NATIONAL JUDICIAL ACADEMY

SEMINAR TO ASSESS WORKING OF HUMAN RIGHTS COURTS IN INDIA

10TH – 13TH MARCH, 2016

READING MATERIAL

Prepared & Compiled By

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SEMINAR TO ASSESS WORKING OF HUMAN RIGHTS COURTS IN INDIA

10th March, 2016 to 13st March, 2016

Programme Schedule for P-977(As on 24.02.2016)

Programme coordinator – Ms. Nitika Jain (Law associate), National Judicial Academy, Bhopal

10th March 2016 Thursday	**09:00 AM – 10:00 AM** **SESSION 1** ***Cases dealt by Human Rights Court under Protection of Human Rights Act, 1993 till date***	**TEA BREAK**	**10:30 AM – 11:30 AM** **SESSION 2** ***Interpretation of Section 30 of Human Rights Act***	**TEA BREAK**	**12:00 PM – 01:00 PM** **SESSION 3** ***The role of human rights court under 1993 Act***	**LUNCH BREAK**	**02:00PM – 03:00 PM** **SESSION 4** ***Rights of women against sexual harassment at workplace – Human Rights of women in danger***	**03:00 PM – 04:00 PM** *Library Reading*	**04:00 PM – 05:00 PM** *Computer Skills Training*
11th March 2016 Friday	**09:00 AM – 10:00 AM** **SESSION 5** ***Human Rights in Conflict with other Rights***		**10:30 AM – 11:30 AM** **SESSION 6** ***Poverty as an impediment in realization of Human Rights***		**12:00 PM – 01:00 PM** **SESSION 7** ***Protection of dignity as a Human Right***		**02:00PM – 03:00 PM** **SESSION 8** ***Functioning of Human Rights Courts and their role vis a vis Human Rights Commission under 1993 Act***	**03:00 PM – 04:00 PM** *Library Reading*	**04:00 PM – 05:00 PM** *Computer Skills Training*
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ROLE OF HUMAN RIGHTS COURTS ESTABLISHED UNDER 1993 ACT; LIMITATIONS

AND

INTERPRETATION OF SECTION 30 OF 1993 ACT

HUMAN RIGHTS COURTS IN INDIA

By N. Chandrashekharayya[1]

One of the objects of the Protection of Human Rights Act, 1993 as stated in the preamble of the Act, is the establishment of human rights courts at district level. The creation of Human Rights Courts at the district level has a great potential to protect and realize human rights at the grassroots.

The Protection of Human Rights Act, 1993 provides for establishment Human Rights Courts for the purpose of providing speedy trial of offences arising out of violation of human rights. It provides that the state Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Sessions to be a Human Rights Court to try the said offences. The object of establishment of such Courts at district level is to ensure speedy disposal of cases relating to offences arising out of violation of human rights.

The Act refers to the offences arising out of violations of human rights. But it does not define or explain the meaning of "offences arising out of violations of human rights". It is vague. The Act dose not give any clear indication or clarification as to what type of offences actually are to be tried by the Human Rights Courts. No efforts are made by the Central Government in this direction. Unless the offence is not defined the courts cannot take cognizance of the offences and try them. Till then the Human Rights Courts will remain only for namesake.

Even if "offences arising out of violations of human rights" are defined and clarified or classified, another problem arises in the working of the Human Rights courts in India. The problem is who can take cognizance of the offences. What the Act says is in each district, one Sessions Court has to be specified for trying "offences arising out of human rights violation". It is silent about taking of cognizance of the offence. The Prevention of Corruption Act, 1988 is another law, which provides for appointment of a Sessions Judge in each district as Special Judge to try the offence under the said Act. Provision has been made in section 5 of the Prevention of Corruption Act, 1988 empowering the Special Judge to take cognizance of the offences under the said Act. In the Protection of Human Rights Act, 1993 it is not so.

[1] Written by: N.Chandrashekharayya, Advocate, Raichur

Sessions Court of the district concerned is considered as the Human Rights Court. Under the Criminal Procedure Code, 1973 a Sessions Judge cannot take cognizance of the offence. He can only try the cases committed to him by the magistrate under Section 193 of the Cr.P.C.

Similar problem had arisen in working of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 in the beginning. The Special Judges used to take cognizance of the offences. In *Potluri Purna Chandra Prabhakara Rao V. State of A.P*., 2002(1) Criminal Court cases 150, *Ujjagar singh & others V. State of Haryana & another*, 2003(1) Criminal Court Cases 406 and some other cases it was held that the Special Court (Court of Session) does not get jurisdiction to try the offence under the Act without committal by the Magistrate. The Supreme Court also held same view in *Moly & another V. State of Kerala*, 2004(2) Criminal Court Cases 514. Consequently the trial of all the cases under the Prevention of Atrocities Act were stopped and all the cases were sent to the Courts of jurisdictional Magistrates. Thereafter the respective Magistrates took cognizance of the cases and committed them to the Special Courts. The Special Courts started trying the cases after they were committed to them. The Act was later amended giving the Special Courts the power to take cognizance of the offences under Act.

The situation in respect of the Human Rights courts under the Protection of Human Rights Act, 1993 is not different.

Apart from the above, the Special Courts will face yet another question whether provisions of Section 197 of CrPC. are applicable for taking cognizance of the offences under the Protection of Human Rights Act, 1993. In most of the cases of violation of human rights it is the police and other public officers who will be accused. The offence relate to commission or omission of the public servants in discharge of their duties. Definitely the accused facing the trial under the Act raise the objection. There are plethora of precedents in favour of dispensing with the applicability of Section 197 of CrPC. on the ground that such acts (like the ones which result in violation of human rights) do not come within the purview of the duties of public servants. But there is scope for speculation as long as there is no specific provision in the Act dispensing with the applicability of Section 197 of CrPC.

The object of establishment of such Courts at district level is to ensure speedy disposal of cases relating to offences arising out of violation of human rights. Unless the lawmakers take note of the above anomalies and remove them by proper amendments the aim for which provisions are made for establishment of special courts will not be achieved.

Case Law

Gangula Ashok & Anr. v. State of A.P.

Hon'ble Judges**:** K.T. Thomas and M.B. Shah, JJ.
AIR2000SC740

Prior History:
From the Judgment and Order Dated September 3, 1999 of the Andhra Pradesh High Court in Cri. P. No. 3534 of 1998

The Court of Session is specified to conduct a trial under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and no other Court can conduct the trial of offences under the Act. Why the Parliament provided that only a Court of Session can be specified as a Special Court? Evidently the Legislature wanted the special court to be Court of Session. Hence, the particular Court of Session, even after being specified as a special court, would continue to be essentially a Court of Session and designation of it as a special court would not denude it of its character or even powers as a Court of Session. The trial in such a Court can be conducted only in the manner provided in Chapter XVIII of the Code which contains a fasciculus of provisions for "Trial before a Court of Session".

Section 193 of the Code has to be understood in the aforesaid backdrop. The section imposes an interdict on all Courts of Session against taking cognizance of any offence as a Court of original jurisdiction. It can take cognizance only if "the case has been committed to it by a Magistrate", as provided in the Code. Two segments have been indicated in Section 193 as exceptions to the aforesaid interdict. One is, when the Code itself has provided differently in express language regarding taking of cognizance, and the second is when any other law has provided differently in express language regarding taking cognizance of offences under such law. The word "expressly" which is employed in Section 193 denoting to those exceptions is indicative of the legislative mandate that a Court of Session can depart from the interdict contained in the section only if it is provided differently in clear and unambiguous terms. In other words, unless it is positively and specifically provided differently, no Court of Session can take cognizance of any offence directly, without the case being committed to it by a Magistrate.

*Neither in the Code nor in the Act, there is any provision whatsoever, not even by implication, that the specified Court of Session (Special Court) can take cognizance of the offence under the Act as a court of original jurisdiction without the case being committed to it by a Magistrate. If that be so, there is no reason to think that the charge-sheet or a complaint can straightway be filed before such Special Court for offences under the Act***.**

Facts: First appellant is a practicing advocate and second appellant is his wife who was working as Matron of a Girls' Hostel run by the Social Welfare Department. One Kumari G. Swetha was a resident of the said hostel. On 27-2-1996 the said Swetha lodged a complaint with the police alleging that on 6-1-1996 the first appellant outraged/tried to outrage her modesty. The police after investigation, filed a charge-sheet directly before the Sessions Court, Karim Nagar (Andhra Pradesh) which was designated as the special Court for trial of offences under the Act committed

within the territorial limits of the district concerned. In the charge-sheet, first appellant is alleged to have committed the offence under Section 3(1)(XI) of the Act and also Section 354 of the Indian Penal Code. Besides first appellant, the investigating officer arrayed his wife as the second appellant for the offence under Section 201 of the Indian Penal Code in relation to the offences put against her husband, on the allegation that when Kumari Swetha complained to the second appellant of the misdemeanor committed by the first accused, she tried to persuade the complainant not to divulge it to anybody else. Subsequently the police dropped Section 354 of the IPC from the charge-sheet and filed a revised charge sheet pursuant to a query put by the Special Judge concerned.

A charge was framed by the Special Judge against both the appellants for the aforesaid offences respectively. It was presumably at the said stage that the appellants moved the High Court for quashing the charge as well as the charge-sheet on various reasons. A single Judge of the High Court of Andhra Pradesh found that the procedure adopted by the investigating officer in filing the charge-sheet straightway to the Special Court was not in accordance with law, and the Special Judge had no jurisdiction to take cognizance of any offence under the Act without the case having been committed to that Court. Accordingly the learned single Judge set aside the proceedings of the Special Court and directed the charge sheet and the connected papers to be returned to the police officer concerned who, in turn, was directed to present the same before a Judicial Magistrate of 1st class "for the purpose of committal to the Special Court". Learned single Judge further directed that "on such committal the Special Court shall frame appropriate charges in the light of the observations in the order.

Appellants have filed this appeal by special leave in challenge of the aforesaid order of the learned single Judge of the Andhra Pradesh High Court.

Issues:

1. Can a "special Court" which is envisaged in Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, (for short 'the Act') take cognizance of any offence without the case being committed to that Court? If the Special Court is a Court of Session the interdict contained in Section 193 of the CrPC (for short 'the Code') would stand in the way.

It reads thus: *193. Cognizance of offences by Courts of Session.- Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code*.

So the first aspect to be considered is whether the Special Court is a Court of Session.

Supreme Court Observations:

Section 14 of the Act says that "for the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification In the Official Gazette, specify for each district a Court of Session to be a Special Court to try the offences under

this Act", So it Is for trial of the offences under the Act that a particular Court of Session in each district is sought to be specified as a Special Court. Though the word "trial" is not defined either In the Code or in the Act it is clearly distinguishable from inquiry. The word "inquiry" Is defined In Section 2(g) of the Code as "every inquiry, other than trial, conducted under this Code by a magistrate or Court". So the trial is distinct from inquiry and Inquiry must always be a forerunner to the trial. The Act contemplates only the trial to be conducted by the Special Court. The added reason for specifying a Court of Session as Special Court is to ensure speed for such trial. "Special Court" is defined in the Act as "a Court of Session specified as a Special Court in Section 14", (vide Section 2(1)(d).

Thus the Court of Session is specified to conduct a trial and no other Court can conduct the trial of offences under the Act.

Why the Parliament provided that only a Court of Session can be specified as a Special Court? Evidently the legislature wanted the Special Court to be Court of Session. Hence the particular Court of Session, even after being specified as a Special Court, would continue to be essentially a Court of Session and designation of it as a Special Court would not denude It of its character or even powers as a Court of Session, **The trial In such a Court can be conducted only in the manner provided in Chapter XVIII of the Code which contains a fascicules of provisions for 'Trial before a Court of Session".**

Section 193 of the Code has to be understood in the aforesaid backdrop. The section imposes an interdict on all Courts of Session against taking cognizance of any offence as a Court of original jurisdiction. It can take cognizance only if "the case has been committed to it by a magistrate", as provided in the Code. Two segments have been indicated in Section 193 as exceptions to the aforesaid interdict. One is, when the Code itself has provided differently In express language regarding taking of cognizance, and the second is when any other law has provided differently in express language regarding taking cognizance of offences under such law. The word "expressly" which is employed in Section 193 denoting to those exceptions is indicative of the legislative mandate that a Court of Session can depart from the interdict contained in the section only if it is provided differently in clear and unambiguous terms. In other words, unless it is positively and specifically provided differently no Court of Session can take cognizance of any offence directly, without the case being committed to it by a magistrate.

Neither In the Code nor in the Act there is any provision whatsoever, not even by Implication, that the specified Court of Session (Special Court) can take cognizance of the offence under the Act as a Court of original jurisdiction without the case being committed to it by a magistrate. If that be so, there is no reason to think that the charge- sheet or a complaint can straightway be filed before such Special Court for offences under the Act. It can be discerned from the hierarchical settings of criminal Courts that the Court of Session is given a superior and special status. Hence we think that the legislature would have thoughtfully relieved the Court of Session from the work of performing all the preliminary formalities which magistrates have to do until the case is committed to the Court of Session.

We have noticed from some of the decisions rendered by various High Courts that contentions were advanced based on Sections 4 and 5 of the Code as suggesting that a departure from Section 193 of the Code Is permissible under special enactments. Section 4 of the Code contains two sub-sections of which the first sub-section is of no relevance since it deals only with offences under the Indian Penal Code. However, Sub-section (2) deals with offences under other laws and hence the same can be looked Into. Sub-section (2) of Section 4 is extracted below:

All offences, under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

A reading of the sub-section makes it clear that subject to the provisions in other enactments all offences under other laws shall also be investigated, inquired into, tried and otherwise dealt with under the provisions of the Code. This means that if other enactment contains any provision which is contrary to the provisions of the Code, such other functions would apply in place of the particular provision of the Code. If there is no such contrary provision in other laws, then provisions of the Code would apply to the matters covered thereby. This aspect has been emphasised by a Constitution Bench of this Court in paragraph 16 of the decision in *A. R. Antulay v. Ramdas Sriniwas Nayak* 1984CriLJ647 . It reads thus (para 16 of AIR, Cri LJ):

Section 4(2) provides for offences under other law which may be investigated, inquired into, tried and otherwise dealt with according to the provisions of the CrPC but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences. In the absence of a specific provision made in the statute indicating that offences will have to be investigated, inquired into, tried and otherwise dealt with according to that statute, the same will have to be investigated, inquired into, tried and otherwise dealt with according to the CrPC. In other words, CrPC is the parent statute which provides for investigation, inquiring into and trial of cases by criminal Courts of various designations.

Section 5 of the Code reads thus:

5. Saving.- Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being

Hence we have no doubt that a Special Court under this Act is essentially a Court of Session and it can take cognizance of the offence when the case is committed to it by the magistrate in accordance with the provisions of the Code. In other words, a complaint or a charge-sheet cannot straightway be laid before the Special Court under the Act.

When this question was considered by various High Courts, the High Courts of Madhya Pradesh, Allahabad, Patna and Punjab & Haryana have adopted the view consistent with the view which we have stated above, (vide *Meerabai v. Bhujbal Singh* MANU/MP/0306/1994; *Pappu Singh v. State of U.P.* MANU/UP/0224/1994; *Jhagru Mahto v. State of Bihar* 1992(2)BLJR1403 ; *Jyoti Arora v. State of Haryana* 1998 Cri LJ 2662.

But it seems that the only High Court which took a contrary view is the High Court of Kerala. At first a Division Bench of that High Court took the view that the Special Court can straightway take cognizance of the offence under the Act and proceed with the trial unaffected by Section 193 of the Code, (vide *In re : Director General of Prosecution,* MANU/KE/0217/1992. One of the Judges of the Division Bench sought support to it from the observations of this Court in *A. R. Antulay's decision* 1984CriLJ647 (supra) and then observed that "the same principle would apply because of the effect of the transmutation of the Session Court as a Special Court".

19. When the correctness of the above decision was later doubted by the same High Court the question was referred to a larger bench. In *Hareendran v. Sarada* 1996 (1) ALT (Cri) 162 a Full Bench of that High Court affirmed the view of the Division Bench aforesaid. The Full Bench put forward mainly two reasons for adopting the said Interpretation. First Is that Section 20 of the Act stipulated that provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained In any other law for the time being in force. As the section gives overriding effect for the provisions of the Act and it was enacted with a view to prevent commission of offence of atrocities against the members of the Scheduled Castes and Scheduled Tribes, the Full Bench felt that "it Is rather difficult for us to hold that the committal proceeding is indispensable as a prelude to the case being tried by the Special Court". Second is that, there is nothing in the Act to indicate that the Special Court would get jurisdiction only on a committal order made by the magistrate.

20. The very approach of the Full Bench of the Kerala High Court seems to be that there should be specific indication in the Act that the Special Court gets jurisdiction to try the offence only on a committal order, and in the absence of such specific indication the Special Court must have the right to take cognizance of the offence as though it is a Court of original jurisdiction. We have pointed out above that unless there is ex press provision to the contrary in any other law the interdict contained in Section 193 of the Code cannot be circumvented. Hence the reasoning of the Full Bench in *Hareendran v. Sarada* 1995 AIHC 4542 (supra) is apparently fallacious.

21. In fact all the other High Courts which dealt with this question (the decisions of which were cited supra) have dissented from the aforesaid view of the Full Bench of the Kerala High Court, after adverting to the reasons advanced by the Full Bench. A Division Bench of the Andhra Pradesh High Court after referring to the Full Bench decision in Hareendran v. Sarada 1995 AIHC 4542 (supra) made the following observations in Referring

Officer rep. By State of A. P. v. Shekar Nair 1999(3)ALT533 (para 26 of Cri LJ):

We find it difficult to agree with the reasoning of the Kerala High Court in the two decisions referred to above. As already observed by us, in the absence of a particular procedure prescribed by the said Act as regards the mode of taking cognizance, enquiry or trial, the procedure under the Code will have to be applied by reason of Section 4(2) of the Code as clarified by the Supreme Court in the case of Directorate of Enforcement 1994CriLJ2269 . There is no provision in the Act who excludes the application of .Section 193, Cr.P.C. *The mere fact that no procedure is prescribed or specified under the Special Act does not mean that the Special Act dispenses with the procedure for committal in the case triable by Court of Sessions and that the Special Court*

gets original jurisdiction in the matter of initiations, enquiry or trial. There is no good reason why the procedural provisions of Code relating to power and mode of taking cognizance including Section 193 should not be applied to the Special Court.

22. We are of the considered opinion that the Division Bench of the Andhra Pradesh High Court has stated the legal position correctly in the above decision.

23. It must be rioted that the observations of this Court in A. R. Antulay (MANU/SC/0082/1984 : 1984CriLJ647) (supra) were made in connection with the establishment of a Special Court under Criminal Amendment Act of 1952. What is to be pointed out is that a Special Judge appointed under the said Act was given the specific power to take cognizance of the offence without the case being committed to him. Hence the observations in A. R. Antuley's case cannot be profitably utilized to support the interpretation of another Act wherein there is no such specific provision.

24. It is contextually relevant to notice that Special Courts created under certain other enactments have been specially empowered to take cognizance of the offence without the accused being committed to it for trial, (e.g. Section 36-A(1)(d) of the Narcotics Drugs Psychotropic Substances Act). It is significant that there is no similar provision in the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

26. So the High Court of Andhra Pradesh has rightly set aside, as per the impugned order, the proceedings Initiated by the Special Court specified under the Act. But we do not support the directions given by the learned Single Judge in his order that after committal of the case the Special Court shall frame charge against the appellants. It is for the Special Court to decide regarding the action to be taken next, after hearing both sides as provided in Section 227 of the Code. No direction can be given to the Special Court at this premature stage as to what the Court should adopt then. It is open to the appellants to raise all their contentions at that stage if they wish to make a plea for discharge. We make it clear that if any such plea is made the Judge of the Special Court shall pass appropriate orders untrammeled by the observations made in the impugned order.

DYNAMICS OF HUMAN RIGHTS COURTS IN INDIA[1]

The nature of administrative system and working procedures of Human Rights Courts (HRC) and nature of cases filed before HRC are explained in this chapter.

LAWS RELATING TO THE HUMAN RIGHTS COURTS

The legal provisions relating to the HRC in Protection of Human Rights Act, 1993(PHR Act) are given below.

