority exercising criminal jurisdiction, or by order of a Court- martial. [9]

A prisoner is as good as a citizen of a country as a free man and as such can avail all rights inherent in a human being except those which have been taken away by the State to protect the society and to bring about his reformation so as to ensure the return of inmate as a law abiding member of the society. Human dignity is the foundation stone of the Universal Declaration of Human Rights (1948), Covenant on Civil and Political Rights (1966), Covenant on Economic and Cultural Rights ands is a dear value in our Constitution. The courts while interpreting Art. 21 of the Constitution have demonstrated that every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every citizen. And so in the discharge of its responsibilities to the people, the state recognizes the need for maintaining establishments such as prisons and provides therein at least minimum conditions ensuring human dignity so as to achieve the dual object of social security and rehabilitation of delinquents. Justice A. N Mulla is votary approach towards the prisoners, while writing his report he has observed, "A criminal is not written off from the society for ever. But if he has to be reformed and

8 Ahmad Siddique- Criminology Problems and Perspective- Eastern Book Company- 4th Edition, Page no. 48-149

9 http:en.wikipedia.org/wiki/prison

rehabilitated all efforts have to be treated as "holiday home", nor should they become "penal colonies" where the objective of imprisonment is reduced to retribution. Living condition in prisons should be compatible to human dignity".

Rights of Prisoners under Art. 21:

The fundamental rights guaranteed under the Constitution are not absolute and many restrictions have been imposed on their enjoyment. When a person is convicted or put in prison his status is different from that of an ordinary person. A prisoner can not claim all the fundamental rights that are available to an ordinary person. There is no guarantee of prisoner's right as such in the Constitution of India. However, certain rights which have been enumerated in Part III of the Constitution are available to the prisoners also because a prisoner remains a 'person' inside the prison [10].

Art. 21 of the Constitution has been a major centre of litigation so far as the prisoner's rights are concerned. The protection of Art. 21 is available even to the convicts in jails, which embodies that"

"No person shall be deprived of his life or personnel liberty except according to procedure established by law".

The Supreme Court of India, by interpreting Article 21 of the Constitution, has developed human rights jurisprudence for the preservation and protection of prisoner's rights to maintain human dignity. Although it is clearly mentioned that deprivation of Article 21 is justifiable according to procedure established by law, this procedure cannot be arbitrary, unfair or unreasonable. The origin of the prisoner's right in India can be found in the celebrated decision of ***A. K. Gopalan v. State of Madres*[11],** the petitioner A. K. Gopalan, a communist leader, was detained under the Preventive detention Act, 1950. The petitioner challenged the validity of the Preventive Detention Act and his detention there under on the following grounds: (1) that it violated his right to move freely throughout the territory of India which is the essence of personal liberty guaranteed in Art. 19. The detension under this Act was not a reasonable detension under Cl. (5) of Art. 19 and hence the Act was void; (2) that the Act was in conflict with Art. 21 of the Constitution inasmuch as it provided for deprivation of the personal liberty of a man not in accordance with a 'procedure established by law'. It was argued that the word 'law' in Art. 21 should be understood not in the sense of an enactment but as signifying the universal principles of natural justice and a law which did not incorporate these principles could not be valid; (3) that the expression "procedure established by law" meant the same thing as the phrase "due process of law" in the American Constitution.

The petitioner argued that the expression 'procedure established by law'

10 *Sunil Batra vs. Delhi Administration* AIR 1980 1597
11 AIR 1950 SC 597

was synonymous with the expression 'due process of law' of the American Constitution. It was contended that the Indian Constitution gives the same protection with the only difference that while the due process clause has been interpreted in America to cover both substantive and procedural law, only the protection of procedural law is guaranteed in India. The contention was that the omission of the word 'due' made no difference to the interpretation of Art. 21; the word 'established' was not equivalent to 'prescribed', but had wider meaning; the word 'law' did not mean enacted law, but it meant principles of natural justice. But the Supreme Court rejected the aforesaid contention and held that 'procedure established by law' did not mean 'due process of law' as understood in America. There was no justification for adopting the meaning of the word 'law' as interpreted by the Supreme Court of America in the expression 'due process of law' merely because the word 'law' is used in Art. 21. This is clear from the report of the Drafting Committee of the Constituent Assembly in respect of Art. 21. The Report of the Drafting Committee shows that Constituent Assembly had formerly used the American expression 'due process of law' but they deliberately dropped it in favour of the expression 'procedure established by law', which is more specific.