Definition: Section 2 (1) (d) - "Human Rights" means the rights relating to the life, liberty, equality and dignity of the individual guaranteed by the Constitution of India or embodied in International Covenant and enforceable by Courts in India.1

Human Rights Courts: Section 30 - For the purpose of providing for speedy trial of offences arising out of violation of human rights, the state government may, with the concurrence of Chief Justice of the High Court, by notification, specify for each district a Court of Sessions to be a human rights court to try the said offences;

Provided that nothing in this section shall apply if –

a) A Court of Session is already specified as a special court,

b) A special court is already constitutes, for such offences under any other law for the time being in force.2

Special Public Prosecutor: Section 31 - For every Human Rights Court, the state government shall, by notification, specify public prosecutors or appoint an

[1] By Ramaraj. V, Available at http://shodhganga.inflibnet.ac.in/bitstream/10603/33742/11/08_chapter%20iv.pdf, retrieved on 20/02/2016

advocate, who has been in practice as an advocate for not less than seven years, as special public prosecution for the purpose of conducting cases in the court.3

Constitution of special investigation teams: Section 37 Notwithstanding anything contained in any other law for the time being in force, where the government considers it necessary so to do, it may constitute one or more special investigation teams, consisting, of such police officers as it thinks necessary for the purposes of investigation and prosecution of offences arising out of violations of human rights.4

Application of Criminal Procedure Code in HRC: Criminal Procedure Code, 1973, is applicable for the Human Rights Courts. High Court of Madras clearly mentioned in its judgment that it is legally permissible for the relevant provisions of the Criminal Procedure Code to be swing into operation for the trial of 'human rights' expecting matters in respect of specific provisions has been made in the Protection of Human Rights Act.5

RECOMMENDATIONS RELATING TO THE HUMAN RIGHT COURTS

NHRC Annual Report 1997 – 1998: Section 30 of the Protection of Human Rights Act, 1993 envisages the notification of HRCs for the purpose of providing speedy trial of offences arising out of the violation of human rights. While a number of States have notified the constitution of HRCs, an ambiguity remains as to the precise nature of the offences that should be tried in such courts and other details regarding conduct of their business.6

NHRC Annual Report 1998 – 99: The National Human Rights Commission has drawn attention to the ambiguity as to the precise nature of offences that could be tried and the procedural issues governing the conduct of the business in the HRCs as envisaged in Sec.30 of the PHR Act. The Commission recognizes that substantive amendments to Sec.30 of the PHR Act, 1993 and other laws are necessary in order to enable the courts designated as HRCs to fulfill the expectation that they would provide speedy trial of offences arising out of violation of human rights. The Commission, therefore, calls upon the Central Government to undertake the necessary legislation for this purpose at an early date.7

NHRC Annual Report 2000 – 2001: The Commission has suggested an amendment to Section 30 of the PHR Act, which provides for HRCs at the district level. The present provision is inadequate and defective and requires modification, without which Human Rights
Courts at the district level, even if formed, cannot function effectively. Many States have designated HRCs under the provisions of Section 30 of the present Act. However, in the absence of action being taken on the proposed amendment, these courts are not adequately discharging the purpose for which they were designated. This is deeply disappointing. The Commission would like to observe, in this connection, that it is not sufficient to set-up State Human Rights Commissions or to designate courts to serve as HRCs. The quality of both must be ensured, both in terms of personnel and competence, if this central purpose of the PHR Act is to be properly observed.8

NHRC Annual Report 2001 – 2002: Under Section 30 of the PHR Act, for the purpose of providing speedy trial of offences arising out of violation of human rights, the State government may, with the concurrence of the Chief Justice of the High Court, by notification specify for each district a Court of Session to be a Human Rights Court to try the said offences. According to the information received by the
Commission, the States of Assam, Andhra Pradesh, Sikkim, Tamil Nadu, Uttar Pradesh, Meghalaya, Himachal Pradesh, Goa, Madhya Pradesh and Tripura have notified such Courts.

A continuing impediment to the proper functioning of these courts has, however, been the lack of clarity as to what offences, precisely, can be classified as human rights offences. The Commission has proposed a precise amendment to Section 30 of the Protection of Human Rights Act, 1993, but in the absence of any action being taken on that proposal, these courts have not been able to adequately discharge the purpose for which they were designated.

The Commission takes this opportunity to reiterate that, both in respect of HRCs and in respect of State Human Rights Commissions, it is insufficient merely to designate or establish them. Their quality must be ensured, both in terms of

personnel and financial autonomy, and they must be extended the support that they need if they are to fulfill the purposes envisaged for them under the PHR Act.9

Recommendations of the NHRC for Amendments to the PHR Act, 1993

Present Provision - Section 30: For the purpose of providing for speedy trial of offences arising out of violation of human rights, the state government may, with the concurrence of Chief Justice of the High Court, by notification, specify for each district a Court of Sessions to be a human rights court to try the said offences;

Provided that nothing in this section shall apply if – a) A Court of Session is already specified as a special court, b) A special court is already constitutes, for such offences under any other law for the time being in force

Proposed amendment: (1) Where an offence under any law for the time being in force also involves the violation of human rights, the State government may, for the purpose of providing speedy trial of the offence involving human rights as, specified by notification issued in that behalf by the appropriate government, and with the concurrence of the Chief Justice of High Court by notification, constitute one or more Human Rights Courts to try the offence.

(2) A HRC shall be presided over by a person who is, or has beena Sessions Judge who shall take cognizance and try the offence, as nearly as may be in accordance with the procedure specified in the Code of Criminal Procedure, 1973. Provided that a HRC shall, as far as possible, dispose of any case referred to it within a period of three months from the date of framing the charge.

(3) It shall be competent for the HRC to award such sentence asmay be authorized by law and the power to decide the violation of human rights shall, without prejudice to any penalty that may be awarded, include the power to award compensation, relief, both interim and final, to the person or members of the family, affected and to recommend necessary action against persons found guilty of the violation.

(4) An appeal against the orders of the HRC shall lie to the HighCourt in the same manner and subject to the same conditions in which an appeal shall lie to the High Court from a Court of Session.

(5) Nothing in this section shall apply if — (a) a Court of Session is already specified as a special court; or (b) a special court is already constituted, for such offences under any other law for the time being in force.

Reasons: To have a better focus to this laudable provision to have easy access to justice at the district level itself in case of human rights violations, which however in its present form is lacking in clarity, the provision is amplified and clarified.10

NHRC Annual Report 2002 – 2003: It remains a matter of regret to the Commission that the promise of section 30 of the PHR Act has not been fulfilled even ten years after the adoption of the Act. It will be recalled that, under section 30 of the Act, for the purpose of providing speedy trial of offences arising out of violation of human rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification specify for each district a Court of Session to be a HRC to try the said offences.

While a number of States have notified such courts, a lack of clarity has persisted as to what offences, precisely, can be classified as human rights offences. For its part, the Commission has proposed a precise amendment to section 30 of the PHR Act, which may be seen in Annexure 1 of the annual report for 2001-2002. Regrettably, in the absence of any definitive action having been taken on that proposal, these courts have not been able to adequately discharge the purpose for which they were designated.

The Commission therefore requests the Central Government to give this matter the attention it deserves. The objectives of the PHR Act should not be thwarted by difficulties of the kind that at present persist, despite clear recommendations having been made on how to resolve them.11

NHRC Annual Report 2003 – 2004: Under section 30 of the PHR Act, the State Governments may, with the concurrence of the Chief Justice of the concerned High Court, by notification specify for each district a HRC to try the offences arising out of the violation of human rights. The Commission time and again has stated that in order to give a better focus to this laudable provision and to provide justice at the district level itself in case of human rights violations, the section needs amendment. Further the lack of clarity as to what offences, precisely, can be clarified as human rights offences, has been the biggest impediment in the effective functioning of HRCs, which have been set up by some of the States. It urged the Central Government through its annual reports for amendment of Section 30 of the PHR Act. It is rather unfortunate that the Central and State governments have so far failed to resolve issues that are creating impediments in setting up of fully functioning HRCs.12

NHRC Annual Report 2009 – 2010: It has been more than 15 years since the PHR Act, entered into force. The Commission has been deeply concerned towards the non-fulfillment of the promise of Section 30 of the PHR Act, which provides for speedy trial of offences arising out of violation of human rights by designating, in each district, a Court of Session to be a HRC to try the offences. It is a matter of great regret that even after so many years, there has been lack of clarity as to what offences, precisely, can be classified as human rights offences.13 **Final Report of National Commission to Review the Working of the Constitution :** Section 491 of the Code of Criminal Procedure, 1898 (since repealed and re-enacted as the Code of Criminal Procedure, 1973) vested the power to issue directions of the nature of *habeas corpus* in all the High Courts. The power was available since the Code was enacted in 1898 when the constitutional provisions of judicial review of the nature provided in article 226 in relation to the High Courts and article 32 for the enforcement of fundamental rights in relation to the Supreme Court of India were not available. The power under section 491 of the Code continued to be available simultaneously with the power of the High Courts and the Supreme Court to issue writs of the nature of a habeas corpus vested in them under article 226 and article 32 of the Constitution respectively even after coming into force of the

provisions of the Constitution. However, when the new Code was enacted in 1973, it was thought that, in face of the constitutional provisions under article 226 and article 32, the power of the nature of section 491 of the Code of Criminal Procedure, 1898 is redundant and was thus not provided for in the new legislation.

Since the enactment of the Code of Criminal Procedure, 1973, issues relating to the human rights have found a prominent place throughout the world. In India, the PHR Act was enacted with a view to providing for establishment of the NHRC and the various SHRCs.

Section 30 of the said Act provides that the State Governments may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a court of session to be a Human Rights Court to try the offences relating to human rights.

Since the issues relating to human rights, more particularly relating to unlawful detention, have now occupied a center-stage, both nationally and internationally, it shall be desirable that the PHR Act may be suitably amended to provide that, in addition to the powers generally vested in that court, such courts shall have the power to issue directions of the nature of a *habeas corpus* as was available to the High Courts under section 491 of the Code of Criminal Procedure, 1898. Vesting of such power will go a long way in providing help to the indigent and vulnerable sections of the society in view of the proximity and easy accessibility of the Court of Session."14

Human Rights Act has anomalies: Madras HC

Highlighting some anomalies and shortcomings in the Protection of Human Rights Act 1993, the Madras High Court has expressed the hope that lawmakers will enact appropriate amendments to make it "workable". Justice S Nagamuthu of the Madurai bench of Madras High Court said sections 2(d) and 30 of the Act were vague. A conjoint reading of these two provisions may lead one to believe that all offences committed by public servants relating to human rights shall be tried only the human rights courts.15

WORKING PROCEDURES OF HUMAN RIGHTS COURTS

Complaint Procedure: There is no specific provision in PHR Act as to *locus standi* in the matter of approaching Human Rights Courts for redressal of grievances in relation to violation of human rights, amounting to offences whether cognizable or non- cognizable. In the absence of such a provision, HRC being a criminal court have to necessarily follow the procedure laid down in the Criminal Procedure
Code.16

1. Police Complaint

Victim of human rights violations has right to lodge a complaint before the concern police officer. The procedure is given in Section 154 and 155 of the Criminal Procedure Code.

Section 154 says that (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. (2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant. (3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence. 17

Section – 155says that (1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate. (2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial. (3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case. (4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are noncognizable.18

2. Private Complaint

When the police officer refuses or failed to take necessary action on a criminal complaint, private complaint have to be filed before the court. The procedure is given in Section 200 and 203 of the Criminal Procedure Code.

Section 200 says that A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate : Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses- (a) if a public servant acting orpurporting to act in the discharge of his official duties or a Court has made the complaint ; or (b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192 : Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.19

Section 201 says that if the complaint is made to a Magistrate, who is not competent to take cognizance of the offence, he shall, - (a) if the complaint is in writing, return it for presentation to the proper court with an endorsement to that

effect; (b) if the complaint is not in writing, direct the complainant to the proper Court.20

Section 202 says that (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding: Provided that no such direction for investigation shall be made, (a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session ; or (b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath : Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer-in charge of a police station except the power to arrest without warrant.21

Section 203 says that if, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.22

3. Commitment of case to Court of Session

Section 209 of the Criminal Procedure Code says that when in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall (a) commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made; (b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial ; (c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence ; (d) notify the Public Prosecutor of the commitment of the case to the Court of Session.23

4. Trail Procedure

The term 'trial' is not defined in the Criminal Procedure Code, 1973, although the Code of 1872 defines it as a proceeding following a charge including the punishment of offence. The trial starts from the stage of charge and ends with delivering of judgment.24

Criminal cases may be classified as summons case and warrant case. Cr. P.C., Section 2(w) - "summons-case" means a case relating to an offence, and not being a warrant-case ; Cr. P.C., Section 2(x) "warrant-case" means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years;

The procedure followed for the various kinds of trials in the criminal courts depends upon the courts in which the criminal proceedings are taken up. The important two types are: trial before a Court of Sessions and trial before a Magistrate Court. The different types of trials as enumerated in the Criminal Procedure Code are: Sessions Trial (Sections 225 to 237 of Cr. P.C.,), Warrant Cases Trial (Sections 238 to 250 of Cr. P.C.,), Summons Cases Trial (Sections 251 to 259 of Cr. P.C.,), Summary Trial (Sections 260 to 265 of Cr. P.C.,).

No doubt, a Court of sessions has been designated as Human Rights Court, a special court, with the powers of a court of original jurisdiction. From this, it cannot be stated that in all eventualities and situations, the procedure prescribed for trial before the said court under sections 225 to 237 of the Criminal Procedure Code will be applicable. The reason is rather obvious. The 'offences' arising out of 'human rights' may fall under various categories, such as triable by the Magistrate Court or exclusively triable by a Court of sessions. Further, depending upon the gravity and extent of the punishment and the nature of the case instituted, that is to say, whether instituted on a police report or otherwise than on a police report, the procedure prescribed there, is not one and the same.

The peculiarity of Protection of Human Rights Act as already indicted is that all 'offences' arising out of violation of 'Human Rights'
– whether triable by the Magistrate Court or exclusively triable by a Court of sessions are required to be tried by a Human Rights Court, a special court, which is in the cadre of Court of sessions.

If the procedure prescribe for trial before a Court of sessions under sections 225 to 237 of the Criminal Procedure Code is to be followed in respect of 'offences arising out of violation of human rights', it will lead to absurdities. If the 'offences arising out of violation of human rights' is of,

1) Such nature, as is required to be tried exclusively by theCourt of sessions, the procedure prescribed under 225 to 237 of the Criminal Procedure Code has to be follows;

2) A warrant case, either instituted on a police report orotherwise than on a police report, the requisite procedure, as the case be, as prescribed under 238 to 250 of the Criminal Procedure Code has to be follows;

3) A summons case, the procedure prescribed under

Sections 251 to 259 of the Criminal Procedure Code has to be followed.25

5. Appeal Procedure

If the trail of 'offences' arising out of violation of 'human rights' belonging to the category of trail at Sessions Court, appeal will be filled before the Human Rights Court.

If the trail of 'offences' arising out of violation of 'human rights' belonging to the category of Magistrate court case takes before the HRC, which is a cadre of a Court of Sessions and results in conviction and consequent appropriate sentence, right to appeal to affected party will be lost and he can, if at all, prefer a revision against such conviction and sentence before the High Court. The affected party, even in such a situation, cannot have any grievance, inasmuch as he had been given the full-fledged opportunity of his defence before the trial court.26

NATURE OF HUMAN RIGHTS CASES

Protection of Human Rights Act does not specify Human Rights offences. However, PHR Act does contain definite indications as to what would be construed as such offences. The phraseology, "offences arising out of violation of Human Rights," defined in Section 2(1) (d) of PHR Act would throw sufficient light, as respects the necessary and requisite parameters for identifying such offences.27

State Human Rights Commission of Tamil Nadu classified the human rights violations as follows:

Subject-wise classification of incidents leading to complaints/suo moto action[28]

Major Head	**Sub-Head**
Children	Child Labour
	Child Marriage
	Child Prostitution
	Exploitation of Children
	Immoral Traffic in Children
	Cruelty to Children

	Neglect of Children
Health	Exploitation of the mentally retarded
	Public health hazards
	Malfunctioning of Medical professionals
Jail	Custodial death
	Custodial rape
	Exploitation of child prisoners
	Deprivation of legal aid
	Harassment of prisoners
	Irregularities in Jail
	Unlawful Solitary confinement
Criminal Gangs	Harassment by gangs
	Harassment by local goonda
	Mischief by anti-social elements
Labour	Bonded labour
	Exploitation of labour
	Forced labour
	Hazardous employment
	Slavery
	Traffic in human labour
Minorities	Discrimination against minorities
	Discrimination against S.C./S.T.
	Harassment OF S.C./S.T.
Police	Arbitrary use of power
	Abduction/Kidnapping
	Abuse of power
	Attempted murder
	Custodial death
	Custodial rape
	Custodial torture

	Custodial violence
	Death in police firing
	Death in police encounter
	Fake encounters
	Failure in taking lawful action
	False implications
	Illegal arrest
	Unlawful detention
	Police motivated incidents
	Rape
	Victimization
Pollution	Ecological disturbances
	Pollution affecting surroundings
Religion-Community	Communal violence
	Group clashes
	Racial discrimination
	Religious discrimination
Women	Abduction, rape and murder
	Discrimination against women
	Dowry death or attempt
	Dowry demand
	Exploitation of women
	Gang rape
	Indignity of women

	Immoral trafficking of women
	Rape
	Sexual harassment
Miscellaneous	Disappearance
	Unlawful actions of public servant
	Unlawful eviction

The analysis of the above classification reveals that it consists of the ingredients as below: i. 'Human Rights' must relate to any of the following, namely, (a) life, (b) liberty, (c) equality and (d) dignity of the individual. ii. Those rights must be guaranteed by Constitution or embodied in the International Covenants; and iii. Those rights are enforceable by Courts in India.29 In the absence of contrary legislation, municipal courts in India would respect rules of international law.30 Article 51 of the Indian Constitution directs that the State shall endeavor to *inter alia*, foster respect for international law and treaty obligation in dealings of organized peoples with one another.31 The victims, of any violations against the following rights, have right to approach the Human Rights Courts for the suitable remedies32.

1. Rights guaranteed in Constitution of India

a) Rights of Equality

b) Prohibition of Untouchability

c) Freedom of Speech and Expression

d) Freedom of Assembly

e) Freedom to form Associations

f) Freedom of Movement

g) Freedom to Reside and Settle

h) Freedom of Profession, Occupation, Trade or Business

i) Rights against Arbitrary Conviction

j) Right to Life

k) Right to Liberty

l) Right against Arbitrary Arrest and Detention

k) Right to Freedom of Religion

m) Cultural and Educational Rights

n) Right to Constitutional Remedies

2. Rights guaranteed in the International Covenant on Economic, Social and Cultural Rights a) Right to Work

b) Right to Social Security

c) Right to Equal Pay for Equal Work

d) Right to Leisure

e) Right to Protection of Motherhood and Childhood

f) Right to Education

g) Right to Protection of Moral and Material Interest

h) Right to Strike

i) Right to Trade Unions

j) Right to Marriage and Family

k) Right to Maternity Benefits

l) Right to Minimum Standard of Living

m) Right to Cultural Life

3. Rights guaranteed in the International Covenant on Civil and Political Rights

a) Right to Equality and Non-Discrimination

b) Right to Life and Liberty

c) Right to Against Arbitrary Arrest

d) Right to Self-Incrimination

e) Right to Freedom of Movement

f) Freedom of Thought and Expression

g) Right to Assembly Peacefully

h) Right to Conscience and Religion

i) Right against Slavery

j) Right to Privacy

k) Right to Nationality

l) Right to Equal Access to Public Service

m) Right to take part in Public Affairs

n) Right to form Association

o) Right of Minorities

4. Rights guaranteed in the international treaties, in which, India is a signatory

In the light of definition of 'offences', as contained in section 2(n) of the Criminal Procedure Code, the offences arising out of violation of 'human rights', as mentioned in section 30 of PHR Act will, in the context of the definition of 'human rights', under section 2(1) (d) thereof, means that such act or omission on the part of the instrumentalities of the State, that is to say, public servants, punishable by law for the time being in force, as relatable to life, liberty, equality and dignity of the individuals and nothing else.33

It may be noted here that, Protection of Human Rights Act deals with violation of human rights by a public servant and not others. This was clearly mentioned in the verdict of Madras High Court in Criminal Revision Petition No.610 of 2005 also.

Distinctions between Human Rights Commission and Human Rights Court

Here it would be worthwhile to make a distinction between Human Rights Commission and Human Rights Court in order to further understand the scope of HRC.

1. Human Rights Courts are functioning as a part ofindependent judiciary. National Human Rights Commission and State Human Rights Commissions are quasi-judicial institutions.
2. HRCs are headed by the sitting judges of Court of Sessions. NHRC and SHRCs are headed by retired judges and non-judicial members.
3. HRCs are having powers to punish the offenders. NHRC and SHRC's findings are recommendations only.
4. HRCs are having all the powers of a criminal court trying a case under Criminal Procedure Code, 1973. NHRC and SHRC are having all the powers of a civil court trying a suit under Code of Civil Procedure, 1908.
5. HRCs are not having its own regulations, which are useful for practice. NHRC and SHRCs are having its own regulations.

VICTIMS OF HUMAN RIGHTS VIOLATIONS

In 1985 the United Nations passed unanimously the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power.

This was enacted after long deliberations by the seventh United Nations Congress on Prevention of Crime and the treatment of offenders held in Milan. This declaration was unanimously adopted by the General Assembly of the United Nations on November 29 that year.34

U.N. Declaration: U.N. Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power recognized four types of rights and entitlements of victims of crime. They are:

(a) Access to justice and fair treatment – which includes prompt redress, right to be informed of benefits and entitlements under law, right to necessary support services through the proceedings and right to protection of privacy and safety.

(b) Right restitution – return of property lost or payment for any harm or loss suffered as a result of the crime.

(c) Compensation – when compensation is not fully available from the offender or other sources, the State should provide it at least in violent crimes that result in serious bodily injury, for which a national fund should be established.

(d) Personal assistance and support services – includes material, medical, psychological and social assistance throughout governmental, voluntary and community-based mechanisms.35

Types of Victim Services: Victim need assistance in overcoming the various harms they have experienced, and victim services have been made available by government and through different organizations in many, but not all communities. The services vary in their main focus and resources available but all have the same goal of assisting victims. Existing victim services can be broken down into four general categories.

i) **Police based services**: These programs being to assist victims when they first come into contact with the criminal justice process, such as police being called to the crime scene, death notification or the arrest of an accused. They are usually located within or in conjunction with local police departments. These types of services include: death notification, providing information about the criminal justice system and investigations, assisting with victim impact statements and compensation applications.

ii) **Court based services**: These are usually associated with the Courts where the services are intended to prepare victims for court and for being witnesses within the trial process. These types of services include: information and orientation about the court process, emotional support throughout the court process if needed, witness services and meetings.

iii) **Community based services**: These programs are unique as they are not necessarily government operated, but may receive some government funding.

These victim services tend to specialize in various areas of victimization such as: sexual assault centers, domestic violence assistance, and crisis centers. It is very common that these organizations were created by victims of crime, or employ victims of crime to help others.

iv) **System based services**: This type of services is meant as an 'all-in-one' centre where services and information about the criminal justice system, including access to both police and Crown victim services, are available. These services are important as it means victims only have to go to one place and all types of victims can be assisted.

Problems being faced by the people, who have filed cases in Human Rights Courts, during the trial and post-trial period, are elaborately analyzed in the next chapter.

The legal provisions relating to the Human Rights Courts should be amended as per the recommendation of various reports for the better human rights justice. The administrative and working system of HRCs should be simplified. Human rights awareness should be strengthened in the society. Victims' problems should be addressed by the concern authorities of the Government.

In this chapter an attempt has been made to describe the structure of HRC, Legislations pertaining to HRC, procedures to be followed to file complaint, trial and appeal before HRC and Recommendations of the NHRC and Constitutional Review Committee for Amendments to the PHR Act, 1993 are explained comprehensively.

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LIMITATION OF HUMAN RIGHTS COURTS

Human rights violations: still no effective remedy[1]

The Constitution of India recognizes human rights in the form of fundamental, non-derogable rights in Part III. However, the lack of efficient remedies and proper fora has ensured that these rights remain illusory. The Protection of Human Rights Act, 1993 had the avowed object of establishing Human Rights Courts at the district level, apart from establishing Human Rights Commissions at the national and state level. But fourteen years later, not a single case has been reported as having come up before any of these Human Rights Courts.

The thinking behind Human Rights Courts:

One of the objects of the Protection of Human Rights Act, 1993 (hereinafter, the Act) as stated in the preamble, is the establishment of special courts at the district level to protect and realise human rights at the grassroots. These courts would provide for the speedy trial of offences arising out of violations of human rights. It provides that the state government may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Sessions to be a Human Rights Court to try, and speedily dispose of, the offences mentioned in the Act.

Lack of definition of offences:

The Act suffers from certain defects which are at least partly responsible for the Human Rights Courts having not taken of. Crucial among these, is that the offences for which these courts have been established lack any sort of definition. There is mere reference to offences arising out of violations of human rights without any effort to define or explain the meaning of that phrase. The proposed human rights machinery is thus a victim of vague drafting, and no efforts were made by the Central Government to correct this situation. According to Section 2(1)(d) human rights refers to 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. A violation of human rights refers to the offences arising out of a violation of the rights relating to life, liberty, equality and dignity

[1] Available at: www.indlaw.com/ActionAid/?Guid=F5280CDD-72E5-4FF9-BBEB-E9DB00D9AB01 – Westlaw India, Retrieved on 20/02/2016

of the individual guaranteed by the Constitution or embodied in the international covenants and enforceable by courts in India. "International covenants" refers to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966 [Section 2(1)(f)]. The rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the international covenants, is too general a phrase to have any enforcement value in criminal courts.[1]Furthermore, maximum punishments have not been specified for these offences.[2]

The Special Courts established under Section 30 of the Protection of Human Rights Act, 1993 are Criminal Courts because and not District Court. Unless the offences are not defined and punishments for different offences triable by the Special Courts are not prescribed, the courts will find it extremely difficult to take cognizance of the offences and try them. Till then, the machinery to redress human rights grievances will remain on paper only.

Lack of provision for taking cognizance:

Even if offences arising out of violations of human rights are defined and clarified, the problems of taking cognizance of the offences will remain. The Act mandates the appointment of one Sessions Court in each district to try these offences. It is silent about taking of cognizance of the offence. The Prevention of Corruption Act, 1988 on the other hand, while providing for the appointment of a Sessions Judge in each district as a Special Judge to try corruption offences under it, also makes provision in s. 5, empowering the Special Judge to take cognizance of these offences.

Under s. 193 of the Criminal Procedure Code, a Sessions Judge cannot take cognizance of offences. He can only try the cases committed to him by the magistrate. A similar problem had arisen with the working of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The Special Judges used to take cognizance of the offences. In Potluri Purna Chandra Prabhakara Rao v. State of A.P., [2002(1) Criminal Court Cases 150], Ujjagar singh & others v. State of Haryana & another, [2003(1) Criminal Court Cases 406] and some other cases it was held that the Special Court without committal by the Magistrate. The Supreme Court also held same view in Moly & another v. State of Kerala, [2004(2) Criminal

Court Cases 514]. Subsequently, all trials under the Prevention of Atrocities Act were stopped and all the cases were sent to the courts of jurisdictional Magistrates. Thereafter the respective Magistrates took cognizance of the cases and then committed them to the Special Courts. The Special Courts started trying the cases after they were committed to them. The Act was later amended giving the Special Courts the power to take cognizance of the offences under Act.

The situation in respect of the Human Rights Courts under the Protection of Human Rights Act, 1993 is not different.

Problem of sanction:

Apart from the above, the Special Courts will face yet another question from the provisions of s. 197 of Cr.P.C which provides for the special procedure for the prosecution of public servants for offences committed in the course of their duty. In most of the cases of violation of human rights, it is the police and other public officers who will be accused. The offence will necessarily relate to the acts or omissions of public servants in discharge of their duties. Even though there are a plethora of precedents in favour of dispensing with the applicability of Section 197 of Cr.P.C. on the ground that certain acts (like the ones which result in a violation of human rights) do not come within the purview of the duties of public servants. However, there is still scope for speculation as long as there is no specific provision in the Act dispensing with the applicability of Section 197 of Cr.P.C.

Unless the lawmakers take note of the above anomalies and remove them through proper amendments, India will remain without effective remedies against human rights violations.

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1. As mentioned earlier, s. 30 of the Act refers to Court of Sessions.
2. In the case of Maganbhai v. Union of India [AIR 1969 SC 792], Hidayatullah J observed that if there is any deficiency in the constitutional system it has to be removed and the state

must equip itself with necessary power (to give effect to treaty) obligation.

HUMAN RIGHTS IN CONFLICT WITH OTHER RIGHTS

HUMAN RIGHTS IN CONFLICT WITH OTHER RIGHTS

The right to life and liberty enjoys the status of 'supreme right' in international law. It has been accorded highest protection as a 'peremptory/imperative norm' from which no derogation is permissible, even in time of war or other public emergency. Affording such protection to the right to life and liberty signifies that utmost importance has been attached to it in various articles of international instruments. So, for example, Article 6 of the International Covenant on Civil and Political Rights (ICCPR) 1966 provides:

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

In international human right law, the right to life is perceived as a 'right not to be killed', affording protection to human life against arbitrary and intentional deprivation/ killing and imposing a correlative obligation on others to forbear or refrain from interfering with the life of the right-bearer. This right establishes an obligation on the State to afford protection to the life of the individuals against unlawful, unwarranted and arbitrary killing. The State is therefore under two countervailing obligations as follows:

1. To forbear or refrain from arbitrarily depriving or taking the life of an individual, and

2. To take reasonable steps and adopt appropriate measures to prevent the taking of life by police and security forces.

The State is further required to provide in its law for ensuring protection of human life. Thus the taking of life in the circumstances described above must generally be illegal under law.

However the basic Human Rights are often in conflict with the state rights or the competing Rights. Right to liberty can nowhere be absolute. In the U. S. A., the executive may impinge upon individual liberty if it acts in accordance with "*due process of law*." In the U. S. A. the Supreme Court examines the constitutional validity of the law under which executive actions are taken. Executive actions are valid only if the law is constitutional. Thus the "due process" restrains both the executive and the legislature. But in India executive actions in encroaching upon an individual's liberty is to be confined only within the "procedure established by law."

The Indian Courts do not exercise the right of judicial review over criminal laws. That was the view taken by the Indian Supreme Court in the famous case of *A. K. Gopalan vs. the State of Madras*[1]. Under this view Indian Courts could restrain only arbitrary executive action but not arbitrary legislation.

This view prevailed till 1978 when in the case of *Maneka vs. Union of India*[2]; the Supreme Court held that procedure for depriving individual liberty in a law must not be "arbitrary, unfair or unreasonable." The position today is, the courts not only restrain arbitrary action of the executive, they also examine whether the laws providing for curtailment of liberty are "arbitrary, unfair or unreasonable."

Art. 22 provides safeguards against arbitrary arrest or detention. The safeguards are three:

1. Even arrested person must he informed of the grounds for his arrest,
2. he must be given the opportunity to consult lawyers of his choice and,
3. he must be produced before the nearest magistrate within 24 hours and his period of detention cannot be extended without magisterial order. Such safeguards however are not available to (1) an enemy alien and (2) persons detained under preventive detention.

The most contentious part of Art 22 is the provision for preventive detention. The constitution empowers the state to resort to preventive detention, i.e. to detain persons without trial and to deny their rights under Art.19, on four grounds. These are

- security of a state,
- maintenance of public order,
- maintenance of essential services and defense,
- Foreign affairs and security of India.

Any person arrested under preventive detention on any of the above grounds, can have no right to liberty visualized under Art 19 or 21.

However to prevent reckless use of 'preventive detention, the constitution prescribes some safeguards.

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[1] 1950 AIR 27
[2] 1978 AIR 597

Firstly, a person may be taken into preventive custody only for a period of 3 months. Extension of the period of arrest beyond 3 months must be referred to an advisory board consisting of persons qualified to be appointed as judges of High Courts.

Secondly, the persons detained must be given the grounds of their arrest. The state however may refuse to disclose the entire grounds in the public interest.

Thirdly, the detainees must be given the earliest opportunity to make representation against detention.

Preventive detention, beyond any doubt makes serious encroachment on individual liberty. At the same time, in unstable societies, preventive detention may be unavoidable.

Apart from the human right to life, there are other rights which are in conflict with the Human Rights like right to development and livelihood which conflicts with the right to clean environment. Then right to privacy, public health, security conflicts with the human right to freedom of association and free speech.

CONFLICT AMONG RIGHTS[1]

The expanded assertion and recognition of rights, and the dimensions to rights that are emerging, have given rise to situations of conflicts **among** rights, and consequently, among rights activists. Choices are being made, and a prioritisation of rights occurring in a range of areas.

The neglect of women's rights in the human rights arena for decades after the Universal Declaration on Human Rights (UDHR), and the Constitution of India, has had the women's movement demanding, and acquiring even if partially, recognition of women's rights as human rights. There were some among our respondents who held that human rights are those which are asserted against state action and inaction. A human rights lawyer, on the other hand, saw human rights as a strategy which ought not to be confined within an inflexible definition. For people in the women's movement, however, human rights are about patriarchy and systemic oppression and violence; domestic violence and death in the matrimonial home could not, clearly, be excluded from the universe of human rights issues. As a civil liberties' activist told us, in a pamphlet they prepared in 1990 (when the debate about whether violence and death in the home should be on their agenda), she compared statistics in dowry deaths with encounter killings: it was 2000:300. Though it stoked a lot of controversy, the women members of the organisation were very happy that the issue had been raised, she said.

The emergence of women's rights in the human rights universe has also brought with it some contradictions which demand to be addressed.

A. A more just deal for women and fair trial standards

In cases of violence against women: registering a case; getting effective investigation underway; the ordeal of trial for the victim, particularly in situations of rape; the difficulty in obtaining evidence in offences within the home, as also in cases of rape; and the low rate of convictions had women's groups, and on occasion, the National Commission for Women, demanding changes in the law to deal with these issues.

Over the years the demand has been for -

- the recognition of certain actions/practices as actionable offences - domestic violence, cruelty in the matrimonial home and 'dowry death'. While the first is under consideration of Parliament, the latter two now find a place in the law. S. 498-A IPC, which makes punishable a 'husband or relative of husband of a woman subjecting her to cruelty' has become contentious. On the one hand the extent of violence in the matrimonial home is undeniable, and restraining the perpetrators and protecting the victim-woman is imperative. On the other hand, the experience of abuses of this provision which defines an offence that is cognisable[2] and nonbailable, which may land families in prison pending bail, is said to have caused resentment against, and distrust of, this provision. Those who would not drop the provision because of the occasional misuse, point out that there are hardly any other protective measures to help a woman battered in her marital home, nor any other deterrent provision to add caution to offending members of the matrimonial family.

- enhanced punishment for certain offences against women. The introduction into the law of 'minimum sentences',[3] and higher sentences has also happened. Implicit in the demand for prescription of higher penalties is the need to secure deterrence - if the low rate of conviction takes away the possibility of deterrence, it is sought to be reintroduced through a higher penalty where conviction does result. It has also been a measure of the state's, and popular, perception of the seriousness of the offence. The conflict lies in this, that it comes at a time when the virtues of imprisonment are in serious question. It is not evident that the conditions in prisons, and the violations of the rights of prisoners which is now common knowledge, has been reckoned with while

[1] Part IV of **HUMAN RIGHTS IN INDIA**: **A MAPPING**, by Usha Ramanathan

[2] 'if information relating to the commission of the offence is given to an officer in charge of a police station by the person aggrieved by the offence or by any person related to her by blood, marriage or adoption or if there is no such relation, by any public servant belonging to such class or category as may be notified by the state government in the behalf ' - First Schedule to the Cr.P.C 1973.

[3] For instance, since 1983, a minimum sentence of seven years is prescribed for the offence of rape under s. 376 (1), which may be reduced 'for adequate and special reasons to be mentioned in the judgment'.

asking for enhanced sentences. But the conflict became most apparent when death penalty for the offence of rape was mooted. When it was first suggested in the mid-1990s, there was very little by way of audible objections from women's groups; some women's groups extended it support. It was when the issue was raised again in 1998, that there was an avalanche of protest from women's groups. The NCW too released a report of a study it had done which showed that most of their respondents opposed the prescription of death penalty for rape. For some in the women's movement, the opposition to death penalty for rape appears to have been a pragmatic position - since it would only make the women more vulnerable if the penalty were so severe. For others, the pragmatic argument was a means of opposing the spread of death penalty into areas where it is not, already. What is disturbing is the persistence of the Home Minister in holding out the death penalty as a promise to women, as a statement of seriousness about the problem.

In this context the failure to challenge the prescription of the death penalty for offences in the Commission of Sati (Prevention) Act 1987 also becomes an area that needs to be re-visited.

- Shifting the onus of proof. This has already been introduced into the Evidence Act 1872 in 1983 and 1986. S. 113 A raises a presumption as to abetment of suicide by a married woman where she commits suicide within seven years of her marriage, and it is shown that her husband or in-laws or a relative of her husband had subjected her to cruelty. S.113 B raises a presumption of dowry death where it is shown that soon before her death she had been subjected to cruelty or harassment by the accused for, or in connection with, any demand for dowry. S.114 A presumes absence of consent in certain prosecutions for rape. A respondent reasoned that she had opposed this shifting of onus of proof because it would open the gates for the state to extend the shifting of onus to other areas; see what has happened in TADA and such laws, she said. Also, while the violations are certainly heinous, the criminal justice system is structured to require the prosecution to prove guilt; it is often not possible for an accused to rebut an accusation, she said, even where the accused may be innocent. Further it is a dilution of fair trial standards. The contrary position is that there are offences where such a presumption is not necessary if justice is to be done to the woman.

- a separate criminal code for women. This was a proposal that emanated from the NCW and was widely discussed in 1995-96. This was intended to make the trial less traumatic for women, speed up the criminal judicial process, and it was expected to raise the conviction rate. There were discussions of making some inroads into the rights given to an accused under the law. This proposal, however, appears to have been shelved.

It was suggested to us that child sexual abuse being of an extraordinary nature, there should be a relaxation of fair trial standards in dealing with it.

B. HIV, AIDS and Disclosure

The two conflicting positions on disclosure by a hospital/doctor about the HIV+ status of a person has been set out *supra* while mapping human rights issues. To that discussion of the issue may be added that the view on disclosure seems to have been influenced by the context of the proposed marriage of the petitioner in that case. It may be appropriate to consider the reach of the principle of disclosure while weighing the rights content of the court's decision.

C. AIDS and High Risk Groups

The AIDS campaign has given visibility to women in prostitution who had so far been unable to requisition public spaces. There are few who deny that women in prostitution need to be empowered to prevent their becoming ready victims of HIV transmission, as also of passing the virus on. However, the programme of intervention to protect from AIDS has re-introduced the idea of high risk groups, and women in prostitution as constituting such a group - a notion that was contested in the 1980s as discriminatory, and with the potential of leading to victimisation of targetted groups.

D. Abortion in the context of Women's Health and Sex Selective Abortion

When Parliament passed the 1971 law legalising abortion under certain conditions, the statement of objects and reasons listed three reasons for passing the law:

- as a health measure - when there is danger to the life or risk to the physical or mental health of the woman;
- on humanitarian grounds - such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc.; and
- eugenic grounds - where there is substantial risk that the child, if born, would suffer from deformities and diseases.'

By 1995, when the Maternity Benefit Act 1961 was amended, the insertion of population control provisions into the law was being acknowledged, and resisted. The 1995 amendment, however, did give a renewed emphasis to placing the onus for family size on the woman when it incorporated 'leave with wages for tubectomy operation' as a 'maternity benefit', even as it gave medical termination of pregnancy the same position in law as miscarriage. This is a statement of the adoption of abortion as state supported policy.

The question of abortion as a right, and abortion as a population control measure may need to be re-visited.

There was also a proposal to limit the provision of maternity benefit under the Act to women workers up to the second child; this however seems to have been dropped, perhaps because of the protest that met the proposal at almost every turn.

The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994, which was modelled on an earlier Maharashtra law, was enacted expressly 'to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. Such abuse of techniques is discriminatory against the female sex and affects the dignity and status of women.'[4] The punishment for transgressing the prohibition of the law is intended to be deterrent. Yet, in the seven years since the law was enacted, there have been no prosecutions of which any of our respondents made mention.

The conflict inherent in asking for abortion as a matter of right, and believing that sex selective abortion needs to be curbed requires to be squarely addressed.

E. Sexual harassment in the workplace

After the Supreme Court's *Vishaka* guidelines, demands for translating them into policy and practice are being made. The allegations of sexual harassment by persons in positions of leadership within the human rights community, and the lack of procedures prescribed in *Vishaka* even within the human rights community, has been raised as an area of conflict in the context of human rights.

F.Freedom of Expression, Privacy and Censorship

The depiction of women, as also of violence against women, has raised difficult questions of censorship and of free speech and expression. The control that capital has over the media has been recognised, and it is not the free speech rights of corporations that is in issue here. Feminists worry that the power to determine what is 'obscene' or 'indecent' could curtail the use of media to interrogate, for instance, rape: for the depiction of rape could be viewed as 'obscene' and explicitly addressing the issue proscribed. Even as feminists, and women, find public spaces for their speech and expression, the space could get restricted and reconstructed by censorship.

The Miss World contest organised in Bangalore in 1996 gave rise to similar, uneasily quietened questions.

[4] Statement of Objects and Reasons of the Act.

The responsibility of the researcher, and the impact of publishing research findings, has been in issue in the Almora case, where research published in September 1999 became a subject of singular controversy in April 2000. The research, on AIDS and the local community, used the responses from a sample of respondents who spoke about the sexual practices in the area, from where male migration for work is very high. Promiscuity and adultery were spoken of. The protesters were angry at the depiction of the community in the report. That the research was funded by a foreign donor agency added a dimension to the protest. The NGO later apologised, and withdrew the report. By then, three activists had spent 45 days in jail.

In the meantime the state had moved in to impose the NSA on them. This last deed was roundly condemned, and much of the human rights community spoke as one to attack the state action.

The questions raised by the research and the report, however, continue to hang in the air.

G. Prostitution

There has been considerable movement in public perception. Most significant though has been the openness with which the practice, proliferation and problems of prostitution are now discussed. Inevitably, perhaps, there have been conflicts that have surfaced in this area of women's rights.

On the one hand is the demand that sex work be recognised as real work. In the mid-'90s this was articulated as sex work being seen as labour. There was also a demand that labour laws be applied to sex work. That appears to have been gradually amended to the demand that sex work be accepted as labour in terms of the dignity that labour commands. A collective of women in prostitution identified three R's - Respect, Recognition and Reliance. The women in the collective also spoke about the right to say 'No' in the course practice of their profession, and said they had to be given the right of 'self-determination'.

While there was no demurring about the need to protect women from exploitation - from the police, the pimp, the madam and the client - there were dissenting voices on recognising prostitution as sexual labour. As one respondent said it: 'Feminists are being included in a much larger agenda. They are giving patriarchy and sexual exploitation a sugar coating by calling it work. Earlier patriarchy oppressed women by calling them 'mother goddess' and curbing her freedom. Today patriarchy oppresses her by calling her the 'bread winner'. She continued: 'I accept that today the state is doing little to stop trafficking. But the day sex work is seen as work under law, that will be the end of all efforts to stop trafficking.'

A woman from the collective, however, said: 'Trafficking can only be stopped by us. Only we know what is happening in our areas. We are telling the government they should give us the right to act.' She however conceded that not all areas where prostitution is practised and trafficking occurs were yet capable of being so monitored. We see ourselves as workers, she said, and we want a union that will give us a base.

A 'mela' which was organised by the collective in Calcutta in March 2001 reportedly met with stiff resistance from some women activists, while others stood up for the rights of the women to organise themselves.

It is sometimes depicted as an issue of 'agency' of the woman as against those who see women in prostitution as victims, and subjects of exploitation.

Six aspects which a woman in the collective adverted to if they were to be considered to be 'labour', and their association recognised, were:

- Police raids would not happen.
- Mental torture in the rescue homes would cease. Also, when the girls are released by pimps, they say they have paid huge amounts when they actually pay far less in bond. Bonded labour is therefore rampant in the present dispensation, she said.
- A self-regulatory examination board, with a multi-sectoral member composition would be able to prevent the entry of minors into prostitution. The two criteria of age and willingness would be applied by them. Now, we don't have even the right to stay where we are, she said.
- The right to say 'No' would get established.

- Teasing to demean women in prostitution would reduce.
- When they retire, they are not even able to go back home; once they are declared to be labour, that will change. That would be real rehabilitation, she said.

There was some conceptual confusion about 'decriminalising' and 'legalising' prostitution. While most of our respondents saw a need to decriminalise to prevent them from being a vulnerable group, the mix up with legalising prostitution - which many among our respondents were unable to accept - dogged our discussion.