But in *Maneka Gandhi v. Union of India*[12], the Supreme Court has overruled the *A.K. Gopalan's* case and has held that the mere prescription of some kind of procedure is not enough to comply with the mandate of Art. 21. The procedure prescribed by law has to be fair, just and reasonable not fanciful, oppressive or arbitrary; otherwise, it should not be the procedure at all and all the requirements of Art. 21 would not be satisfied. What is fair or just? A procedure to be fair or just must embody the principles of natural justice. Natural justice is intended to invest law with fairness and to secure justice, the Court said; 'Law' should be reasonable law, and not enacted piece of law.

By accepting the concept of natural justice as one of the essential component of law, it is submitted that the court has imported the American concept of 'due process of law' into our Constitution. Like due process of law natural justice is also not rigid or mechanical concept. The rules of natural justice are to be applied in the context of the situations in which it is to be applied. The Court itself quoted the observation of Magarry, J. who described natural justice "as distillate of due process of law". This was further upheld in *Francis Coralie Mullin v. The Administrato*[13]*r,* that the "Article 21 requires no one shall be deprived of his life or personal liberty except by procedure established by law and this procedure must be reasonable, fair and just and not arbitrary, whimsical or fanciful".

The Supreme Court of India has considerably widened the scope of Art. 21 and has held that its protection will be available for safeguarding the fundamental rights of prisoners and for effecting prison reform. The Supreme Court by its

12 AIR 1978 SCC 597
13 AIR 1981 SC746

progressive interpretation made Art. 21 which guarantees the Right to life and personal liberty, the reservoir of prisoner's rights.

Rights against Solitary Confinement and Bar Fetters

Solitary Confinement in a general sense means the separate confinement of a prisoner, with only occasional access of any other person, and that too only at the discretion of the jail authorities. In strict sense it means the complete isolation of a prisoner from all human society. The Courts have strong view against solitary confinement and held that imposition of solitary confinement is highly degrading and has dehumanizing effect on the prisoners. The Courts have taken the view that it could be imposed only in exceptional cases where the convict is of such a dangerous character that he must be segregated from the other prisoners. In *Sunil Batra v. Delhi Administration (1)*,[14] Supreme Court considered the validity of solitary confinement. The Constitutional validity of solitary confinement prescribed under section 30(2) of the Prisons Act, 1894 was considered. Section 30(2) of the Act provides the solitary confinement when prisoner is under sentence of death, while section 56 of the said Act permits the use of bar fetters for the safe custody of the prisoners.

The Supreme Court while approving section 30(2) of the Prisons Act, 1894 declared that the imposition of solitary confinement on Sunil Batra was illegal on the ground that under sentence of death refers to a finally executable death sentence, which means that the sentence of death has become final and conclusive, and cannot be annulled by any judicial or Constitutional authority. Sunil Batra was not considered as a prisoner under sentence of death, since his appeal against the death penalty was pending before the Supreme Court and in the event of its dismissal, he retained the right to appeal for presidential clemency. The Court held that Batra was put in statutory confinement and not solitary confinement.

The Supreme Court has also reacted strongly against putting bar fetters to the prisoners. The court observed that continuously keeping a prisoner in fetters day and night reduced the prisoner from human being to an animal and such treatment was so cruel and unusual that the use of bar fetters was against the spirit of the Constitution of India. On the question of the validity of the use of bar fetters, the court in Sunil Batra (I) observed that subjecting a prisoner to bar fetters for an unusually long period, without due regard to the safety of the prisoner and the security of the prisoner would violate basic Human Dignity and is hence impermissible under the Constitution of India. The Court while approving section 56 of the Prisons Act and declared that bar fetters can be used subject to the following procedural safeguards:

a. It must be absolutely necessary to use fetters;
b. The reasons for doing so must be recorded;
c. The basic condition of dangerousness must be well–grounded;

14 AIR 1978 SC 1675

d. Principles of natural justice must be observed;
e. The fetters must be removed at the earliest opportunity;
f. There must a daily review of the absolute need for bar fetters;
g. Continuance of bar fetters beyond a day is subject to the direction of a District Magistrate or Session's judge.