A proposal that the travel of single women across political borders be controlled, which was under discussion with the NCW, was dismissed by some respondents as being a prescription for obstructing freedom of movement of women and as likely to serve no other end.

The children of women in prostitution are seen by the law as being potentially in 'moral danger'. The Juvenile Justice Act 1986 and its successor legislation - the Children in Need of Care and Protection Act 2000 - allow for their children to be taken over by the state. A judge of the Supreme Court had even said that the women should be 'coaxed, cajoled or coerced' to give up their children.[5] This clash of a complex of rights and of perceptions needs to be more fully understood.

H. Environment

In the past fifteen years, environmental concerns have acquired a dominance which, it seems, have re-prioritised, and sometimes dislodged, rights.

Reduced pollution and hazards v. Workers' livelihood

The issue was most starkly represented in the Delhi Relocation case. When 168 industries in the first instance, and thereafter all 'hazardous' industry in Delhi, were ordered to be closed or relocated, the conflict between the right to reduced pollution and hazards, and workers' jobs exploded into prominence. The matter arose out of a PIL filed by an environmental lawyer. The condition in which such an order would leave the workers - whether the industries closed down or relocated - was not considered till after the decision was made. The order, coming from the Supreme Court, has had an effect of finality and narrow negotiability which has pushed workers' rights very low in the hierarchy of rights into a residuary position.

In Kerala, the Grasim industries pollution case has engaged the environmentalists since the 1970s, and the workers from even earlier. Between 1985 and 1988, the industry closed down for reasons unconnected with the pollution. Environmentalists and workers then fought on the same side to have the industry re-started; the loss of jobs was then the primary concern. Since it re-started in 1988, the environmentalists have been gradually moving away from an appreciation of labour's concerns, since they do not see that environmental concerns and workers' jobs can be accommodated in a single solution. The environmentalists have voted for battling the pollution at all costs, even as they are chagrined at having to leave labour out of the reckoning.

In Trivandrum, we heard of people whose livelihoods had been dislocated by the pollution of the coastal waters demanding that either the industry close down, or they be absorbed into the industry in replacement of livelihood lost due to the pollution.

In Tuticorin in Tamil Nadu, among the salt pans is located a chemical industry. A drying pond stands mute testimony to the potent pollution being caused by the industry. The salt workers' cooperative is maintaining a stoical silence about the pollution, since any protest from them may result in loss of jobs for about 1800 workers employed in the industry.

In Vellore in Tamil Nadu, when the Supreme Court ordered that tanneries be closed, around 8000 workers were reportedly laid off.

On the one hand, a labour activist said that it is time that workers developed a position which takes public health, pollution and environmental issues into account. On the other, the practice of using the court system, in PIL, to

[5] *Gaurav Jain* v. *Union of India* (1997) 8 SCC 114.

project a uni-dimensional view of the issue by environmentalists was attacked. The present priority accorded to environmental issues was seen as allowing the environmentalists to get away without having to reconcile conflicting concerns.

Shelter v. Conservation

The displacement, by court order, of residents of slums bordering, and encroaching in some measure, into the Borivili National Park in Mumbai has raised similar concerns. The clash between environmentalists and those espousing the cause of the slum dwellers has been violent, and the positions apparently irreconcilable.

Shelter v. Beautification

A petition asking for garbage disposal in Delhi has allowed the Supreme Court to order demolition of slum dwellings. While doing so, the court has likened giving land for rehabilitation to 'an encroacher' to 'rewarding a pickpocket'. In this vein, there has been a mass-scale illegalising of structures which house the poor. In the same order, the court has directed that garbage disposal being a public purpose, land should be released to the municipal corporation, free of cost.

The court has been re-working priorities, and groups approaching the court increasingly recognise that environment, as expansively defined, is likely to take precedence over other rights such as shelter and workers' livelihood. There has been greater scope for negotiation, however, when the survival of an industry is concerned - clean-up technology (particularly ETPs and CETPs) which, at best, is recognised to be a partial answer, have been accepted as an answer to the charge of pollution.

Tribals v. Forests

The presenting of the conflict in these terms, i.e., tribals vs. forests, has tended to marginalise the tribal communities. There has been denudation of the rights of tribals who habitually reside in forests and live off forest produce. The creation of national parks and sanctuaries has led to installing the concept in law of exclusion of the tribal from the forest. Where they are being allowed access, their rights are severely circumscribed - by identity cards, timings, numerous checkpoints and a very limited range of permitted activity - leaving them often at the mercy of the forest officer. A distinct school of thought has emerged which advocates against the exclusion of tribals, and which sees a role for tribal and forest dependent communities in the conservation of forests. The reconstructing of the rights of tribal communities is, largely, except for the rare exception, being done without the participation of the affected communities.

Anti-smoking law v. Workers

The workers in the tobacco industry have found their jobs threatened by the anti-smoking legislation that has been introduced in some states. Trade unions find themselves impelled to oppose the ban because it will cause reduced sale of beedis and, consequently, reduced employment. They also argued that it was a ploy by large tobacco companies to snuff out the beedi industry since it is the class which smokes beedis which will have difficulty in finding spaces which are not public and where they may smoke legally. Yet, this would present workers as selfcentred and anti-health. The conflict defies easy solution.

I. Tribal Land Alienation

The law, generally prohibits the transfer of land from a tribal to a non-tribal in agency areas, or scheduled areas, except for reasons recognised by law, and by procedure prescribed therein. While this is usually respected as fair and legitimate protection extended to scheduled tribes, and to prevent exploitation of the tribal by the non-tribal, the situation in Kerala has been somewhat complicated. In 1975, the state legislature enacted the Kerala Scheduled Tribes (Restriction on Transfer of Lands and Restoration of Alienated Lands) Act 1975. The law has had a chequered career, with the government attempting to dilute the effect of the law, by amendment, and the courts demanding its implementation in its 1975 guise. The question of alternative land rather than restoration has also been mooted - but it is not clear that such alternative land exists. While tribal activists have been campaigning for enforcing the 1975 law, others have been muted in their reactions. The reason, our respondents say, is because the land appears to have been transferred for a price to settlers who are themselves only marginalised populations. It would be unjust and iniquitous to dislodge them from lands for which they have paid as much as they can afford, it

was said. This was represented as a case of conflicting interests, but of two equally, if differently, affected communities. Rehabilitation of the already displaced adivasi community appears to be one way of resolving the issue - a view with which tribal activists do not concur, considering it as an erosion, even a denial of the right against alienation of land.

J. Dalit movement and the Caste as Race representation

The effort by NGOs to get caste on the race agenda at the Conference for the Elimination of Racial Discrimination has been an attempt to internationalise the issue of caste. Some activists and leaders in the dalit movement have also been involved. While some of them have got on board as in Gujarat, the dalit activists/leaders in Andhra Pradesh and Tamil Nadu have been consulted but have chosen not to enter the arena themselves. This is how a dalit activist leader explained it: 'We need international pressure. So far we have treated it as an internal matter. This will help the issue get focus…. This has been raised by NGOs, not by the movement. I don't know about donor politics. We only tried to get some control by putting some of our academicians in it. But we are not sure what it means.'

A Dalit leader who had not heard of this move objected to the caste-as- race representation. Race is not our politics, he said. Our fight is against brahmanism and casteism, he said.

Even if it were to be considered that NGOs may not be able to consult with *all* affected or concerned persons, groups, organizations or movements before espousing causes, the conflict that could exist where the NGO position and that of movement politics do not converge has to be addressed.

K. Speedy Disposal of Cases v. Open Criminal Justice Process

Overcrowding in prisons has been partly attributed to the problem of transporting undertrials to the courts, and of finding police escort to perform this task. In response there is an emerging practice of magistrates holding court within prison premises. This reportedly happens in Delhi and in Bangalore, for instance. The prison is patently a closed premise, as also beyond the beat of the persons who make the judicial process an open system, including lawyers, reporters and observers.

In a different context, the virtues of in camera trials in cases of rape to protect the interests of the victim of rape has also been debated, inconclusively.

L. Human Rights Lawyering

In approaching the court, or when an activist is drawn into the judicial process, a question of representation of a political or an ideological position often rises. Illustratively, a feminist litigating for getting custody of her child may be faced with two choices: either to assert the stereotype - the mother as the primary carer of the child, and the child needing the care and attention that only the mother can give - and increase the probability of getting custody, or staying within the politics of feminism and reject such stereotyping which, in turn, may drastically reduce the chances of getting a favourable order from the court. An instance, again, is in matters of contempt of court, where activists may be advised to tone down their honest opposition to a court order which is patently unjust, even unconstitutional, or perhaps to tender an apology which would serve the requirement of the court, but which may compromise the politics of the contemnor. Difficulties abound where activists are picked up by the police, and there are apprehensions that they may be subjected to torture, or even be killed in a fake encounter - does politics stop at the doorstep of the courtroom? Is it necessary to get the consent of the activist before taking a position in court, in a habeas corpus petition, for instance? And what is to be done where the activist is unreachable?

POVERTY AS AN IMPEDIMENT IN REALISATION OF HUMAN RIGHTS

POVERTY AS AN IMPEDIMENT IN REALISATION OF HUMAN RIGHTS

Extreme poverty is a denial of all human rights. Within the framework of the United Nations Decade for the Eradication of Poverty (1997-2006) the General Assembly has set itself two distinct goals : to eradicate absolute poverty and to reduce substantially overall poverty in the world (Resolution 53/198). An individual in a situation of poverty still has a possibility of exercising certain rights, whereas extreme poverty implies a total lack of resources and means of social integration (see report of A..M.Lizin, Independent Expert E/CN.4/2000/52, 25 February 2000 para 12). The extremely poor cannot express themselves or play any role in the communities in which they live. They lack resources for livelihood and have no means to approach or even reach the Court. Having no means to bear any expense for transport such person will be forced to walk to reach the Court if summoned. The first priority would therefore be to combat extreme poverty that is the biggest obstacle to justice. The violent clashes in the Communities, armed conflicts and natural disasters have devastating effects that may generate extreme poverty. Extreme poverty continues to spread in all countries of the world. The gulf between the rich and those living in dire poverty is widening. The rich may adopt a "fortress mentality" to defend their prosperity against perceived external threats and exploit migrants and displaced persons who provide cheap labour. The simmering discontentment can explode into a riotous situation. The fortress mentality is assuming global dimensions and the international community faces a fundamental choice "either we envisage a world of two vastly different parts, one with ever increasing wealth and technological sophistication, the other a place where people live in abject poverty; or we embrace the idea that we are all in this together as member s of one human family, with entitlements to economic, social and cultural rights which need to be progressively implemented. This embracing option regards diversity as strength, not weakness, and recognizes the great social, cultural, and yes, economic benefits of a multicultural society. It is a vision of a world where people of all colours, creeds and standing live together in harmony and peace" (Address by Mary Robinson, United Nations High Commissioner for Human Rights and Secretary General of the World Conference against Racism - on 1st May 2000.)

The poor lack the information about the programs of ameliorating their plight. Every law enacted, particularly welfare legislation for the benefit of the poor must be implemented in the proper spirit for achieving the noble object for which such law is made. It becomes the duty of the Court to ensure that rehabilitation measures contained in the legislative provisions are properly implemented. The fundamental rights to life and against exploitation cast a duty on the Government to suitably rehabilitate bonded labourers freed but living in a State of abject poverty (see *Neeraja Chaudhary V. State of MP* (1984) 3 SCC 243) . Social backwardness is, on ultimate analysis, the result of poverty to a very large extent. Poverty demands affirmative action and its eradication is a Constitutional mandate. The Supreme Court of India has observed that in final analysis, poverty which is the ultimate result of inequities and which is the immediate cause and effect of backwardness has to be eradicated not merely by reservation policy, but by free medical aid, free elementary education, scholarships for higher education and other financial support, free housing, self-employment and settlement schemes, effective implementation of land reforms, strict and impartial operation of law-enforcing machinery … free water supply.. and other ameliorative measures particularly in the areas densely populated by backward classes of Citizens. (see *Indra Sawhney V. Union of India* 1992 supp (3) SCC 217). Free legal assistance at State cost is considered to be a fundamental right of a person accused of an offence which may jeopardize his life or personal liberty and this fundamental right is held to be implicit in the requirement of reasonable, fair and just procedure. The exercise of this fundamental right does not depend upon the accused applying for legal aid and even if the accused failed to apply he is entitled to legal aid. The Supreme Court of India has held that it woul d be the mockery of the legal aid programme if it were to be left to the poor, ignorant and illiterate accused to ask for free legal services (see *Suk Das V. Union Territory of Arunachal Pradesh*, (1986) 2 SCC 401) . Article 39A of the Constitution of India provides that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that the opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The Parliament has framed Legal Services Authorities Act, 1987 to, inter alia, constitute legal services authorities to provide free and competent legal services to the weaker sectors of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The

elaborate provisions of the Act have been operating successfully to obviate obstacles in the way of the poor by providing them free and competent access to justice.

POVERTY - THE MOTHER OF ALL HUMAN RIGHTS VIOLATION[1]

-- By Rajindar Sachar

Of the many violations of human rights that can be listed, none is worse (but less spoken of in fashionable seminaries on human rights) than poverty -the mother of all human rights violations.

No doubts human rights violations manifest themselves in various forms - brutality of police, or gender injustice, pollution and environmental degradation, social ostracism of the dalits - but ultimately the answer to all these must be found in our commitment to the elimination of poverty.

The horror of poverty was highlighted in a message given on October 17, in observance of the International Day of the Eradication of Poverty, by the United Nations Secretary General, Mr. Kofi Annam : "How many times have we said that it (poverty)was incompatible with human dignity."

"But billions of people are still trying to survive on less than Rs. 130 a day, with no drinking water, health care, or access to education, still denied the jobs that would help them escape their impoverished state, and thus, still deprived of some of their most basic rights.

During the Cold War human rights were said to be restricted to what we call the political right of freedom of speech. Association and economic rights were said to be something necessary, but not a part of human rights. This is a myth.

Fortunately, this myth of conflict between political or economic rights or artificial prioritization of such rights in developed or developing countries was exploded when the Vienna Declaration and Programme of Action at the World Conference on Human Rights (1993) affirmed that human rights were the birth right of all human beings and their protection and promotion were the first responsibility of the Government and that all the human rights were universal, indivisible and interrelated.

Bread and liberty are two sides of the same coin, and deprivation of either must inevitably damage the fabric of the other. The freedom to agitate for bread, and sustenance to fight for one's liberties are concomitant.

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[1] Retrieved from: http://www.pucl.org/reports/National/poverty.htm, on 19/02/2016

Freedom of an individual, which is the postulate of human rights, obviously can have no meaning so long as the poor in the country do not have their economic conditions improved and the discrimination based on privilege do not become mere memories instead of becoming more and more aggressive as time passes on. The present situation must cause concern to all human right activists.

The richest fifth have an income 74 times that of the poorest fifth.

One percent of the wealth of the 20 richest people, or $ 8 billion, could provide universal access to primary education for a year but no political party is seeking to correct this balance the result is a denial of the human right to universal education.

The assets of the three of the richest people are more than the combined GNP of the 48 least developed countries.

In Delhi, nearly one third of the total population lived in Juhggi Jhompri bustees. There is a shortage of 40 million houses. Those preferring artificial sympathy to the homeless express helplessness because of the huge outlay of Rs 123,000 crores required for this purpose. But curiously these very worthies maintain a deafening silence about Rs. 55,000 crores in bad debts (euphemistically called non-performing assets) owed by big business to banks and which if realized could considerably help the homeless meet their needs.

Many a time one feels distressed by some human rights organization getting preoccupied with human rights problems which are more relevant in the European and America context the rights of homosexuals , the rights of unmarried mothers, the right to abortion or the status of surrogate mothers - no doubt important aspects of human rights dimension in their social set up. But I do feel that the protagonists of human rights in developing countries should concern themselves on a priority basis with the actual realities of oppression of the weak and of discrimination in the social set up.

The blessing of the government would degenerate in to tyranny unless it is accompanied by a recognition that there are certain basic rights which are possessed by all the citizens. Though belivers in human rights must be ever vigilant to resist any onslaught on the civil and political liberties of the individual, and there can be no compromise on their essentiality, it is necessary that these rights, so far as developing countries are concerned, must correlate with the

equally important major issue which is also an aspect of human rights, namely, the development of the economy and the responsibility of the society to feed, clothe, house, keep its people free from starvation, and to be able to be bring up one's children and oneself in a decent, healthy environment.

The former South African President, Mr. Nelson Mandela, speaking at the Heads of the Non - Aligned Nations Conference held on 2.9.1998 in Durban highlighted the immediate need to fight poverty when he said: "We have to remark to our common world anew. The violence we see all around us, against people who are as human as we are, who sit in privileged positions, must surely be addressed in a decisive and sustained manner. I speak here of the violence of hunger which kills, of the violence of homelessness which kills, of the violence of the joblessness which kills, of the violence of the Malaria and HIV/AIDS which kill of the trade in narcotics which kills."

Unfortunately the solutions being suggested are all an illusion. Thus the much touted claim by the propagandists of globalization that it will accelerate progress in developing countries is belied by the UNDP's Tenth Human Development Report of 1999, which says that "market dominated globalization has led to growing marginalization of poor nations and people, growing insecurity and growing inequality with benefits acquiring almost solely to the richest people and countries". HDR 1999 has commented tersely that "the benefits of globalization in the past decade have been so unevenly shared that the very word had come to acquire in certain quarters a pejorative tinge".

Similarly, the World Development Report for 1999- 2000 says that at the start of the new millennium an estimat3ed 1.5 billion people will subsist on the equivalent of a dollar a day.

About 220 million urban dwellers (13 percent of the developing World's urban population) lack access to safe drinking water and about twice that number lack access to even the simplest of the latrines.

In most countries women have neither the right to the home which they were born nor to the home they live in after marriage. This essential homelessness of women is a major factor in limiting the valuable contribution women can make towards gaining and retaining a home

and, in turn, in building a society. This critical fact has the effect of perpetuation of gender inequality and poverty.

A century ago Swami Vivekananda warned the Indian elite that unless they carried the masses with them in all efforts at national regeneration, no great progress could be made. The neglect of the masses ..... chronic poverty under which they were held down have been the main cause of India's degradation. "I call him a traitor who having been educated, nursed in luxury by the hearts blood of the down trodden millions? A few thousands graduates do not make a nation, a few rich men do not make a nation".

How sad that even after a century that reproach by the saintly soul should continue to shame us.

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Human Rights and Extreme Poverty
Author(s): ARJUN SENGUPTA
Source: *Economic and Political Weekly*, Vol. 45, No. 17 (APRIL 24-30, 2010), pp. 85-93
Published by: Economic and Political Weekly
Stable URL: http://www.jstor.org/stable/25664389
Accessed: 19-02-2016 07:10 UTC

Human Rights and Extreme Poverty

ARJUN SENGUPTA

This paper provides a rationale for defining extreme poverty as a combination of income poverty, human development poverty and social exclusion. It briefly discusses the implication of treating this combination as union or intersection of the three sets of people, suffering from these three types of poverty. It also brings out the significance of looking at extreme poverty in a human rights perspective, and what is its value addition to programmes of poverty eradication in different countries. Besides, it elaborates on the formulation of such programmes, in terms of human rights obligation through national actions, extending them to programmes of international actions. By spelling out the characteristics of these actions that make them conform to a human rights approach, it discusses some of the anti-poverty programmes that have been used in different countries like the United States, European Union, Africa and Asia and how they differ from a rights-based approach that has been developed in this paper.

The author is grateful for the research support provided by Rita Nangia of the Asian Development Bank and Namrata Pathak, and Menka Chandiramani of the Centre for Development and Human Rights, New Delhi.

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Since 1989, the United Nations Commission on Human Rights has been discussing extreme poverty as a major source of deprivation, affecting all human rights, which constitute a violation of human dignity and has therefore called for urgent national and international action to eliminate them. In 1998, the commission decided to establish the mandate of the independent expert on the question of human rights and extreme poverty. A M Lizin served as the independent expert from 1998 to 2004, and I succeeded her in 2004. In its resolutions 1998/25, 2004/23 and 2005/16, the commission invited the independent expert to focus on the relationship between the enjoyment of human rights and extreme poverty; the obstacles encountered and progress made by women living in extreme poverty; and the impact of discrimination on extreme poverty.

This paper builds upon the four reports on the subject submitted to the Human Rights Commission in 2005, 2006, 2007 and 2008 as well as on my mission report on extreme poverty conditions in the United States (US), considered by the commission in 2006. Besides, findings from my experiences in some of the African, Asian and European Union (EU) countries reflect how looking at extreme poverty from the perspective of human rights makes a distinct value addition to the discourse on poverty and its eradication.

The Definition of Extreme Poverty

Extreme poverty is a combination of income poverty, human development poverty and social exclusion which highlights the extreme vulnerability of a section of the poor, so that the society could be expected to accept the responsibility of mitigating at least that poverty.[1] It is an extreme form of deprivation, in terms of some consensual definition of severity of deprivation, especially when all these elements of deprivation coexist.

The first dimension of poverty, of course, is income poverty. Conventionally, poverty has been viewed as the lack of income or purchasing power to secure basic needs. This income poverty can be considered in absolute or relative terms, depending upon the understanding of the notion of basic needs. A simple absolutist interpretation would be to fix a minimum daily amount of calorie intake from food necessary for survival in a reasonably healthy condition, supplemented by some minimum amount of non-food items regarded as essential for a decent social existence. An alternative form of this absolutist interpretation of income poverty would be to agree, by consensus, to a per capita level of expenditure as a poverty line, such as $1 a day or $2 a day, in terms of a comparable level of purchasing power. This approach would avoid the difficult exercise of determining the minimum calorie requirement of

food and the essential nature of the minimum amount of non-food item consumption.

Income poverty can also be seen in a relativist way. Basic needs may be made dependent upon the sociocultural norms of a country so that even while a person's income covers the requirements of subsistence and essential consumption, she may be regarded as poor if her income does not allow access to goods and services required to satisfy sociocultural norms. Alternatively, relative poverty can be looked at in terms of income distribution. For example, people belonging to the lowest 10% in the scale of income distribution can be regarded, by a social consensus, as relatively poor.

The distinction between poverty and extreme poverty in this framework of income poverty would essentially be a question of degree or extent of the phenomenon. Since poverty is defined in terms of access to and availability of goods and services, extreme poverty would mean the command over a much smaller basket of goods and services and/or the prevalence of a longer duration of poverty. Or, if a group of people remains poor for generations, they can be described as suffering from chronic poverty and can be considered as extremely poor. In a relativist framework, people affected by chronic poverty over generations may suffer from a rigidity of social standing because they are expected by society to behave in a particular manner or play a particular role, from which it is difficult for them to deviate – and which is different from the behaviour or roles of people with higher income who constitute the social mainstream. People affected with chronic poverty would thus tend to become socially excluded.

The second dimension of poverty is human development poverty, where extreme poverty may be regarded as extreme or severe deprivation of human development. The international community has affirmed, in virtually all international forums, that poverty is not only confined to economic deprivation, but extended to social, cultural and political deprivation as well. Growth in gross national product (GNP) was the goal of development in the 1950s and 1960s. However, in the last two decades, the poverty discourse has moved much beyond just the income criterion. A policy of maximising income growth alone will not be the policy to maximise the well-being of the people.

For several years, especially in the 1960s and 1970s, this concern with elements of well-being, which could not be secured only by increased GDP growth, was accommodated by targeted expenditure of resources and provision of goods and services in an attempt to adjust the structure of economic activities of aggregate demand and supply to supplement the policy for maximising economic growth. It was only with the emergence of the human development literature that income growth was displaced from its role as an objective characterising development and was relegated to its role as an instrument of promoting development. This also highlights and emphasises the role of economic policies and the concomitant role of policymaking institutions, such as the State and other corporate and non-corporate authorities.

To operationalise this notion, the UNDP report introduced a Human Development Index (HDI), based on the availability of data in different countries, which captured three essential components of human well-being, namely, longevity, knowledge and basic income for a decent living standard. Poverty could then be regarded as deprivation and extreme poverty as severe deprivation of human development.

Amartya Sen has provided the rationale for considering human development indicators as components of well-being by giving a multidimensional definition of poverty as capability deprivation, where capability is defined as the freedom or ability to lead a life of value in terms of what a person chooses to be or to do. Accordingly, extreme poverty can be reckoned as extreme deprivation of such capability. The role of such freedom is both constitutive and instrumental. For instance, the freedom to lead a healthy life is a constitutive element of a person's well-being, but it is also instrumental in allowing the person to enjoy other freedoms, including freedom of work or freedom of movement. Capability poverty then means deprivation of basic capabilities and is a composite of income poverty and human development poverty in both their constitutive and instrumental sense. The level of indicators to be identified with poverty and extreme poverty has to be decided by some form of consensus about what is meant by "basic", which would differ across countries.

The third dimension of poverty is social exclusion, which can be seen both in its constitutive role with intrinsic value and in its instrumental role. Social exclusion is an extension of the relativist concept of income poverty, except that it goes beyond the simple purchasing power for goods and services to cover other elements that are not captured by the concept of income. Social exclusion affects the level of different human development indicators and often the level of income itself, just as income and human development would influence social exclusion. It is this relational aspect of social exclusion that adds a distinct value in identifying problems associated with poverty.

In his report, Joseph Wresinski observed that

> the poor are pushed into areas where others rarely penetrate: inner city slums, the outskirts of towns and isolated rural dwellings. When they appear in the public eye, it is often because they have been made homeless in their own neighbourhoods. Geographically segregated and socially isolated, they are cut off from the cultural, political and civic life of the country.

Wresinski (1987) suggested that it is this exclusion that traps poor families and that any effort to reduce poverty cannot be successful unless it addresses the effects of exclusion.

Social inclusion is seen as a key characteristic in many approaches to eradicating poverty adopted in the EU. These programmes include: eradicating child poverty by breaking the vicious circle of intergenerational inheritance, making labour markets more inclusive,[2] ensuring decent housing for everyone that promotes social inclusion related to homelessness,[3] tackling financial exclusion, overcoming discrimination and increasing the integration of people with disabilities, ethnic minorities and immigrants by adopting a three-pronged approach: increasing inclusion of vulnerable and marginalised groups; increasing access to mainstream services and opportunities; and enforcing legislation to overcome discrimination and developing targeted approaches to respond to the specific needs of each group, particularly immigrants and ethnic minorities. The Open Method of Coordination (OMC) was also established at the Lisbon

European Council in March 2000 as a framework of political coordination without legal constraints between member-states for the identification and promotion of policies with regard to social protection and social inclusion.[4]

Clearly, incorporating the notion of social exclusion in the definition of extreme poverty introduces a distinct value addition to the problem because deprivation resulting from social exclusion may be quite different from deprivation of income and of human development. Measuring social exclusion may be difficult because it will have to focus on specific failures and social relations, which may be both context-specific and inter-temporal in nature. However, the difficulties in measuring social exclusion should not lead to its omission from the notion of poverty. Several attempts have been made in different countries of the EU, notably Belgium and the United Kingdom, to estimate social exclusion, and to establish a relationship between social exclusion and other aspects of poverty which lead to the denial of basic freedoms or of security of different people. In many developing countries, statistics do exist on the number of people who are socially marginalised, excluded or ostracised as well as of their living conditions. In India, a substantial debate is taking place on the living conditions of people belonging to the lower castes and tribes who are socially excluded, and whether affirmative action by the government should be extended to all such people or be confined only to those who are also income poor. In that sense, accepting the view that people who are socially excluded are suffering from extreme poverty would add substantial value to the discourse in both developed and developing countries.

Thus, poverty has been viewed as a composite of income poverty (i e, income below a minimum level barely sufficient to meet the basic needs), human development poverty (i e, deprivation of food, health, education, housing and social security needed for any human development), and social exclusion (i e, being marginalised, discriminated and left out in social relations). Extreme poverty would be regarded as an extreme deprivation and chronic poverty applied to people suffering from income poverty and human development poverty as well as social exclusion for such a long time that it ossifies social relationships as the affected group is expected by others to remain deprived and socially excluded forever.

The total universe of the poor in a country should then be regarded as the aggregate or union of all three groups, i e, those who are income poor, deprived of human development and socially excluded. Extreme poverty in such a case would be a portion of each of these categories selected in terms of the severity of the conditions of deprivation.

Since this number can be very large in many developing countries, a society may choose a set of criteria limiting the number of people suffering from extreme poverty to a smaller subset, i e, an overlap or inter-section of the three sets of people who are income poor, human-development poor and socially excluded, or those suffering from all three categories of poverty, giving a smaller number of people than implied in the union approach.

The advantage of this approach, concentrating on the overlap, is that the severity of the conditions of poverty would be apparent to every member of society. Following the Rawlsian principle of justice, which emphasises the need to concentrate on the most vulnerable sections of society, it should therefore be possible to appeal to people's sense of justice and persuade them to accept the obligations associated with the elimination of extreme poverty, which makes a small section of the population extremely vulnerable, suffering from the loss of all liberties or freedom of action. If extreme poverty is to be regarded as denial of human rights, the obligations for removing extreme poverty must be recognised and accepted by society, and the "overlap" definition increases the chance of that acceptance. Also, because of a smaller set of people involved, it becomes possible to develop indicators for these forms of poverty from the existing data, which not only captures the outcomes but also the process aspects of activities, and not only the availability of goods and services but also the access to them. The eradication of poverty becomes more manageable, with limited sacrifice of resources and privileges of other sections of the people, which any redistributive policy needed for this purpose would entail.

Poverty from a Human Rights Perspective

The significance of recognising a desirable objective as a human right is essentially the corresponding enforcement of obligations. Human rights are recognised as highly valuable objectives that all individuals in a society are inherently entitled to as human beings. Agents of society – individuals, institutions, corporations and governments – representing the State have obligations to enable individuals to enjoy their rights. The State is regarded as the primary duty bearer and is obliged to frame laws and mechanisms to influence the behaviour of other agents, with the obligation to protect, respect and promote and fulfil human rights.

When an objective of social arrangement is accepted as a human right, it implies that all agents of society would regard the fulfilment of that objective as a "binding" obligation, which supersedes all other policy objectives. All social objectives cannot be regarded as human rights and for that, we must apply what may be described as Amartya Sen's "legitimacy" and "coherence" tests (Sen 2000). The social objective must be of sufficient importance to form the constitutional norms of a society as standards of achievement, the realisation of which would provide legitimacy to the behaviour of all agents and authorities, especially the State. The objective should also be "coherent" so that the obligations or duties that have to be carried out, and the agents who have to do so, can both be specified.

There may be several different social objectives, but the obligation to realise human rights "trumps" all others. Obligations would be binding on the agents in the sense that if an agent does not carry out the specified obligations, there would be a mechanism of reprimand and sanctions, inducing appropriate corrective or compensatory actions. If the obligations are incorporated into the domestic legal system, this mechanism would be "legal", settled in the courts of law. If the rights are recognised in international human rights law, then states parties to international human rights treaties would be bound by this obligation.

The state authorities would be the primary duty bearers. It would be up to the state authorities to take appropriate steps for implementing the rights through direct action, or through

implementing rules and procedures and adopting specific laws to induce other agents to adopt appropriate action. In addition to state authorities, all other states and members of the international community which recognise human rights would have the obligation to cooperate among themselves and take whatever action is necessary to realise the rights in all countries belonging to that community. Normally, other states and international institutions would provide assistance and take complementary action to help the national state authorities to realise the rights of their citizens. In certain situations, and by following appropriate procedures, other state members of the international community can supersede the national state authority and directly help citizens realise their rights when these national states fail to fulfil their obligations or act against their citizens. States also would be subject to monitoring and continuous review by civil society and human rights institutions.

The human rights language is obviously appealing, for if poverty is considered as a violation of human rights, it could mobilise public action which itself may contribute significantly to the adoption of appropriate policies, especially by governments in democratic countries. Also, the international community, donor-states, international institutions, multilateral institutions and multinational corporations would have to cooperate to enable nation states to implement anti-poverty programmes. The poverty reduction programme would then not be a matter of charity, but of duty, including the possibility to claim rights through the legal system and courts. It would make a government's intervention "justiciable", in that "violation" of this right would have a potential cost for the government, as cases could be taken to courts.

Another value addition of the human rights approach, is that when the interventions involved in the application of instruments to reduce poverty are opposed by the rich, the adoption of extreme poverty as a denial or violation of human rights would help to overcome their resistance (a) by increasing the cost to the rich of opposing those interventions, thereby implying a change in their opportunity sets; (b) by convincing the rich of the desirability of reduction in the incidence of poverty, implying a change in the preference of the rich; and (c) by limiting the sacrifices of wealth and privileges to a small set of people without very much affecting the position of others. Countries may adopt policies to resolve internal conflicts and to reduce extreme poverty, as would be required by an international convention, even without becoming parties to it. However, the peer group effect may be a very relevant consideration for many countries joining the convention, as they would not wish to be isolated as the only country not following the obligations after having ratified to such a convention. In fact, the value added to poverty reduction of an international convention increases as a function of the importance of peer group pressures, and of the strength of its monitoring and "naming and shaming" provisions upon parties.

There is considerable debate as to whether extreme poverty can be described as a violation of human rights, or whether it is a condition that is caused by human rights violations. If extreme poverty can be identified in itself as a violation of human rights, it becomes an obligation for both the concerned states and the international community to make the best efforts directly to remove it. The discussion would then effectively centre around what policies could have the maximum impact for poverty eradication and, if such policies are not adopted, which agencies are responsible and accountable, and what steps can be taken to compensate for less than "best efforts" made by the respective duty bearers. If, however, extreme poverty was associated with conditions created by the non-fulfilment of the various human rights, the obligations would turn on the realisation of those rights. That may or may not be sufficient to eradicate extreme poverty. In the latter proposition, human rights are taken in their instrumental role in creating a condition of well-being for the right holder, leading to the eradication of extreme poverty. In the former proposition, human rights are constituent elements of well-being, identified with the eradication of extreme poverty.

It can be demonstrated, both empirically and logically, that a denial of some human rights would cause and be instrumental to creating a state of extreme poverty. It also should be possible to demonstrate that the fulfilment of all human rights would facilitate the removal of basic insecurity, i e, Wresinski's concept of poverty and thereby the eradication of extreme poverty. However, it is plausible that people can enjoy basic security without enjoying all human rights, so the lack of basic security need not be equivalent to lack or denial of human rights as such.

The case is similar with respect to capability deprivation. Unless the freedom that is lacking when there is a deprivation of capabilities which are identified with and claimed as human rights, equivalence between capability deprivation and human rights deprivation cannot be established. The international human rights law currently recognises only a limited number of such freedoms as human rights, such as civil, political, economic, social and cultural rights. The space of capability is much broader, consisting of all kinds of freedoms that are necessary to let an individual lead a life of value. There are a number of steps before all such "freedoms" can be elevated to "rights". As Sen puts it, "rights involve claims (specifically claims on others who are in a position to make a difference)" and "freedoms are primarily descriptive characteristics of conditions of persons". Society has to recognise certain freedoms to be enjoyed by its members as a fundamental value or norm, binding them in the society and claimed by them as "rights". These freedoms have to be universal, enjoyed by all equally and without discrimination. They must fulfil the criteria of "legitimacy" and "coherence", and they must be claimed following "due" procedures, through an accepted "norm-creating" process. Basic capabilities that correspond to the notion of extreme poverty would cover only a subset of the total space of capabilities. If that subset is taken as consisting of freedoms currently recognised as rights, extreme poverty, or basic capability deprivation, can be identified with the lack of human rights (Sen 2004).

Incidentally, the condition of extreme poverty can be considered as the violation of the right to development (adopted through the Declaration of the Right to Development of 1986 and reiterated by international consensus in the Vienna Declaration and Programme of Action of 1993) for a group of people identified as poor by society. But still there is no consensus about the

content of this right and the nature of corresponding obligation, so we have not pursued the approach of equating extreme poverty with the denial of human rights to development (Sengupta 2002).

Thus, it may not always be possible to go beyond the instrumental role of human rights to asserting that poverty is equivalent to a violation of human rights. The absence of those rights may be the result of existing social arrangements for which no individual party can be blamed or held accountable. It depends upon the state parties accepting their obligations as legally and morally binding. Several states have not yet fully ratified the international human rights conventions, and even those which have ratified have failed to incorporate them into the domestic legal system or submitted themselves to respond to international criticisms. Such states do not really deny the importance of human rights, or the value of these norms, but object to accepting the legality of these rights. In that case, claiming poverty as violation of human rights will make little contribution to the actual alleviation of poverty.

It so happens that the fulfilment of most of the human rights that have been recognised in international human rights laws through the covenants on economic, social and cultural rights and on civil and political rights can be described as the basis of conditions of life without poverty. If these rights, such as the right to food, health, education and an adequate standard of living are fulfilled, it is difficult to imagine that society will still have conditions of poverty. This does not mean that poverty is to be defined as the violation of human rights, as these two concepts are not equivalent. If rights are realised, there may not be any poverty, but even if there is no poverty in a society there could be violation or denial of some human rights.

In spite of being signatory to the international covenants, countries have shown no political will to adopt poverty reduction programmes or have not accepted their "obligations" that would follow from their legal recognition of the relevant human rights. And hence, in view of this, the notion of extreme poverty, as has been defined, is best proposed as a concept that would appeal to the international community of States for accepting the obligations which can effectively remove those conditions creating extreme poverty and which are regarded as consistent with human rights norms.

The idea is to identify a group as extremely poor whose number is limited so that society does not find it unmanageable to deal with their problems. Once such a group is identified, the removal of their conditions of extreme poverty must be taken as an obligation corresponding to the fulfilment of human rights norms. Even if the countries concerned may not be able to ensure the realisation of all human rights, those rights, the denial of which have directly caused extreme poverty, should be subject to immediate fulfilment. The international community and all member states should voluntarily take up the obligations for removing extreme poverty as a core element of their human rights obligations.

The following sections discuss the national and international actions that would be required to implement poverty eradication programmes in a human rights perspective.

National Actions

Besides aiming directly at fulfilling civil, political, economic, social and cultural rights to remove income and human development poverty as well as social exclusion, an important requirement to conduct human rights policy is for all states that have ratified international human rights treaties to incorporate them in their domestic legal system and establish their own national human rights commission that can adjudicate, review and recommend appropriate remedial actions when human rights are denied, for individuals and groups who seek such actions. There should be a universal campaign to set up such institutions all over the world, as well as a universal campaign to spread human rights education.

Measures have to be taken in a planned and coordinated manner to promote a development programme that facilitates the realisation of human rights. Human rights are supposed to be progressively realised; some more immediately than others, and the speed of progression would depend upon the flexibility of social, legal and economic institutions, and the availability of resources. For the removal of extreme poverty, such programmes must be targeted at the most vulnerable, those lacking essentially in income and human development. Dependence on the markets alone can seldom achieve these specific targets and may often accentuate the deprivation of vulnerable groups even further. This highlights the importance of reforms in the system of governance for implementing any effective programme for rights-based development.

Generation of sustainable employment opportunities, especially for the poorer sections residing in both rural and urban areas and mostly in the unorganised sectors, can have a substantial impact on eradicating extreme poverty. Such a programme should rely on establishing connectivity with markets, skills and finance. To make the programme sustainable, it should be allowed to expand to include eventually the unemployed labour force of the country as a whole. Employment provides income and allows access to all human development facilities, which, in turn, increases labour productivity, contributing to employment sustainability.

Employment generation programmes in the informal sector have to be based on three essential measures. First, the targeted people must have access to training, which means that facilities have to be set up throughout the country to meet the requirements of specific, but low-grade and simple skills. The programme must be driven by market demand for skills, with public support to increase supply by training and vocational education. Second, the products of these semi- and low-skilled workers must have access to markets. Connectivity with markets depends on information, transport facilities and telecommunications. Connectivity with product markets has to be supplemented by access to input markets and essential services for engaging in production, such as access to power, water, shelter and sanitation, and then to finance. Expanding microfinance facilities, as have been instituted in many developing countries, together with reorienting the existing financial intermediary institutions of a country with adequate refinancing and appropriate risk-sharing, must be taken up in these countries supported by central banks and often by national and international financing institutions.

A plan for employment generation consistent with human rights standards, respecting international labour rights and removing the constraints induced by income poverty, human development poverty and social exclusion, will be universally relevant both in developed and developing countries.

International Actions

International obligations for the realisation of human rights take the form of international cooperation to which all states of the world pledged themselves under Articles 55 and 56 of the Charter of the United Nations and of obligations specified in various international conventions.

Agencies of the international community may be galvanised to adopt policies specifically aimed at removing income and human development poverty as well as social exclusion by following policies based on human rights standards of participation, accountability, transparency, equity and non-discrimination. The reorientation of their methods of operation is an imperative for all agencies, such as the UNDP, the World Trade Organisation (WTO), the World Health Organisation (WHO), the Food and Agriculture Organisation of the United Nations (FAO), the United Nations Children's Fund (UNICEF) and the United Nations Industrial Development Organisation (UNIDO). But most important would be the role of the World Bank and the International Monetary Fund (IMF). There is a need to coordinate official development assistance (ODA) with policies of international cooperation, besides the need to increase it.

Within the existing mechanisms, it would be useful to concentrate on the operations of the World Bank and the IMF and their implementation of poverty reduction strategies explicitly in the form of human rights fulfilment. To this end, a first requirement may be the amendment of the Articles of Agreement of the World Bank and the IMF.

It may be necessary to make the funding of poverty reduction strategies open-ended, by allowing the international financial institutions to recommend the effective expansion of cooperation in the fields of trade, debt and technology transfer, and additional funding, when countries successfully conduct their strategies in a rights-based manner. In addition, it may be useful to set up a financing facility of callable funds created on the basis of commitments by all countries to contribute 0.7% of their GDP. The funds would only be available once the World Bank and the IMF had determined that the poverty reduction strategy had been implemented in accordance with human rights standards.

In addition, for each implementing country, an independent body could be set up, consisting of independent experts, to monitor the programmes and to adjudicate on appeals by all the concerned parties, focusing on the responsibilities and recommending remedial actions. Even if those recommendations are not binding, the exercise would facilitate the implementation of the programme.

Finally, a special window could be created within the Bank and the Fund for financing plans by developing countries to expand employment opportunities for the poor, the marginal and vulnerable in the unorganised sector. This would be the international counterpart of the national action described above.

International Obligation for Cooperation

Though most experts argue that there is no legally binding international obligation on the part of developed countries to provide international aid and development assistance to developing countries, the existing international legal framework on international cooperation makes a strong case for rich developed countries to assume a moral and political obligation to reach out to developing countries in the spirit of international cooperation.

For that purpose, the eradication of extreme poverty may be regarded as the primary objective of development policies, and can only be ensured by a rights-based approach to development. Those policies must internalise the basic principles of international human rights norms: equity, non-discrimination, participation, accountability and transparency as proposed in the Development Compacts Model of international cooperation.[5] For implementing a rights-based poverty reduction programme, the issue of donor conditionalities requires to be resolved in a manner whereby developing countries, while receiving international aid and assistance to fulfil their development objectives, do not have to sacrifice ownership in the design and implementation of their policies and programmes. This approach calls for developing countries to accept obligations to fulfil and protect human rights. The international community, including donor countries and international agencies, must ensure that developing countries carrying out their obligations must have free access to trade and finance. It must be ensured that the conditions or obligations undertaken by the developing countries are in their best interest and closely monitored by themselves in a manner consistent with the rights-based approach.