The Supreme Court in Sunil Batra (I) diluted the rigor of solitary confinement and bar fetters to a considerable extent by specifying the procedural norms to be followed when resorting to sections 30 (2) and 56 of the Prisons Act, 1894.

Rights against Hand Cuffing

An arrested person or under-trial prisoner should not be subjected to handcuffing in the absence of justifying circumstances. When the accused are found to be educated, selflessly devoting their service to public cause, not having tendency to escape and tried and convicted for bailable offence, there is no reason for handcuffing them while taking them from prison to Court. In *Prem Shanker Shukla vs. Delhi Administration* [15] the Supreme Court added yet another projectile in its armory to be used against the war for prison reform and prisoners rights. In the instant case the question raised was whether handcuffing is constitutionally valid or not? The Supreme Court discussed in depth the hand cuffing jurisprudence. It is the case placed before the Court by way of Public Interest Litigation urging the Court to pronounce upon the Constitution validity of the "handcuffing culture" in the light of Article 21 of the Constitution. In the instant case, the Court banned the routine handcuffing of prisoners as a Constitutional mandate and declared the distinction between classes of prisoner as obsolete. The Court also opined that "hand cuffing is prima-facie inhuman and, therefore, unreasonable, is over harsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring to inflict "irons" is to resort to Zoological strategies repugnant to Article 21 of the Constitution [16]".

While deciding the Constitutional validity of handcuffing, the Supreme Court specifically referred to Article 5 of the Universal Declaration of Human Rights 1948 [17] and Article 10 of the International Covenant on Civil and Political Rights [18] and held that hand cuffing is impermissible torture and is violate of Article 21. In the instant case *Justice Krishna Iyer,* rightly emphasized handcuffs should not be used in routine and they were to be used in extreme circumstances

15 AIR 1980 SC 1535
16 Ibid at p 1541
17 Article 5 of the Universal Declaration of Human Rights, 1948 provides that "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
18 Article 10 of the Universal Covenant of Civil And Political Rights stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"

only, when the prisoner is a security risk, desperate, rowdy or involved in non–bailable offences. But in even such circumstances, the escorting authority must record the reasons for doing so. Otherwise, the Court pointed out, under Article 21 of the Constitution the procedure will be unfair and bad in law.

In spite of such clear ruling of the Supreme Court against handcuffing, the high handedness of the police personnel came to the light in *Delhi Judicial Service Association case* [19], wherein the Supreme Court held that an extraordinary and the unusual behavior of police was not proper and the Court laid down detailed guidelines which should be followed in case of arrest and detention of judicial officer. The Supreme Court took a serious note of whole incident and it amounts to interference with the administration of justice, lowering of its judicial authority and it amounts to criminal contempt. It is submitted that wherever any police official acts contrary to the clear directions against hand cuffing as laid down by the Supreme Court and thus violates the basic Human Right to human dignity, he should be made personally liable to pay the compensation and this fact is clearly established in *State of Maharashtra vs. Ravikanth S.Patil* [20]. Apart from the above, the Supreme Court had delivered many cases against hand cuffing and ruled that it is violative of Article 21 of the Constitution.

The Supreme Court directed the Union of India to frame rules or guidelines regarding the circumstances in which handcuffing of the accused should be resorted to, in conformity with the judgment of the court in Prem Shankar case; and to circulate them among all the Government of the States and Union Territories for strict observance. It is important to mention that so as to put an end to handcuffing, it is suggested that the parliament may make a suitable amendment to the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1973 where in, handcuffing should be made a cognizable offence so as to give effect to the ruling of the Apex Court of the land and also to preserve the right to live with Human Dignity, which is a important facet of personal liability of the individuals.

Rights against Inhuman Treatment of Prisoners:

Human Rights are part and parcel of Human Dignity. The Supreme Court of India in various cases has taken a serious note of the inhuman treatment on prisoners and has issued appropriate directions to prison and police authorities for safeguarding the rights of the prisoners and persons in police lock–up [21].The court observed that "the treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast would certainly be arbitrary and can be questioned under Article 14". In *Maneka Gandhi vs. Union of India* [22], Supreme Court held that right to 'live' is not merely confined

19 Delhi Judicial Service Association vs. State of Gujarat AIR 1991 4SCC 406
20 AIR 1991 2SCC373
21 Ramana Murthy vs. State of Karnataka AIR 1997 SC 1997
22 AIR 1981 SC 746

to physical existence but it included within its ambit the right to live with human dignity.

Custodial torture is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personally. It is a calculated assault on human dignity and whenever human dignity is wounded, civilization takes a step backward. Personal liberty under Art. 21 is a sacred and cherished right under the Constitution. The expression life and personal liberty has been held to include right to live with human dignity and thus it would include within itself a guarantee against torture and assault by the State or its functionaries. In the *Raghubir Singh v. State of Bihar* [23], the Supreme Court expressed its anguish over police torture by upholding the life sentence awarded to a police officer responsible for the death of a suspect due to torture in a police lock – up.

It is pertinent to mention that the custodial death is perhaps one of the worst crimes in civilized society governed by the rule of law. The court promptly ruled that the inhuman treatment meted to the accused in police custody is the gross and blatant violation of Human Rights. In the absence of any legislative or executive guidelines the court has undertaken an activist role and ruled in plethora of cases and one such case is *D.K.Basu vs. State of West Bengal* [24]. The decision of the Supreme Court in the case of D.K. Basu is note worthy. While dealing the case, the court specifically concentrated on the problem of custodial torture and issued a number of directions to eradicate this evil, for better protection and promotion of Human Rights. In the instant case the Supreme Court defined torture and analyzed its implications. The observations of the court on torture are valuable and worth quoting at length. With a view to curbing this menace, the Supreme Court laid down detailed guidelines as preventive measures as follows.

1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock – up shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed as soon as

23 AIR 1986 4SCC 481
24 AIR 1997 SC 610

practicable that he has been arrested and is being detained at the particular place unless the attesting witness of the memo of arrest is himself such a friend or relative of the arrestee.

4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through legal aid organizations in the district and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

5) The person arrested must be aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. "Inspection Memo" must be signed both by the arrestee and the police officer affecting the arrest and its copy provided to the arrestee.

8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

9) Copies of all the documents including the memo of arrest, referred to above should be sent to the area Magistrate for his/her record.

10) The arrestee may be permitted to meet his lawyer during interrogation though not throughout the interrogation.

11) A police control room should be provided at all district and state head quarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

In the instant case, the Apex Court made it clear that, custodial violence,including torture and death in the police lock–up, strikes a blow at the rule of law, which demands that the powers of the executive should not only be deprived from the law but also that the same should be limited by the law. The court also made it clear that failure to comply with guidelines should, apart from rendering the official concerned liable for departmental action and also render

him liable to contempt of court

Right to have Interview with Friends, Relatives and Lawyers:

The horizon of Human Rights is expanding. Prisoner's rights have been recognized not only to protect them from physical discomfort or torture in person, but also to save them from mental torture. The Right to Life and Personal Liberty enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. The right to have interview with the members of one's family and friends is clearly part of the Personal Liberty embodied in Article 21. Article 22 (I) of the Constitution directs that "no person who is arrested shall be denied the right to consult and to be defended by a legal practitioner of his choice". This legal right is also available in the code of criminal procedure under section 304. [25] The court has held that from the time of arrest, this right accrues to the arrested person and he has the right of choice of a lawyer. The accused may refuse to have a lawyer but the court has to provide an Amicus Curie to defend him. When an accused is undefended it is the duty of the court to appoint a counsel on Government expenses for his defense [26]. In a series of cases the Supreme Court of India considered the scope of the right of the prisoners or detainees to have interviews with family members, friends and counsel. In Sunil Batra(II) v. Delhi Administration [27], the Supreme Court recognized the right of the prisoners to be visited by their friends and relatives. The Court favored their visits but subject to search and discipline and other security criteria. The Court observed that the visits to prisoners by the family and friends are a solace in insulation, and only a dehumanized system can deprive vicarious delight in depriving prison inmates of the human amenity.