As such, a framework of international cooperation to achieve poverty reduction targets has been adopted by the international community, under the aegis of developed donor countries and international financial institutions such as the World Bank and the IMF. The poverty reduction strategy papers, initiated by IMF and the World Bank in 1999, are prepared by low-income countries, detailing their strategies for poverty reduction, linking national action, donor support and development outcomes, involving domestic stakeholders and development partners, including IMF and the World Bank. While most countries have recognised the primacy of poverty reduction in their policy framework and their broad objectives are in conformity with international human rights standards and international cooperation principles, it would be important to review the implementation of the papers from the perspective of a rights-based approach to poverty reduction, i e, equity, non-discrimination, participation, accountability and transparency.

Equity and Non-Discrimination

Equity is to be construed as equity with respect to growth, structure and distribution of resources in the economy, as well as equitable distribution of income and benefits accruing from the exercise of rights. Non-discrimination entails abstention from discriminating on the grounds of sex, race, language, political affiliation or socio-economic status in the design and implementation of policies and practices and in the practice of democracy and the

rule of law, while particular attention is paid to the well-being of vulnerable groups.

Social safety nets, including cash transfers, food and price subsidies, public works and so on are targeted at the poor or those at risk of poverty to protect them against the insecurity of unequal distribution of income and to help them overcome vulnerability to shocks and adversities that can drive them to complete destitution. However, in most developing countries, especially in Africa, the right to social security has not been achieved as the fruits of economic growth have failed to trickle down to the poorest and most vulnerable. Gender inequality is also a major obstacle to rights-based economic growth.

Participation

All members of a community that adopts a rights-based approach to development should be able to participate, either individually or collectively in (a) decision-making about policy priorities; (b) formulation of programmes to implement policies; (c) monitoring the process of implementation; and (d) evaluating the outcomes, and then taking corrective actions.

The interim poverty reduction strategy papers, which were the basic documents for framing the final papers, were usually prepared by technocrats in collaboration with officials of IMF and the World Bank, without any participatory process. That needs to be changed to make such strategy papers integral to the rights-based programme of poverty reduction.

Accountability and Transparency

Accountability focuses on how to transform right-holders from passive recipients of aid into empowered claimants. Since duty-bearers are accountable for the failure in the fulfilment of their duties, there should be appropriate legal procedures to cover the process of implementation, indicators to assess the process, reforms of the judiciary and other institutions that can provide evaluation and assistance in overcoming corruption, as well as effective governance.

States and the international community at large have the responsibility of realising universal human rights. Thus, monitoring and accountability procedures should not only involve States but also extend to global actors such as the donor community, intergovernmental organisations, international non-governmental organisations (NGOs) and transnational corporations, whose actions have a bearing on the enjoyment of human rights.

Due to the grossly inadequate national monitoring and evaluation system, the approach of poverty reduction strategy paper faces a serious challenge in ensuring transparency and accountability. The monitoring and evaluation system should examine the input, process and outcome of the poverty reduction strategy papers, and should also be participatory in nature, including the voices of civil society, academia, the private sector, the media and other stakeholders.

Programmes for Eradicating Extreme Poverty

The following sections present the findings of the studies conducted on policy experiences of some of the African, Asian and EU to identify the implementation of poverty reduction policies in a human rights framework in a context specific environment. While in economically advanced regions of EU where social protection systems are well developed, poverty reduction programmes have been devised to focus on those "at risk of poverty", in developing and underdeveloped regions of Africa and Asia, poverty reduction programmes are also a reflection of their socio-political and economic development. Hence the focus is more on programmes that provide for welfare services and access to basic services in the form of health, education and safe drinking water. In Africa, the added burden is of a lack of participation by democratic institutions in such programmes and even a lack of governance in many countries. In addition I had conducted a fact-finding mission in US in 2005 which revealed that even with its high per capita income, poverty rate remained high compared to other rich nations and there was no evidence that the incidence of poverty, and especially extreme poverty, was on the decrease (Sengupta 2007).

Since then, in terms of poverty reduction strategies, the US has come up with the American Recovery and Reinvestment Act of 2009. Analysis reveals that the Act has succeeded in keeping more than 6 million Americans out of poverty and reducing the severity of poverty for 33 million more. The main provision of the Act includes a new tax credit called the Making Work Pay Tax Credit, an expanded Child Tax Credit for lower-income working families with children; an expanded Earned Income Tax Credit, additional weeks of emergency unemployment benefits (paid after a worker's 26 weeks of regular state unemployment benefits expire); an additional $25 per week for all jobless workers receiving unemployment benefits; a $250 one-time payment to certain retirees and veterans and people with disabilities and lastly, an increase in food stamp benefit levels.[6]

Poverty Reduction in the European Union

Despite the overall image that prosperity and well-being prevail in the EU, nearly 16% of the EU population is living at risk-of-poverty.[7] The "at-risk-of-poverty rate" is defined as the "share of persons with an equivalised disposable income, before social transfers below the risk-of-poverty threshold, which is set at 60% of the national median equivalised disposable income (after social transfers)". Nineteen per cent of children (under 16 years) in the EU are at risk of poverty.[8]

Poverty reduction is one of the top priorities on the EU agenda. The Lisbon Strategy that emerged from the Lisbon Summit in 2000 addressed the key issue of social exclusion, and set the goal for poverty eradication within the region by 2010, to be achieved through the OMC. These objectives, if met, would help achieve the larger EU goal of a "socially cohesive Europe". The objectives were to be fulfilled through the development of appropriate National Action Plans against Poverty and Social Exclusion (NAPS) subject to periodic reporting and monitoring of progress. Further improvements of the indicators for social inclusion were made at the Laeken Economic Council in December 2001.

Social protection systems are fairly well developed in the EU and they attempt to provide adequate coverage to at-risk-of-poverty populations affected by unemployment, old age, ill health, inadequate income and parental responsibility.

The EU has also been actively involved in the modernisation of social protection systems in member countries. The Social Protection Committee established by the European Council after the Lisbon Summit in 2000, is mandated to work on policy challenges related to secure income, safe and sustainable pension systems, social inclusion and high quality healthcare. In 2005, the European Commission adopted the new Social Agenda 2005-10, which focuses on two priority areas of action, employment and equal opportunities for all. PROGRESS, the EU's integrated programme for employment and social solidarity supports, since January 2007 till 2013, further contributes to the EU's wider strategy for jobs and growth. In July 2008, the European Commission proposed to reinforce the OMC in the social field to allow the EU to achieve better results for the 2008-10 period and pave the way for the introduction of a sound framework post-2010. The year 2010 is the final year of the 2008-10 OMC cycle, but also the first year of a new policy strategy for the EU and the European Year for Combating Poverty and Social Exclusion. The European Year 2010 aims to recognise the rights and capacity of excluded people to play an active part in society, promote social cohesion, underline the responsibility of everyone in the society to tackle poverty and to reinforce the commitment of all major political players to take more effective actions.

As of early 2008, 9.2% of the EU-25 (EU of 25 member states) (2004 to 2006) working-age adults were living in jobless households (i e, where no member of the family was working). The existence of working poverty in the EU raises serious questions about the quality of work and the commitment of the EU to poverty reduction.

As with increasing life expectancy, the share of old and very old persons in the population has increased. Ageing also increases the pressures to provide better curative and rehabilitative healthcare, and most of the EU member countries are presently ill-equipped to provide such long-term care. No EU country has a specific legislation on long-term care; France and the Czech Republic are among the only countries to have incorporated long-term care into their social assistance programmes. The EU also recognises the healthcare sector as a potential generator of employment opportunities for skilled workers. With a greater number of older persons in need of care, the demand for healthcare professionals is on the rise, but interestingly, with more professionals reaching the retirement age, the supply in this sector is shrinking. The shrinking supply of healthcare professionals, in turn, raises healthcare expenditure, thereby adversely affecting the financial sustainability of healthcare. This problem can be tackled by devising better human resource strategies.

Poverty Reduction in Africa

In Africa, poverty reduction strategies were based on the recognition that engineering economic growth through structural adjustment programmes may exacerbate inequality and poverty, and in the absence of conscious efforts to mitigate these side effects, social resentment and popular discontent may increase to the extent that it negatively impacts on the growth process. Poverty reduction strategies incorporated in Poverty Reduction Strategy Papers (PRSPs) are meant to counter this tendency. There are usually three main features of all PRSPs, namely, macroeconomic reforms and trade liberalisation in order to stimulate economic growth; the redirection of social policy towards the provision of welfare services to the poor and the vulnerable and the emphasis on ownership and popular participation. In terms of real social welfare impact, country statistics show that PRSPs are making a visible difference. However, apart from a few countries like Uganda and Ghana, civil society organisations, labour and trade unions and professional associations are sidetracked in the consultation process, and democratic institutions such as the Parliament and political parties are also not involved. As a result, PRSPs often undermine the growth of democracy, rather than strengthen it (Adejumobi 2006). Despite these criticisms, it is generally recognised that the PRSPs have brought anti-poverty programmes to the forefront of national development policies and have highlighted the nature of political regimes and governance in Africa.

Poverty Reduction in Asia

Development policy now emphasises the identification of priority areas by national governments themselves to enable them to design their own national poverty reduction strategies within the context of social development. In line with this approach, many Asian countries have adopted PRSPs, with the broad participation of civil society, as the framework for their efforts at poverty reduction and as a basis for accessing loans and grants from international donors.

Most countries in the Asia-Pacific region focus their national poverty reduction strategies and programmes on the majority of the poor population. These programmes aim at reducing poverty, increasing access to basic services like education, health and safe drinking water as well as addressing the issues of equity, non-discrimination and participation through targeted safety net programmes. Although in many of these countries, the actual implementation process is still in its infancy, success in terms of overall poverty reduction is already becoming apparent. In Nepal, for example, the Central Bureau of Statistics (2005) reveals that the national poverty head count rate declined from 41.76% in 1995-96 to 30.85% in 2003-04. Vietnam also has been able to meet significant poverty reduction targets through the implementation of its Comprehensive Poverty Reduction and Growth Strategy (CPRGS) adopted in 2000.[9] The incidence of poverty in Vietnam has declined from 17% in 2000 to 7% in 2005 (ADB 2006).

Most Asian countries also attach considerable importance to providing social safety nets for targeted vulnerable groups in order to fulfil the criteria of equity and non-discrimination. Bangladesh, in particular, has had significant success in its social safety net programmes (SNPS) of which 27 represent 4.4% of public expenditure. With regard to basic education, public schools account for the bulk of primary school enrolment in the region (89%), and their share of overall education expenditure is 79%. In contrast to education, however, the average share of the public sector in overall health expenditure is only about 52% for developing Asian countries, and is particularly low in south Asian countries, reflecting the predominance of private and other forms of healthcare provision in this subregion. The low quality

of many public health systems leads even the poor to opt for private services. This is in particular the case in rural areas where the health systems are often administered by traditional doctors and under-qualified practitioners. In some cases, impact evaluation studies assessing the effectiveness of public health systems and health service delivery by NGOs found that contracting to NGOs can be both effective in terms of attaining higher improvements in health indicators, but also more equitable in terms of reaching the poor.

Experience of participation in PRSPs has shown that there is a need to establish a clear framework for participation that defines guidelines and benchmarks for determining who is involved, at what stage and with what "level of participation", and for the methodology to be used in the process. Most case studies demonstrate a general failure to directly involve poor people, and the absence of a clear and appropriate framework for participation. However, some success has been achieved in fostering community participation. Monitoring and accountability, however, still remain the weakest aspects of the implementation of a rights-based approach to development. The existence, in most countries of the region, of democratic political systems makes possible the setting up of the monitoring and accountability procedures that are an essential ingredient of the rights-based approach to development. However, electoral democracy on its own is seldom enough to guarantee accountability. An extensive institutional framework needs to be in place, including a well functioning Parliament and parliamentary committees, semi-judicial institutions such as a human rights commission and ombudsmen, and an effective system of decentralisation.

Conclusions

This paper attempted to deal with approaches to poverty-reduction comprehensively in a human rights framework. It tried to demonstrate that a rights-based approach adds a distinct value to a poverty-reduction strategy in all countries, developed or developing, which contain a significance portion of the population suffering extreme form of poverty. The debates on all the issues are still not settled and it is hoped that more empirical studies and theoretical investigation would refine and improve the rights-based process of poverty reduction and its eventual eradication.

NOTES

1 See the first and second reports of the independent expert on extreme poverty submitted to the Human Rights Commission, Geneva: First Report Ref No E/CN/.4/2005/49, 11 February 2005, second report Ref No E/CN 4/2006/43, 2 March 2006, Geneva. See also the article by the independent expert Sengupta (2007).

2 Active inclusion at http://ec.europa.eu/employment_social/spsi/active_inclusion_en.htm

3 Decent housing and homelessness at http://ec.europa.eu/employment_social/spsi/homelessness_en.htm

4 See http://ec.europa.eu/employment_social/spsi/the_process_en.htm

5 See the Fifth report of the independent expert on the right to development, submitted to the Commission on Human Rights, Geneva, E/CN.4/2002/WG.18/6 18 September 2002.

6 Centre on Budget and Policy Priorities (http://www.cbpp.org/cms/index.cfm?fa=view&id =3047).

7 At risk of poverty after social transfers in percentage of Eurostat, at http://epp.eurostat.ec.europa.eu/portal/page?_pageid=1996,39140985&_dad=portal&_schema=PORTAL&screen=detailref&language=en&product=sdi_ps&root=sdi_ps/sdi_ps/sdi_ps1000

8 ETF, Eradicating Poverty: The 2010 European Year starts today, Available at http://www.etf.europa.eu/Web.nsf/o/99B8799FF3C99006C12574E500347419?OpenDocument&LAN=EN

9 "Vietnam: Poverty Reduction Strategy Paper", Annual Progress Report, IMF Country Report No 06/340, September 2006, at http://www.imf.org/external/pubs/ft/scr/2006/cro 6340.pdf

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Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies[82]

Foreword

Poverty is the gravest human rights challenge facing the world today. With a staggering 40 per cent of the world's population living with the reality or the threat of extreme poverty, and one in five persons living in a state of poverty so abject that it threatens survival,[83] a world free from want and fear, the vision of the Universal Declaration of Human Rights, is still a distant aspiration.

Poverty on this scale is no accident of fate. As the report of the United Nations Millennium Project argues forcefully, the end of poverty is an achievable goal.[84] Governments around the world have expressed their strong commitment to eradicating poverty. Most recently, at the 2005 World Summit, world leaders reiterated their determination to ensure the timely and full realization of the Millennium Development Goals, including the eradication of poverty and hunger, stressing "the right of people to live in freedom and dignity, free from poverty and despair".[85] The challenge now is to translate these commitments into concrete action.

Poverty is not only a matter of income, but also, more fundamentally, a matter of being able to live a life in dignity and enjoy basic human rights and freedoms. It describes a complex of interrelated and mutually reinforcing deprivations, which impact on people's ability to claim and access their civil, cultural, economic, political and social rights. In a fundamental way, therefore, the denial of human rights forms part of the very definition of what it is to be poor.

A human rights-sensitive understanding of poverty facilitates the development of more effective and equitable responses to the multiple dimensions of poverty. It complements more orthodox approaches to development and poverty reduction, looking not just at resources, but also at the capabilities, choices, security and power needed for the enjoyment of an adequate standard of living and of other fundamental civil, cultural, economic, political and social rights.

This publication, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies,* aims to assist countries, international agencies and development

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[82] *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*. Office of the High Commissioner on Human Rights. HR/PUB/06/12
http://www2.ohchr.org/english/issues/poverty/docs/poverty_strategies.doc

[83] United Nations Development Programme (UNDP), *Human Development Report 2005: International cooperation at a crossroads: Aid, trade and security in an unequal world* (New York, United Nations, 2005), p. 24.

[84] United Nations Millennium Project, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (London and Sterling, VA, Earthscan, 2005).

[85] 2005 World Summit Outcome (A/RES/60/1, para. 143).

practitioners in translating human rights norms, standards and principles into pro-poor policies and strategies.

The work here builds upon several previous publications of the Office of the United Nations High Commissioner for Human Rights, *Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2002) and *Human Rights and Poverty Reduction: A Conceptual Framework* (2004), drafted by Professors Paul Hunt, Manfred Nowak and Siddiq Osmani, and also draws on consultations with various stakeholders (including Member States, intergovernmental and non-governmental organizations).

While by no means a blueprint in such a complex field, I hope that this tool will prove useful at the country level in enhancing the quality, impact and sustainability of national poverty reduction strategies.

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Acknowledgements

The preparation of these *Guidelines* would have not been possible without the support, advice and contributions of a large number of individuals and organizations.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) is particularly grateful for the collaboration of the European Commission, the European Network on Debt and Development, the Food and Agriculture Organization of the United Nations, the Ford Foundation, the International Labour Organization, the International Monetary Fund, the Organisation for Economic Co-operation and Development/Development Assistance Cooperation, the Overseas Development Institute, the United Nations Children's Fund, the United Nations Development Programme, the United Nations Educational, Scientific and Cultural Organization, the World Bank and the World Health Organization.

OHCHR also expresses its gratitude to Professors Paul Hunt, Manfred Nowak and Siddiq Osmani, who authored the draft guidelines upon which the present document is based.

CONTENTS

- Right to adequate food
- Right to adequate housing
- Right to health
- Right to education
- Right to personal security and privacy
- Right of equal access to justice
- Political rights and freedoms

Introduction

1. The promotion of human rights and the fight against poverty lie at the very heart of the United Nations mandate. The two goals are closely connected and mutually reinforcing, as recognized in, among others, the Vienna Declaration and Programme of Action of 1993 and in the Millennium Declaration of 2000. Equally, the 2005 report of the Secretary-General, "In larger freedom: towards development, security and human rights for all", and the 2005 World Summit Outcome reaffirm the importance of human rights to reducing poverty and achieving the development goals set out in the Millennium Declaration.

2. The present publication aims to make a contribution to the United Nations-wide endeavour to integrate human rights into development efforts to combat poverty. It is the outcome of a request made by the Committee on Economic, Social and Cultural Rights to the Office of the United Nations High Commissioner for Human Rights (OHCHR) "to develop substantive guidelines for the integration of human rights in national poverty reduction strategies". Its objective is to provide policymakers and practitioners involved in the design and implementation of poverty reduction strategies (PRSs) with guidelines for the adoption of a human rights approach to poverty reduction.

3. As it is widely accepted that poverty reduction strategies must be "country-owned", and as international human rights law primarily regulates the relationship between States and individuals, the principal focus of these *Guidelines* is on the role of the State. However, it is hoped that they will also be of use to other actors—civil society organizations, national human rights institutions, the agencies of the United Nations system and other international organizations—that are committed to the eradication of poverty.

4. The *Guidelines* are framed at a certain level of generality so as to be of relevance under most conditions and circumstances. They should not be taken as a prescriptive technical manual. Rather, they elaborate and clarify certain principles that should guide the process of formulating, implementing and monitoring a poverty reduction strategy if it is to be consistent with a human rights approach. The expectation is that once the principles are understood, the actors involved in poverty reduction will be able to implement them in practice, keeping in view the specificities of their own contexts and with the assistance of more specific tools as needed.

5. While the principles of a human rights-based approach to poverty reduction are broadly applicable to both rich and poor countries, the primary focus of these *Guidelines* is on poverty in poorer countries. In part, this is in recognition of the obvious fact that poverty is a much more serious problem in these countries. But it is also partly because poverty in rich countries has special features that need to be addressed separately.

6. The *Guidelines* do not address all aspects of human rights with equal emphasis, because they are formulated for the specific context of poverty reduction, which is only a part of the broader human rights agenda. The choice of and relative emphasis placed on different human rights is based on judgements as to which rights and obligations are most relevant to the context of poverty. These judgements are in turn guided by the understanding that human rights can be relevant to poverty in different ways.[86] Of special significance in the context of poverty reduction are rights that have either constitutive or instrumental relevance.

7. From a human rights perspective, poverty can be described as the denial of a person's rights to a range of basic capabilities—such as the capability to be adequately nourished, to live in good health, and to take part in decision-making processes and in the social and cultural life of the community. In the language of rights, one may say that a person living in poverty is one for whom a number of human rights remain unfulfilled—such as the rights to food, health, political participation and so on. Such rights have *constitutive* relevance for poverty if a person's lack of command over economic resources plays a role in causing their non-realization. Some human rights are such that their fulfilment will help realize other human rights that have constitutive relevance for poverty. For example, if the right to work is realized, it will help realize the right to food. Such rights can be said to have *instrumental* relevance for poverty. The same human right may, of course, have both constitutive and instrumental relevance. These *Guidelines* address the rights that are considered to be particularly relevant to poverty—on either constitutive or instrumental grounds or on both. [Link to paras. 30 and 107]

8. The document is divided into three chapters. **Chapter I** outlines the basic principles of and rationale for a human rights approach. **Chapter II** (guidelines 1–7) sets out in more detail how human rights principles should inform the *process* of formulating, implementing and monitoring a poverty reduction strategy. **Chapter III** (guideline 8) deals with the human rights approach to determining the *content* of a poverty reduction strategy, identifying the major elements of a strategy for realizing a number of specific human rights and human rights obligations of particular relevance to poverty reduction.

9. The discussion of each right or set of rights in **chapter III** (guideline 8) is structured around four parts. **Section A** outlines the relevance of particular human rights standards in the context of poverty. **Section B** sketches the scope or content of the rights and obligations as set out in the international human rights instruments. For ease of reference, boxes reproduce some of the most relevant international human rights provisions; they

[86] For a more detailed discussion of the multiple ways in which human rights can be relevant to poverty, see OHCHR, *Human Rights and Poverty Reduction: A Conceptual Framework* (New York and Geneva, United Nations, 2004), Section 1.

also refer to recent world conferences, as well as the most relevant general comments or recommendations adopted by United Nations human rights treaty bodies.[87] **Section C** identifies key targets in relation to specific human rights and human rights obligations and lists. For each target, certain indicators will help assess the extent to which these targets are being achieved over time. **Section D** sets out key features of a strategy for achieving the specified targets. Some brief comments are in order regarding the *targets*, *indicators* and *strategies* identified in these *Guidelines*.