In *Sheela Barse vs. State of Maharashtra* [28] case, , the court held that interviews of the prisoners become necessary as otherwise the correct information may not be collected but such access has got to be controlled and regulated. The pressmen are not entitled to uncontrolled interview. As and when factual information is collected as a result of interview, the same should usually be cross – checked with the authorities so that a wrong picture of the situation may not be published. Those who receive permission to have interviews will agree to abide by reasonable restrictions.

In *Jogindar Kumar vs. State of U.P* [29], the court opined that the horizon of Human Rights is expanding and at the same time, the crime rate is also increasing

25Sec 304(1) of Criminal procedure Code, 1973 stipulates that "where , in a trail before the court of session, the accused is not represented by a pleader and where it appears to the court that the accused has not sufficient means to engage a pleader. The court shall assign a pleader for his defense at the expense of the state.

26 Tara Singh vs. State AIR 1951 SC

27 AIR 1980 SCC1597

28 AIR 1987 4SCC 373

29 AIR 1994 SC 1349

and the court has been receiving complaints about violation of Human Rights because of indiscriminate arrests. The court observed that there is the right to have someone informed. That right of the arrested person upon request, to have someone informed and to consult privately with a lawyer was recognized by Sec 56(1) of the Police and Criminal Evidence Act, 1984 in England. For effective enforcement of the Articles 21 and 22 (1) of the Constitution of India which require to be recognized and scrupulously protected, the court issue the following requirements.

a. An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told as far as practicable that he has been arrested and where is being detained.

b. The police officer shall inform the arrested person of his right when he is brought to the police station.

c. An entry shall be required to be made in the diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22 (1) and enforced strictly.

Right to Legal Aid:

The main object of the Free Legal Aid scheme is to provide means by which the principle of equality before law on which the edifice of our legal system is based. It also means financial aid provided to a person in matter of legal disputes. In the absence of Free Legal Aid to the poor and needy, Fundamental Rights and Human Freedoms guaranteed by the respective Constitution and International Human Rights covenants have no value.

Though, the Constitution of India does not expressly provide the Right to Legal Aid, but the judiciary has shown its favour towards poor prisoners because of their poverty and is not in a position to engage the lawyer of their own choice. The 42nd Amendment Act, 1976 has included Free Legal Aid as one of the Directive Principles of State Policy under Article 39A [30] in the Constitution. This is the most important and direct Article of the Constitution which speaks of Free Legal Aid .Though, this Article finds place in part-IV of the Constitution as one of the Directive Principle of State Policy and though this Article is not enforceable by courts, the principle laid down, there in, are fundamental in the governance of the country. Article 37 of the Constitution casts a duty on the state to apply these principles in making laws. While Article 38 imposes a duty on the state to promote the welfare of the people by securing and protecting as effectively as it many a social order in which justice, social, economic and political, shall inform all the

30 Article 39-A provides that "the state shall secure the operation of the legal system promotes justice, on the basis of equal opportunity and shall secure in particular, provides Free legal Aid by suitable legislation or scheme or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

institutions of the national life. The parliament has enacted Legal Services Authorities Act, 1987 under which legal Aid is guaranteed and various state governments had established legal Aid and Advice Board and framed schemes for Free Legal Aid and incidental matter to give effect to the Constitutional mandate of Article 39-A. Under the Indian Human Rights jurisprudence, Legal Aid is of wider amplitude and it is not only available in criminal cases but also in civil, revenue and administrative cases..