10. The *targets* were derived from the scope of the specific rights and obligations as set out in international human rights law. The choice of targets was guided by the following question: what are the major targets whose fulfilment would ensure the realization of rights and obligations of particular relevance to the poor? Many of the targets draw upon, and are similar to, those set out in the Millennium Development Goals (MDGs) adopted by the General Assembly in September 2000.

11. Several points relating to *indicators* are worth noting. First, the construction of human rights indicators is an ongoing enterprise and this publication does not claim to have entirely resolved the matter.[88] Nonetheless, an attempt has been made to derive from the existing literature, including that on the Millennium Development Goals, a set of indicators that seem most appropriate for the targets in question, keeping in view the context of poverty. Furthermore, the proposed list of indicators is intended for reference only. Each country must decide for itself which indicators are most appropriate for its specific circumstances.

12. Second, the objective of using the indicators is to illustrate the conditions of people living in poverty, and not the average condition of the population as a whole. The indicators will therefore often have to be disaggregated to reflect the condition of people living in poverty and of specially disadvantaged groups among them, e.g., women, minorities, indigenous peoples. Exactly what type of disaggregation is appropriate will depend on the nature of the target in question and the particular circumstances of the country. However, in view of the generally disproportionate impact of poverty on women, indicators should in most instances be disaggregated by sex.

13. Third, most of the indicators proposed in these *Guidelines* are standard indicators of socio-economic progress, although it should be observed that some human rights indicators, especially those relating to civil and political rights, do not usually figure in measures of socio-economic progress. Essentially, what distinguishes a human rights indicator from a standard disaggregated indicator of socio-economic progress is less its

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[87] General comments and recommendations offer guidance to States parties on the meaning and content of particular human rights and the measures that might be taken to better secure their implementation. All general comments and recommendations are available on the OHCHR website, and a compilation is published annually (see HRI/GEN/1/Rev.8 for the 113 general comments and recommendations adopted as of May 2006).

[88] It is worth mentioning that several initiatives are currently under way, including those being proposed by OHCHR (HRI/MC/2006/7) and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (E/CN.4/2006/48), which examine the use of quantitative and qualitative indicators in human rights assessments.

substance than (a) its explicit derivation from a human rights norm and (b) the purpose to which it is put, namely human rights monitoring with a view to holding duty-bearers to account.

14. The *strategies* proposed for a particular right are meant to be suggestive rather than definitive. Some of the recommendations proposed here may be relevant in some cases but not in others, while there may be circumstances that demand actions that have not been addressed here at all. Such details need to be worked out by those actively participating in the preparation of poverty reduction strategies, and these details are bound to vary depending on the context. In addition, the strategy proposed for a particular right or obligation has to be seen as part of a comprehensive approach rather than as being adequate in isolation. Thus, the strategy proposed for implementing the right to food will not succeed for everyone unless progress is made in realizing the right to work, because most people who are not directly involved in food production have to work to purchase food from the market. Furthermore, successful implementation of any right will depend on the institutions for participation, monitoring and accountability.

Chapter I:

THE RATIONALE FOR A HUMAN RIGHTS APPROACH

15. The human rights approach underlines the multidimensional nature of poverty, describing poverty in terms of a range of interrelated and mutually reinforcing deprivations, and drawing attention to the stigma, discrimination, insecurity and social exclusion associated with poverty. The deprivation and indignity of poverty stem from various sources, such as the lack of an adequate standard of living, including food, clothing and housing, and the fact that poor people tend to be marginalized and socially excluded. The commitment to ensure respect for human rights will act as a force against all these forms of deprivation.

16. The essential idea underlying the adoption of a human rights approach to poverty reduction is that policies and institutions for poverty reduction should be based explicitly on the norms and values set out in international human rights law. Whether explicit or implicit, norms and values shape policies and institutions. The human rights approach offers an explicit normative framework—that of international human rights. Underpinned by universally recognized moral values and reinforced by legal obligations, international human rights provide a compelling normative framework for the formulation of national and international policies, including poverty reduction strategies.[89] (See guideline 2.)

17. The application of human rights to poverty reduction reinforces some of the existing features of anti-poverty strategies. For example, anti-poverty strategies that demand

[89] For a more detailed discussion of the salient features of a human rights approach to poverty reduction, see OHCHR, *Human Rights and Poverty Reduction: A Conceptual Framework* (New York and Geneva, United Nations, 2004), especially Section 2.

transparent budgetary and other governmental processes are congruent with the right to information, while the insistence that strategies are "country-owned" corresponds to the right of peoples to self-determination. The value added by the human rights approach to poverty reduction consists both in the manner in which it departs from existing strategies and in the manner in which it reinforces them.

18. One reason why the human rights framework is compelling in the context of poverty reduction is that it has the potential to empower the poor. As is now widely recognized, effective poverty reduction is not possible without the *empowerment* of the poor.[90] The human rights approach to poverty reduction is essentially about such empowerment.

19. The most fundamental way in which empowerment occurs is through the introduction of the concept of rights itself. Once this concept is introduced into the context of policymaking, the rationale of poverty reduction no longer derives merely from the fact that the people living in poverty have needs but also from the fact that they have rights—entitlements that give rise to legal obligations on the part of others. Thus, the human rights perspective adds legitimacy to the demand for making poverty reduction the primary goal of policymaking. The human rights perspective draws attention to the fact that poverty signifies the non-realization of human rights, so that the adoption of a poverty reduction strategy is not just desirable but obligatory for States which have ratified international human rights instruments.

20. Most of the salient features of the human rights normative framework can contribute to the empowerment of the poor in one way or another. These features include the principles of universality, non-discrimination and equality, the principle of participatory decision-making, the notion of accountability, and the recognition of the interdependence of rights.

21. The twin principles of *equality and non-discrimination* are among the most fundamental elements of international human rights law. Recognition of these principles helps to highlight the fact that a great deal of poverty originates from discriminatory practices—both overt and covert. This recognition calls for the reorientation of poverty reduction strategies from a tendency to focus on narrow economic issues towards a broader strategy that also addresses the socio-cultural and political-legal institutions which sustain the structures of discrimination. Thus, the human rights approach to poverty reduction requires that the laws and institutions which foster discrimination against specific individuals and groups be eliminated and that more resources be devoted to the areas of activity with the greatest potential to benefit the poor. (See guideline 3.)

22. While the human rights approach imposes an obligation on duty-bearers to work towards poverty reduction, it recognizes that, due to resource constraints, some human

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[90] The term "empowerment" is used here to describe a process of increasing the capabilities of poor individuals or groups to make choices and to transform those choices into desired actions and outcomes, and to participate in, negotiate with, influence, control and hold accountable the institutions that affect their lives. For a more detailed discussion of empowerment, see Deepa Narayan, ed., *Empowerment and Poverty Reduction: A Sourcebook* (Washington, D.C., World Bank, 2002) and the World Bank *PovertyNet* website.

rights may have to be realized over a period of time. Making trade-offs among alternative goals in the light of social priorities and resource constraints is an integral part of any approach to policymaking. The human rights approach, however, imposes certain conditions on the act of prioritization which protect the poor against certain trade-offs that may be harmful to them. In particular, it cautions against any trade-off that leads to the retrogression of a human right from its existing level of realization and rules out the non-achievement of certain minimum levels of realization. (See guideline 4.)

23. Unlike earlier approaches to poverty reduction, the human rights approach attaches as much importance to the processes which enable developmental goals to be achieved as to the goals themselves. In particular, it emphasizes the importance of ensuring the active and informed *participation* by the poor in the formulation, implementation and monitoring of poverty reduction strategies. It draws attention to the fact that participation is valuable not just as a means to other ends, but also as a fundamental human right that should be realized for its own sake. Effective participation by the poor requires specific mechanisms and arrangements at different levels of decision-making in order to overcome the impediments that people living in poverty, and marginalized groups in general, face in their efforts to play an effective part in the life of the community. (See guideline 5.)

24. The human rights approach to poverty reduction emphasizes the *accountability* of policymakers and others whose actions have an impact on the rights of people. Rights imply duties, and duties demand accountability. It is therefore an intrinsic feature of the human rights approach that institutions and legal/administrative arrangements for ensuring accountability are built into any poverty reduction strategy. While duty-bearers must determine for themselves which mechanisms of accountability are most appropriate in their particular case, all mechanisms must be accessible, transparent and effective. (See guideline 6.)

25. In many countries, poverty reduction strategies are bedevilled by corruption. However, corruption is unlikely to flourish where there is access to information, freedom of expression, participation and accountability—all key human rights features. Therefore, a human rights approach has the power to protect a poverty reduction strategy from being undermined by the corroding effects of corruption.

26. Yet another feature of the human rights approach is that poverty reduction becomes a shared responsibility. While a State is primarily responsible for realizing the human rights of the people living within its jurisdiction, other States and non-State actors also have a responsibility to contribute to, or at the very least not to violate, human rights. (See guideline 7.)

27. The international human rights framework also broadens the scope of poverty reduction strategies by recognizing the *interdependence of rights*. Although poverty may seem to concern mainly economic, social and cultural rights, the human rights framework highlights the fact that the enjoyment of these rights may be crucially dependent on the enjoyment of civil and political rights. The human rights approach thus dispels the

misconception that civil and political rights and freedoms are luxuries relevant only to relatively affluent societies, and that economic, social and cultural rights are merely aspirations and not binding obligations. Accordingly, it demands that civil and political as well as economic, social and cultural rights are integral components of poverty reduction strategies. (See guideline 8.)

28. In sum, the human rights approach has the potential to advance the goal of poverty reduction in a variety of ways: (a) by urging the speedy adoption of a poverty reduction strategy, underpinned by human rights; (b) by broadening the scope of poverty reduction strategies so as to address the structures of discrimination that generate and sustain poverty; (c) by urging the expansion of civil and political rights, which can play a crucial instrumental role in advancing the cause of poverty reduction; (d) by confirming that economic, social and cultural rights are binding international human rights, not just programmatic aspirations; (e) by cautioning against retrogression and non-fulfilment of minimum core obligations in the name of making trade-offs; (f) by adding legitimacy to the demand for meaningful participation of the poor in decision-making; and (g) by creating and strengthening the institutions through which policymakers can be held accountable for their actions.[91]

Chapter II

THE PROCESS OF FORMULATING, IMPLEMENTING AND MONITORING A HUMAN RIGHTS-BASED POVERTY REDUCTION STRATEGY

Guideline 1: Identification of the poor

29. Any strategy for poverty reduction has to begin with an identification of the poor. This task is composed of two steps: (a) identifying the attributes that are deemed to constitute poverty and (b) identifying the population groups that possess these attributes.

30. *Identifying the attributes of poverty.* From a human rights perspective, poverty consists in the non-fulfilment of a person's right to a range of basic capabilities (see para. 7). Capability failure is thus a defining attribute of poverty.

31. Since poverty denotes an extreme form of deprivation, only those capability failures that are deemed to be basic should count as poverty, and these should be rated in some order of priority. As different societies may have different orders of priority, the list of basic capabilities may differ from one society to another.

[91] For further discussion of the added value of a human rights-based approach to development and its relevance to United Nations development programming, see OHCHR, *Frequently Asked Questions on a Human Rights-based Approach to Development Cooperation* (New York and Geneva, United Nations, 2006).

32. However, empirical observation suggests a common set of capabilities that can be considered basic in most societies. This set includes the capabilities of being adequately nourished, avoiding preventable diseases and premature mortality, being adequately sheltered, having basic education, being able to ensure personal security, having equitable access to justice, being able to live in dignity, being able to earn a livelihood and being able to take part in the life of a community. The present *Guidelines* deal with this common set. But in each country, it must be ascertained, through a participatory process, which other capabilities its people consider basic enough for their failure to count as poverty.

33. *Identifying the poor*. Once the basic capabilities have been determined, the next step is to identify the population groups that suffer from inadequate achievement of those basic capabilities. This task is informationally demanding, especially since poverty must be measured in terms of a range of attributes. Innovative mechanisms have to be designed—using a combination of quantitative and qualitative methods—to elicit the necessary information cost-effectively. The preferred method depends on the particular circumstances of a given country. If the current capability of that country is not adequate to elicit the desired information, steps should be taken to develop that capability as expeditiously as possible.

34. Whatever method is actually used to identify the poor, the human rights approach demands that it should be guided by two special considerations.

35. First, the objective of the exercise should not merely be to come up with a number, such as the percentage of poor people in the population, but to ascertain who these people are and how poor they are. Thus it is necessary to identify those in extreme poverty—that is, the poorest of the poor, as well as specific groups, in terms of various characteristics, such as gender, geographical location, ethnicity, religion, age or occupation—so that the problem of poverty can be addressed at as disaggregated a level as possible.

36. Second, special efforts must be made to identify those among the poor who are especially deprived and marginalized (e.g., women, or people living with HIV/AIDS, or the elderly, or the disabled, or those suffering from racial or religious discrimination). When resource constraints call for the setting of priorities, it is the entitlement of these groups that should receive prior attention. This is necessary for the sake of equality, which is an essential principle of the human rights approach.

Guideline 2: National and international human rights framework

37. While the documents spelling out poverty reduction strategies are not legal instruments, they must be consistent with, and informed by, the State's national and international human rights commitments for two reasons: (a) this will make the strategy more effective; and (b) otherwise, some features of the strategy may be unlawful.

38. This has significant implications for States as well as for those responsible for policies and programmes that impact on States. All parties should use a State's national and international human rights commitments as the normative foundation on which poverty reduction strategies are constructed.

39. When beginning to prepare or review a poverty reduction strategy, a State should expressly identify:

(a) National human rights law and practice in its jurisdiction, for example human rights provisions from the constitution, bill of rights, anti-discrimination laws, freedom of information legislation, as well as the main human rights case law;

(b) The international and regional human rights treaties it has ratified;

(c) Other important international human rights instruments, such as the Universal Declaration of Human Rights;

(d) Commitments entered into at recent world conferences in so far as they bear upon human rights, including the United Nations Millennium Declaration;

(e) Pledges made to the Human Rights Council, as well as human rights commitments undertaken in national programmes and plans of action.

40. Given its responsibility to ensure that its human rights commitments inform the formulation and implementation of its poverty reduction strategy, a State should ensure that:

(a) Its human rights commitments are expressly referred to in the poverty reduction strategy;

(b) Those responsible for formulating and implementing the poverty reduction strategy receive basic human rights training so that they are familiar with the State's human rights commitments and their implications;

(c) Individuals are appointed with a particular responsibility to ensure that the State's human rights commitments are taken into account throughout the formulation and implementation of the poverty reduction strategy (e.g., departmental human rights officers);

(d) Processes are designed, and put in place, to ensure that the State's human rights commitments receive due attention throughout the formulation and implementation of the poverty reduction strategy (e.g., arrangements to

secure the preparation and scrutiny of ex ante and ex post human rights impact assessments).

41. Because the relevance of a State's human rights framework is not confined to the State itself, all those responsible for policies and programmes that impact upon a State should:

(a) Ensure that they do not make it more difficult for the State to implement its human rights commitments to individuals and groups within its jurisdiction;

(b) Make their best efforts, within their mandates, to help a State fulfil its national and international human rights commitments.

Guideline 3: Equality and non-discrimination

42. The right to equality and the principle of non-discrimination are among the most fundamental elements of international human rights law. The right to equality guarantees, first and foremost, that all persons are equal before the law, which means that the law shall be formulated in general terms applicable to every individual and shall be enforced in an equal manner. Secondly, all persons are entitled to equal protection under the law against arbitrary and discriminatory treatment by private actors. In this regard, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability and health status, including HIV/AIDS, age, sexual orientation or other status.

43. People living in poverty are typically victims of discrimination on grounds such as birth, property, national and social origin, race, colour, gender and religion. Depending on the particular circumstances of each society, poverty may affect members of certain socially disadvantaged classes, or of certain ethnic or religious groups, women, elderly people or indigenous persons, but in most cases poverty is aggravated by some sort of discrimination. If Governments are responsible for such discrimination, they are under an obligation immediately to prohibit and cease all discriminatory laws and practices. If discriminatory attitudes are caused by traditions among the population (that are usually deeply rooted), Governments shall adopt and enforce laws prohibiting any discrimination by private actors. In both cases, Governments must take special additional measures to afford effective protection to their most disadvantaged, discriminated and socially excluded groups, including the poor, against discrimination by governmental authorities as well as by private actors.

44. Inequalities and discrimination may assume various forms, including explicit legal inequalities in status and entitlements, deeply rooted social distinctions and exclusions, and forms of indirect discrimination. For instance, even laws and policies that

do not use categories of men and women may discriminate against women in practice, e.g., while there might be no intention to discriminate against women when the term "breadwinner" is included in social security law, if the practical application of this term disadvantages women, it may constitute indirect discrimination on the grounds of sex. It is therefore important to look at the effects, and not only the intentions, of measures and laws.

45. Not every distinction constitutes discrimination since it might be based on reasonable and objective criteria. Whereas poverty might have been regarded in earlier times as a kind of "natural phenomenon", today it is looked upon as a social phenomenon aggravated by discrimination, which in turn requires corresponding anti-discrimination or even affirmative action by Governments. A human rights approach to poverty provides the necessary tools for identifying the roots of poverty that lie in discriminatory practices and for developing appropriate strategies to deal with them.

46. As discrimination may cause poverty, poverty also causes discrimination. In addition to bias towards their race, colour, gender and social origin, the poor are also subject to discriminatory attitudes by governmental authorities and private actors simply because they are poor. The twin principles of equality and non-discrimination require States to take special measures to prohibit discrimination against the poor and to provide the poor with equal and effective protection against discrimination. As the poor are among the most disadvantaged and marginalized groups in every society, a poverty reduction strategy must start by addressing their special needs as well as their right not to be discriminated against, according to the particular circumstances of the society concerned. Given that the most common discriminatory practices deny the poor equal access to fundamental services and human rights such as the rights to food, education, health and justice, the respective State obligations, targets, indicators and strategies will be dealt with in guideline 8 below.

PROVISIONS ON EQUALITY AND NON-DISCRIMINATION IN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

International Covenant on Civil and Political Rights

Article 2.1
Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3
The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 24.1
Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

PROTECTION OF DIGNITY AS A HUMAN RIGHT

PROTECTION OF DIGNITY AS A HUMAN RIGHT

"Every person has inalienable dignity, duties, and rights. Whatever social class one belong to, every person is endowed not only with a living body but with an intelligent free and immortal soul which God created. Having come from God, this soul should serve God and return to God. Whether this soul lives in the body of a worker at the bottom of a dark coal mine, or in the body of a well-fed financier living in the lap of luxury, it doesn't matter: in reality both of them have the same value. They have equal personal dignity, equal moral responsibility, the same eternal destiny, and both of them have been given earthly existence so that through truth, morality and religion they may strive for eternal life." - - *Father Leo John Dehon, Founder of the Priests of the Sacred Heart*

Dignity is a universal human concern. Its moral agenda is to attempt a double kind of evaluation of the individual community on the one hand and the entire social formation on the other. Today various forces challenge the basic dignity of the people all over the world. To a large extent, globalization has played a role in undermining and destroying sources of dignity like autonomy, opportunity and rationality.

Dignity has a critical relationship with caste, class, race, religious and gender divisions. Women are objectified after all, in order to maintain the ‘dignity’ of a patriarchal society. Self-perceptions are at the very heart of dignity, and they have to be combined with a recovery of a truly democratic state. Employment, education, health, freedom from hunger, guaranteed livelihood, social security and related economic and social rights are crucial means of ensuring a dignified existence to all human beings. A perspective from the point of subalterns and the marginal is also important for ensuring minimum conditions for dignity. Dignity means freedom to live in peace, health and hope.

International Human Rights Instruments and the Right to Life, Liberty and Security or Personal Dignity. The rights guaranteed under Part III of the Constitution are in conformity with international human rights instruments. However, some of the guarantees provided by such instruments have been left untouched. Without being exhaustive we will pick up a few provisions relating to the right to life, liberty and security guaranteed by such international human rights instruments.

The Universal Declaration of Human Rights 1948 (henceforth UDHR) provides a series of rights including the right to life, liberty and security. Article 3 stipulates, "Everyone has the right to life,

liberty and security of person." Article 4 provides a right against slavery or servitude and Article 5 has guaranteed a right against torture, or cruel, inhuman or degrading treatment or punishment.

Article 6 of ICCPR provides "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Article 9 of the Covenant has conferred the right to personal liberty and says, "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are prescribed by law." It also provides within the scope of right to liberty the right to be informed of charges and reasons for arrest, right to be produced before judicial authority, right to speedy trial and right to compensation for unlawful arrest or detention. Article 14 of ICCPR deals with a number of rules essential for fair trial. The rights and principles of justice stipulated in the Covenant provide a modern standard for justice and human rights jurisprudence.

There are some other international human rights instruments dealing with the right to life, liberty and security. The International Covenant on Economic, Social and Cultural Rights, 1966 (henceforth ICESCR) also provides a right of self-determination and social security. The ICESCR has recognized the right to work, right to livelihood and adequate living conditions. The Convention on the Elimination of All Forms of Discrimination against Women 1981 (henceforth CEDAW) provides a right to women for their dignified life. The Declaration on the Elimination of Violence against Women again reaffirmed the importance of the right to life, liberty and security and mentioned provisions so as to fill up the gaps left by CEDAW.

The Indian Supreme Court has derived a catalogue of human rights in both the senses from the notion of ‘human dignity’ implied by a right to life. People of India have fundamental right to food, shelter, hygiene, clean air, health care, education and so on as aspects of their right to live with human dignity.