In *Madhav Hayawadan Rao Hosket vs. State of Maharashtra*, the Supreme Court reading Articles 21 and 39-A, along with Article 142 and section 304 of Cr.PC together declared that the Government was under duty to provide legal services to the accused persons. Justice Krishna Iyer observed that Indian socio legal milieu makes free legal services, at trial and higher levels, an imperative procedural piece of criminal justice. The Supreme Court decided the point of Legal Aid in appeal cases as follows "If a prisoner sentenced to imprisonment is virtually unable to exercise his Constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there is implicit in the court under Article 142 read with Articles 21 and 39 A of the Constitution, power to assign counsel for such imprisoned individual for doing complete justice". The court further added that legal Aid in such cases is states duty and not Government's charity.

In *Hussainara Khatoon and others vs. Home Secretary, State of Biha* [31]*r*, the main observations of the Supreme Court are on speedy trail. Bhagwathi and Koshal, JJ observed that the speedy trail, which means reasonably expeditious trial, is an integral and essential part of the Fundamental Right to Life and Liberty enshrined in Article 21.. Justice Bhagwathi observed that Article 39-A of the Constitution also emphasizes that free legal service is an unalienable component of reasonable, fair and just procedure for without it, a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore clearly an essential ingredient of "reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in Article 21 of the Constitution.

Right to Speedy Trial:

The speedy trial of offences is one of the basic objectives of the criminal justice delivery system. Once the cognizance of the accusation is taken by the court then the trial has to be conducted expeditiously so as to punish the guilty and to absolve the innocent. Everyone is presumed to be innocent until the guilty is proved. So, the quality or innocence of the accused has to be determined as quickly as possible. It is therefore, incumbent on the court to see that no guilty person escapes, it is still more its duty to see that justice is not delayed and the accused persons are not indefinitely harassed. It is pertinent to mention that "delay

31 AIR 1979 SC 1360

in trail by itself constitute denial of justice" which is said to be "justice delayed is justice denied". It is absolutely necessary that the persons accused of offences should be speedily tried so that in cases where the bail is refused, the accused persons have not to remain in jail longer than is absolutely necessary.

Taking the principle of fairness and reasonableness evolved in Maneka Gandhi's cases, the Supreme Court in *Hussainara Khatoon (I) VS. Home secretary*[32] case held that "Obviously procedure prescribed by law for depriving a person of his liberty cannot be reasonable, fair, or just unless that procedure ensures a speedy trial for determination of the guilty of such person. No procedure which does not ensure a reasonably quick trial can be regarded as reasonable, fair or just and it would fall foul of Article 21. There can be no doubt that speedy trail and by speedy trail we mean reasonably expeditious trial, is an integral and essential part of the Fundamental Right to Life and Liberty enshrined in Article 21. Thus, the right to speedy trial is implicit in broad sweep and content of Article 21 of the Constitution. Hence any accused who is denied this right of speedy trial is entitled to approach the Supreme Court for the purpose of enforcing such right.

However, the main procedure for investigation and trial of an offence with regard to speedy trial is contained in the code of criminal procedure. The right to speedy trial is contained under section 309 of Cr.PC [33]. If the provisions of Cr.PC are followed in their letter and spirit, then there would be no question of any grievance. But, these provisions are not properly implemented in their spirit. It is necessary that the Constitutional guarantee of speedy trial emanating from Article 21 should be properly reflected in the provisions of the code. For this purpose in *A.R.Antulay vs. R.S.Nayak* [34],the Supreme Court has laid down following propositions which will go a long way to protect the Human Rights of the prisoners. The concerns underlying the right to speedy trial from the point of view of the accused are:

- **a.** The period of remand and pre – conviction detention should be as short as possible. In other words, the accused shall not be subjected to unnecessary or unduly long detention point of his conviction.
- **b.** The worry, anxiety, expense and disturbance to his vocation and peace resulting from an unduly prolonged investigation, in query or trial shall be minimal; and.
- **c**. Undue delay may result in impairment of the ability of the accused to defend himself whether on account of death, disappearance or non–availability of witnesses or otherwise.

32 AIR 1980 1SCC 81

33 Section 309 (1) of Cr.PSection 309 (1) of Cr.PC contemplates "In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds that the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

34 AIR 1992 SC 1701

In the instant case the Apex Court held that the right to speedy trial flowing from Article 21 of the Constitution is available to accused at all stages like investigation, inquiry, trial, appeal, revision and retrial. The court said that the accused cannot be denied the right to speedy trial merely on the ground that he had failed to demand a speedy trial. From the above cases and principles of the Supreme Court, it can be concluded that the right to speedy trial is implicit under Article 21 of the Constitution.

Right Against delayed execution:

Another principle evolved by the Supreme Court is that if there is prolonged delay in execution of a death sentence then it would be an "just, unfair and unreasonable" procedure to execute the sentence. Prolonged delay in the execution of death sentence is dehumanizing and deprives a person of his life is an unjust, unfair and unreasonable way so as to offend Art. 21 [35]

In *Vatheeswaran v. State of Tamil Nadu* [36], the Court thought that the delay of two years would make it unreasonable to execute death sentence. The cause of delay was immaterial. The accused himself may be responsible for the delay for the delay. In such case, the appropriate relief would be to vacate the death sentence and substitute life imprisonment instead.

But in *Sher singh v. State of Punjab* [37], the Supreme Court agreed with this view that prolonged delay in the execution of a death sentence was an important consideration for invoking Art. 21 for judging whether sentence should be allowed to be executed or should be converted into sentence of imprisonment. Prolonged detention to await the execution of sentence of death is an unjust, unfair and unreasonable procedure and the only way to undo the wrong is to quash the death sentence. However, the Court held that this cannot be applied as a rule in every case and each case should be decided on its own facts. In the instant case, the delay was found to be due to the conduct of the convict and therefore it was held that the death sentence was not liable to be quashed. Accordingly, the Court overruled the decision in *T. V. Vatheeswaran v. State of Tamil Nadu.*

Javed Ahmad v. State of Maharashtra [38], the Supreme Court held that where there is delay in execution of death sentence of more than 2 years and the conduct and behaviour of the accused in the jail, evident from the report of the jail authorities show that he was showing genuine repentance it was held that the death sentence could be commuted to life imprisonment.

In *Triveniben v. State of Gujarat* [39], the Supreme Court again reaffirmed the constitutional validity of the death sentence and sought to resolve the conflict of

35 M.P. Jain- Indian Constitutional Law-Lexis Nexis Butterworths Wadhwa Nagpur- Haryana India-60th Edition2010, page no.1216
36 AIR 1981 SCC 643
37 AIR 1983 SCC 465
38 AIR 1985 SCC 231
39 AIR 1989 SCC 1335

judicial views expressed in *Vatheeswaran* and *Sher Singh* and in *Javed Ahmad's* case.

The Court considered in detail the following questions in Triveniben:

1) Delay in execution of death sentence;
2) What should be the starting point for computing the delay?
3) What are the rights of a condemned prisoner who has been sentenced to death but not executed? And
4) What could be the circumstances which could be considered along with the time that has taken before the sentence is executed?

The Court now said that the delay which could be considered in considering the question of commutation of death sentence into one of life imprisonment could only be from the date of judgment by the apex Court is pronounced, i.e. when the judicial process comes to an end. While considering the question of delay after the final verdict is pronounced, the time spent on petitions for review and repeated mercy petitions at the instance of the convicted person himself however shall not be considered. The only delay which would be material for consideration will be the delay in disposal of the mercy petitions received under Art. 72 or 161 are disposed of expeditiously by the concerned authorities.

After the final judicial verdict is pronounced inordinate delay in executing the death coupled with subsequent circumstances could be held to be sufficient to come to a conclusion that execution of death sentence will not be just and proper. On the question of delay, the Court has given the following ruling:

> "*Undue long delay in execution of the sentence of death will entitle the condemned person to approach this court under Art. 32 but this Court will only examine the nature of delay caused and circumstances ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to reopen the conclusions reached by the Court while finally maintaining the sentence of death. This Court, however, may, consider the question of inordinate delay in the light of all the circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death in executable and to this extent Vatheeswaran's case cannot be said to lay down the correct law and to that extent stands overruled".*

Compensation and Art. 21:

A new judicial trend has manifested itself in the area of personal liberty for sometime now. This is the manifestation of the "dynamic constitutional jurisprudence" which the Supreme Court is evolving in this area. The Court can

quash an order of detention or arrest if not according to law [40]. It is internationally recognized principle that right to compensation is not alien to the concept of enforcement of guaranteed right. Compensation through writs is a recent development and an extension of the prerogatives of the Supreme Court and High Courts in the field of Constitutional remedies. Even though, there was much criticism on the payment of compensation under Article 32 of the Constitution, because of this Article as such it does not expressly empower the courts to award such relief. It is important to mention here that the seed of compensation for the violation of the rights implicit in Article 21 is first sowed in ***Khatri vs. State of Bihar*** [41]**,** (the Bhagalpur Blinding case), it was alleged that the police had blinded certain prisoners and the state was liable to pay compensation to them. Thus was raised the extremely significant constitutional question, viz: while the Court can certainly injunct the State from depriving a person of his life or personal liberty except in accordance with procedure established by law, but if the State has deprived a person of his life or personal liberty in violation of Art. 21, can the Court grant him relief, or is the Court helpless to grant any relief to him? Thus the important question raised in Khatri was: would the state be liable to pay compensation for acts of its servants outside the scope of their power and authority affecting the life and personal liberty of a person and thus infringing Art. 21?

Bhagwati, J., took an affirmative view on this question. He thought that, otherwise, Art. 21 would be reduced to a nullity, 'a mere roap of sand' for 'on this view, if the officer is acting according to law there would be no breach of Art. 21 and if he acting without the authority of law, the state could argue that it is not responsible for the officer's action and so there is no violation of Art. 21. While not giving a definitive answer to the basic question raised by Bhagwati, J., as an interim measure, in the instant case, the court ordered the State to meet the expenses of housing these men in a blind home in Delhi.

In a precedent-setting judgment in *Rudal Shah v. State of Bihar* [42], the Supreme Court has held that the Court has power to award monetary compensation in appropriate cases where there has been violation of the constitutional rights of citizens. In the present case the Supreme Court in a writ petition under Art. 32 awarded Rs. 35,000 as compensation against the State of Bihar to the petitioner because he was kept in jail for 14 years after he had been acquitted by a criminal Court. Similarly, in *Bhim Singh v. State of J&K* [43], the Court awarded a sum of Rs. 50,000 to the petitioner as compensation for the violation of his constitutional right of personal liberty under Art. 21 of the Constitution. The petitioner a MLA was arrested and detained in police custody and deliberately prevented from

40M.P. Jain- Indian Constitutional Law-Lexis Nexis Butterworths Wadhwa Nagpur- Haryana India-60th Edition2010, page no.1219
41 AIR 1981 SCC 928
42 AIR 1983 SC1086
43 AIR 1985 4SCC 677

attending Session of the Legislative Assembly. The police officers acted deliberately and mala fide and magistrate and Sub-judge aided them either by colluding with them or by their casual attitude. When the constitutional right of personal liberty is invaded the invasion is not washed away by him being set free marks.

Conclusion

Man was born free and was left free by the creator in this world. Therefore, right to personal liberty is the birth right of a man and this right should be free from any sort of restraint and coercion. However, this right does not mean a person can go to any extent affecting the rights of others. Thus, he is free to the extent the rights of others are not infringed. Human rights are guaranteed by the part III of the Constitution of India. Thus the law dealing with prisoners must stand the test of part III of the grundnorm, the Constitution. Hence the authorities cannot act arbitrarily, and cannot violate the rights given to the prisoners under Constitution.

Despite adequate safeguards provided under the statutory law ,the Constitution also guarantees certain fundamental rights to the prisoners in part III of Constitution .Article 21 of Indian Constitution has been major centre of litigation so far as prisoner's rights are concerned .The protection of Article 21 is available even to the convicts in Jail . The rights provided under Article 21 of Indian Constitution must be taken into consideration by jail authorities.

The Supreme Court has demonstrated on many occasions that every person is entitled to a right to live with human dignity, and so in the discharge of its responsibilities to the people, the State must recognize the need for maintaining prison establishment for the care of those unfortunate who are castaways. The State has a positive obligation to protect life, to ensure human dignity to every individual.