Case Laws on Right to Dignity:

Kartar Singh v. State of Punjab 1994 SCC (3) 569, the SC had ruled that liberty aims at freedom not only from arbitrary restraint but also a right to secure such conditions which are essential for full development of personality.

In various cases Supreme Court interpreted 'personal dignity' in various ways, some of them are following:-

Air India Statutory Corporation v. United Labour Union

AIR 1997 SC 645

The Preamble and Article 38 of the Constitution envision social justice as the arch to ensure life to be meaningful and livable with human dignity. Jurisprudence is the eye of law giving an insight into the environment of which it is the expression. It relates the law to the spirit of the time and makes it richer. Law is the ultimate aim of every civilized society, as a key system in a given era, to meet the needs and demands of its time. Justice, according to law, comprehends social urge and commitment. The Constitution commands justice, liberty, equality and fraternity as supreme values to usher in the egalitarian social, economic and political democracy. Social justice, equality and dignity of person are cornerstones of social democracy. The concept of "social justice" which the Constitution of India engrafted, consists of diverse principles essential for the orderly growth and development of personality of every citizen.

Consumer Education and Research Centre v. Union of India

AIR 1995 SC 922

Right to life includes protection of the health and strength of the worker is a minimum requirement to enable a person to live with human dignity. The right to human dignity, development of personality, social protection, right to rest and leisure are fundamental human rights to a workman assured by the Charter of Human Rights, in the Preamble and Arts.38 and 39 of the Constitution.

Francis Coralie Mullin v. Administrator, Union Territory of Delhi

AIR 1981 SC 746

The right to life enshrined in Art.21 cannot be restricted to mere animal existence. It means something much more than just physical survival. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

The right of a detenu to consult a legal adviser of his choice for any purpose not necessarily limited to defence in a criminal proceeding but also for securing release from preventive detention or filing a writ petition or prosecuting any claim or proceeding, civil or criminal, is obviously, included in the right to live with human dignity and is also part of personal liberty and the detenu cannot be deprived of this right nor can this right of the detenu be interfered with except in accordance with reasonable, fair and just procedure established by a valid law.

D. K. Basu v. State of W.B

AIR 1997 SC 610

"Custodial torture" is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward - flag of humanity must on each such occasion fly half-mast.

Guruvayur Devaswom Managing Committee v. C. K. Rajan

AIR 2004 SC 561

The Courts exercising their power of judicial review found to its dismay that the poorest of the poor, depraved, the illiterate, the urban and rural unorganized labour sector, women, children, handicapped by 'ignorance, indigence and illiteracy' and other down-trodden have either no access to justice or had been denied justice. A new branch of proceedings known as 'Social Interest Litigation' or 'Public Interest Litigation' was evolved with a view to render complete justice to the aforementioned classes of persons. It expanded its wings in course of time. The Courts in pro bono publico granted relief to the inmates of the prisons, provided legal aid, directed speedy trial, maintenance of human dignity and covered several other areas. Representative actions, pro bono publico and test litigations were entertained in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to by-pass the real issues on the merits by suspect reliance on peripheral procedural shortcomings.

Kishor Singh Ravinder Dev v. State of Rajasthan

AIR 1981 SC 625

Human dignity is a dear value of our Constitution not to be bartered away for mere apprehensions entertained by jail officials.

Bhagwati, J.:- It is obvious that poverty is a curse inflicted on large masses of people by our malfunctioning socio-economic structure and it has the disastrous effect of corroding the soul and sapping the moral fibre of a human being by robbing him of all basic human dignity and destroying in him the higher values and the finer susceptibilities which go to make up this wonderful creation of God upon earth, namely, man.

The Bonded Labour System (Abolition) Act, 1976 has been enacted pursuant to the Directive Principles of State Policy with a view to ensuring basic human dignity to the bonded labourers and any failure of action on the part of the State Government in implementing the provisions of this legislation would be the clearest violation of Article 21 apart from Article 23 of the Constitution.

Sunil Batra v. Delhi Administration

AIR 1978 SC 1675

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 Art. 14.

Unni Krishnan, J.P. v. State of A.P.

AIR 1993 SC 2178

Article 21 has been interpreted by this Court to include the right to live with human dignity and all that goes along with it. "The 'right to education' flows directly from right to life". In other words, 'right to education' is concomitant to the fundamental rights enshrined in part III of the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of citizens." The benefit of education cannot be confined to richer classes.

T. K. Gopal v. State of Karnataka

AIR 2000 SC 1669

It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity."

Ajay Kumar Choudhary v Union of India Through its Secretary and another

(2015) 7 SCC 291

It will be useful to recall that prior to 1973 an accused could be detained for continuous and consecutive periods of 15 days, albeit, after judicial scrutiny and supervision. The Code Of Criminal Procedure, 1973 contains a new proviso which has the effect of circumscribing the power

of the Magistrate to authorize detention of an accused person beyond a period of 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and beyond a period of 60 days where the investigation relates to any other offence. Drawing support from the observations contained of the Division Bench in **Raghubir Singh v. State of Bihar** 1986 Indlaw SC 617 and more so of the Constitution Bench in Antulay, we are spurred to extrapolate the quintessence of the proviso to Section 167(2) of the CrPC 1973 to moderate suspension orders in cases of departmental/disciplinary enquiries also. It seems to us that if Parliament considered it necessary that a person be released from incarceration after the expiry of 90 days even though accused of commission of the most heinous crimes, a fortiori suspension should not be continued after the expiry of the similar period especially when a memorandum of charges/charge-sheet has not been served on the suspended person. **It is true that the proviso to Section 167(2) of the Cr.P.C. postulates personal freedom, but respect and preservation of human dignity as well as the right to a speedy trial should also be placed on the same pedestal.**

We, therefore, direct that the currency of a suspension order should not extend beyond three months if within this period the memorandum of charges/charge-sheet is not served on the delinquent officer/employee; if the memorandum of charges/charge-sheet is served, a reasoned order must be passed for the extension of the suspension. As in the case in hand, the Government is free to transfer the concerned person to any Department in any of its offices within or outside the State so as to sever any local or personal contact that he may have and which he may misuse for obstructing the investigation against him. The Government may also prohibit him from contacting any person, or handling records and documents till the stage of his having to prepare his defence. **We think this will adequately safeguard the universally recognised principle of human dignity and the right to a speedy trial and shall also preserve the interest of the Government in the prosecution**. We recognise that the previous Constitution Benches have been reluctant to quash proceedings on the grounds of delay, and to set time-limits to their duration. However, the imposition of a limit on the period of suspension has not been discussed in prior case law, and would not be contrary to the interests of justice. Furthermore, the direction of the Central Vigilance Commission that pending a criminal investigation, departmental proceedings are to be held in abeyance stands superseded in view of the stand adopted by us.

Parhlad v. State of Haryana

(2015) 8 SCC 688

The Hon'ble Supreme Court has held that an offence of rape is an assault on the human rights of a victim. It is an attack on her individuality. It creates an incurable dent in her right and free will and personal sovereignty over the physical frame. It has been held as under:

It has to be borne in mind that an offence of rape is basically an assault on the human rights of a victim. It is an attack on her individuality. It creates an incurable dent in her right and free will and personal sovereignty over the physical frame. Everyone in any civilised society has to show respect for the other individual and no individual has any right to invade on physical frame of another in any manner. It is not only an offence but such an act creates a scar in the marrows of the mind of the victim. Anyone who indulges in a crime of such nature not only does he violate the penal provision of the IPC but also right of equality, right of individual identity and in the ultimate eventuality an important aspect of rule of law which is a Constitutional commitment. The Constitution of India, an organic document, confers rights. It does not condescend or confer any allowance or grant. It recognises rights and the rights are strongly entrenched in the Constitutional framework, its ethos and philosophy, subject to certain limitation. Dignity of every citizen flows from the fundamental precepts of the equality clause engrafted under Articles 14 and right to life under Article 21 of the Constitution, for they are the "fon juris" of our Constitution. The said rights are constitutionally secured.

Therefore, regard being had to the gravity of the offence, reduction of sentence indicating any imaginary special reason would be an anathema to the very concept of rule of law. The perpetrators of the crime must realize that when they indulge in such an offence, the really create a concavity in the dignity and bodily integrity of an individual which is recognized, assured and affirmed by the very essence of Article 21 of the Constitution."

HUMAN RIGHTS COURT AND THEIR ROLE VIS-À-VIS HUMAN RIGHTS COMISSION UNDER 1993 ACT

FUNCTIONING OF HUMAN RIGHTSA COURTS VIS-À-VIS HUMAN RIGHTS COMMISSION UNDER 1993 ACT

The definition of Human Rights as engrafted in the Protection of Human Rights Act, 1993 (herein after "the Act") is very vast. It says, "Human Rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International covenants and enforceable by courts in India. According to this definition, every constitutional or statutory right comes within the purview of Human Rights.

In every case of violation of Human Rights, the general supposition is to move the National Human Rights Commission (NHRC) or State Human Rights Commissions for appropriate remedies. Owing to this, the number of cases that are pending before the Human Rights Commissions is very high. According to the official website of National Human Rights Commission, New Delhi, the total number of pending cases was 29759 in November 2013. In the State of Karnataka, approximately 28000 cases were pending for disposal before the State Human Right Commission at the end of 2013.

It is pertinent to mention that in the Act, an effective and alternative remedy is available for investigation and trial of offences relating to the Human Rights. Section 30 of the Act provides for the constitution of the Human Right Courts. Most of the states have issued notifications in this regard and constituted and notified for the each district a court of session to be a Human Rights Court. In Madhya Pradesh too, there is a very old notification in this regard.

Section 30 of the Protection of Human Rights Act, 1993 empowers every state government to notify designated sessions courts as "Human Rights Courts" for providing speedy trial in cases of offences involving violations of human rights. As of 2011, however, these courts had only been operational in West Bengal. Elsewhere, human rights continue to be litigated before regular courts. Specific human rights claims may also be raised before the National Human Rights Commission, the State Human Rights Commissions, and quasi-judicial fora comprising officials of the executive such as sub-divisional magistrates and forest officers.

An application under section 30 of the Act could be filed before a Human Right Court on the basis of any of the following reasons:

1) At present, the complaints are being dealt by the Human Rights Commissions, which are overburdened and take long time in disposing cases pending before them. In the larger public interest, by applying the doctrine of "speedy trial", all cases pertaining to violation of Human Rights must be decided without any unnecessary delay. The Human Right Courts are the better instrumentalities to achieve this motive.

2) It is far better to make joint efforts to deal with the problems relating to violation of Human Rights.

3) Section 36 of the Act prescribes that the Commission shall not inquire into any matter after expiry of one year from the date of incident. This limitation is applicable only for proceedings before Commissions and not for Human Right Courts.

4) No statutory remedy is provided against the direction, order or report issued by Human Rights Commissions, but the order passed by the Human Right Court can be challenged under the Code of Criminal Procedure, 1973.

5) Under Section 31 of the Act, it is mandatory that in Human Rights Courts, the applicants shall have the assistance of Special Public Prosecutor appointed by the State Governments.

Case laws:

Mr. Rasiklal M. Gangani vs Government of Goa through Chief

(2004) 106 BOMLR 626

Bench: A Khanwilkar, P Hardas

Facts: he petitioners/complainants had filed their respective complaint cases in the Court of the Special Judge, North Goa, Panaji, alleging violation of human rights by the respondents/accused named therein. By virtue of Notification, dated 20th June, 1995, the Government of Goa with the concurrence of the Chief Justice of the High Court at Bombay, in exercise of the powers conferred by Section 30 of the Protection of Human Rights Act, 1993, specified the District Court of Sessions, North Goa and the District Court of Sessions, South Goa to be the Human Rights Courts

for North Goa District and South Goa District respectively for the purpose of human rights under the Protection of Human Rights Act. By a Notification, dated 27th July. 2001, the Government of Goa in exercise of the powers conferred by Section 31 of the Protection of Human Rights Act, 1993, specified two Public Prosecutors as Special Public Prosecutors for the purpose of conducting cases in the Human Rights Courts for the North Goa District and South Goa District respectively.

It appears that on the basis of some preliminary objections, the learned Special Judge, North Goa, Panaji, considered three points as arising for his determination in the four complaint cases pending on his file.

Issues: Whether the complaints/proceedings instituted by the respective complainants are maintainable?

2. Whether the Special Public Prosecutor appointed by the Government can conduct the cases when the complaints are filed by private complainants?

3. Whether the Special Public Prosecutor appointed by the Government can defend the respondents who are functionaries of the State machinery?

Judgement: A perusal of sections 3, 12, 13, 14, 17, 18, 21 would clearly indicate that the powers, duties and functions of the Commission under the Human Rights Act do not overlap with the functions, powers of the Human Rights Court. The provisions of the Human Rights Act do not mandate that a prosecution cannot be launched unless and until the complaint has been first inquired into or investigated by the Commission. The provisions of the Act certainly empower the Commission to recommend to the Government the prosecution of the erring officers but that does not mean that a prosecution can only be launched if the Commission recommends the institution of the prosecution. In fact Section 12(b) permits the Commission to intervene in any proceeding involving violation of human rights, no doubt, with the permission of the Court. That would be a strong indicator that the trial of the case involving violation of human rights and a complaint alleging violation of human rights before the Commission are independent of each other. By this Act two different forums are created. One forum, namely, the Commission to inquire and investigate into the complaints involving violation of human rights and to suggest either remedial measures or the prosecution of the violators. The second forum, namely, theHuman Rights Court to try the complaints involving violation of human rights. The trial before the Human Rights Court

is not dependent upon any inquiry or investigation done by the Commission. Trial of an offence by the Human Rights Court is different from the inquiry and investigation by the Commission. Filing of complaint cases is not something unknown to the procedure in the Code of Criminal Procedure. Private complaint cases can be filed for offences exclusively triable by a Court of Sessions. The Human Rights Court has to try the cases as per law and is not called upon by the Code of Criminal Procedure or the Human Rights Act to hold any inquiry. The role of the Human Rights Commission is more recommendatory in nature while the role of the Court under the Human Rights Act is to try the offenders and punish them according to law. The jurisdiction and function of the Human Rights Court and the Human Rights Commission being entirely different, there was no basis for the Special Judge to arrive at the conclusion that unless and until a complaint has been inquired into by the Commission, the prosecution cannot be launched. We, therefore, see considerable force in the submission of the learned Counsel for the parties that the learned Special Judge was in error in holding that before the Special Judge tries an offence a complaint has to be first inquired into by the Human Rights Commission. To recommend the institution of the prosecution is a power conferred on the Commission which is independent of the power and jurisdiction of the Human Rights Court to try the violators of human rights. The provisions in Chap. II, III, IV and V relating to the establishment of the Human Rights Commission, its functions and its powers are distinct and separate than the provisions applicable to the Human Rights Court. The powers of the Human Rights Court in the trial of cases involving violation of human rights is neither fettered nor circumscribed by the powers of the Commission to inquire into complaints of violation of human rights. A perusal of the Human Rights Act does not even remotely suggest that a private complainant cannot put the criminal law in motion in respect of violation of human rights by filing a complaint. In the absence of any such restriction restricting the Special Judge from taking cognizance of the offence of violation of human rights on the basis of a private complaint, the learned Special Judge, according to us, was in error in holding that the complaints were not maintainable.

Human Rights Act, Human Rights Commissions and implementation of Act through the Courts[1]

By B. Mohan**,** Advocate

The Human Rights Act came to force in the year in the year 1993. The Human rights courts were constituted in important district designating the Chief Judicial Magistrate Courts apart from the establishment of Statutory body of National and State Human Right commissions at the National and State levels throughout the country. But unfortunately, those Courts designated as Human Rights Court did not function for pretty long time. The reason is known to all that the Rules of practice for the Human rights courts were not formulated dealing about procedures for taking up complaints from individuals, penal provision for punishing the guilty persons. Since we are working among tribal of the western Ghats came across the problems of the inhuman torture of tribals and hill area people at the Joint Task Forces of Tamil Nadu and Karnataka in the nab of nabbing Forest brigand in the year 1992 to 1996. Number of incidents of illegal detentions in camps in the remote forest areas, encounter deaths, tortures in the camps of the men and woman folks and were brought to the notice of the activists and advocates. Since the perpetrators of human right violations are law enforcing machineries a namely Police, the Local police or district administration have not taken any action whenever the matter were brought to their knowledge. All representations fell in to deaf ears. At this Juncture, in the Talawadi Hills of Sathiamangalam Taluk of Tamil nadu, Number of tribals were detained in the camps for many days and tortured. When they were let of, they came to the notice of Tamil nadu Palzhankudi Makkal Sangam (Tamilnadu Tribal people Association representation before the District Collector, Erode who promised to look in to the matter, but in vein. Therefore, those people returned back to their hamlets where they were taken to hill side police station and spinned in the false case of murder of police constable in an encounter of police and Forest brigand. The tribals who were detained in the camps and put in to torture were reported to the higher authorities. Under these circumstances, private complainant was filed under Human Rights Act before Human Rights Court namely at Chief Judicial Magistrate, Erode, Tamilnadu who returned the complainant for want of rules of practice and penal provision for punishing the accused. This happened in the year1995 on which the complaint was sent to Retied Supreme Court Judge and great legend of protector human rights by

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[1] By B.Mohan**,** Advocate – At National Judicial Academy, Bhopal (On 17.01.10)

his historical and land mark judgments in the Supreme Court, who in turn sent the complainant to Chief Justice of Madras High court. The then CJI of Madras High Court ordered to take up the complaint as a suo-moto revision under article 227 of the Constitution and Division bench consisting Justice Janarthanam and Karpavinayagam was constituted by which the land mark judgment was pronounced to follow the Criminal Procedure Code till the comprehensive Rules are to be framed by the Govt.

It is known to all that the judgment paved the way for the functioning of all Human Right s Court throughout the Country. But the fact remains that the purpose of formations of Human rights Courts were not achieved as still the comprehensive Rules of Practice were not framed after the verdict passed in the year 1996 by the Madras High Court and even advocates and judges show scant regard for the human rights cases being filed for inherent weaknesses the administration of justice is concerned.

First of all the difficulty arose in filing the complaint before the Sessions Court. Previously, cognizance was taken straightaway by the Sessions Court u/s 193 Cr.P.C. later it was laid down by the apex Court and High Courts that committal proceedings should be followed as far as the Human Rights cases are concerned. There are lots of practical problems for victims of the Human rights violations to get justice against the perpetrators of violators as the offenders are uniformed people wielding all sorts of influence.

From the experience I had so far, the procedures for taking up the complainant should be made easier. Even when the suo-moto revision was being heard by the Hon'ble High Court, Madras, It was submitted by the Learned Senior Counsel K.G.Kannbiran, that once the Human rights Protection act was passed with a necessity with formation of Human rights act and Human rights commission, then the corollary is that the sanction for prosecution under section 197 Cr.P.C is impliedly repealed. Due to this tedious procedure, the poor victim is unable to fight in the court of law since it is a long drawn battle. There must be some restriction to file cases against public authorities in the name of Human rights violations, to avoid frivolous litigations. There must be loud thinking and open debate before amendment in new context emerging that nobody is above the law and are accountable to the people so that the abuse of power and violations of human rights can be prevented.

The State is the custodian of law and protector of interest of people especially the weaker sections of the society namely the Dalits, Tribes. Women, children, minorities and working people who produce wealth by their labor. These sections are victims of human rights violations at the hands of vested interest, state terrorism and by law enforcing agency.

Even though the old Act was repealed and new Prevention of Atrocities against SC and ST was passed, still Dalits have not achieved the expected status in the social, cultural economic sphere except in some Government services. There is no considerable improvement and empowerment even after 6 decades of Independence due to Globalization, Liberalization and Privatization.

The education has become costlier affair for the common man even though the parliament has enacted fundamental right. The human right education is a must and education is more prerequisite as a human right.

Number of legislations were brought to ventilate the grievances of the women and gender bias who constitute half of the population but, they are deprived still their basic right to access to those rights enshrined in the Constitution. The Media and press mostly depict the women as commercial commodity to sell their product.

Dalits are deprived of their lands. When the state itself acquired about one and half acres of land for Bauxite Company in the tribal area of Orissa, why not for the tribal who has been living for centuries in the hills and forest areas, are provided with 2 acre of land. To prevent deforestation and to have natural forest cover, Adivasis and forest living dwellers should be empowered as it is a traditional right of tribes and forest dwellers to be a part of the forest. Eventhough the recent enactment conferring the right of tribes to have residence and livelihood in the forest living for centuries, the question of implementation is at stake. Therefore the tribes naturally rise against State even with arms for which Maoist can't be blamed. What is happening in Chhattisgarh is an outstanding example as to how to tackle the problems of the people. Instead of addressing to the root cause of problems faced by the people, the state machinery stepped in to suppressing voices of democratic elements. That is what happened When Dr. Binak Sen raised the violation of Human rights of the tribes, he has been jailed and detained for ayear without any reasonable grounds under anti terrorist acts. At the same time, counter violent organizations like Salwar- judum, of upper

caste movements are allowed to go scot-free. Here in Tamil and Karnataka, in the name of nabbing Veerappan, the Joint Special Task forces of Tamil Nadu and Karnataka committed so many atrocities on the tribes and hill living people which we traced and represented right from the beginning of 1992 onwards which ultimately resulted in the appointment of Justice Sadasiva-Narasimman Panel which held detailed enquiry from 1999 onwards and filed the report in the year 2004 and NHRC accepted the report directed the State governments to disburse interim relief to the victims. The Justice Sadasiva panel categorically exposed on the basis of post mortem reports numbering about 60 more deaths in so called fake encounters wherein it has been found that the gun shot injuries were found either on the chest or head with shot range. It is very unfortunate that hundreds of thousands of victims at the hands of Special Task Force (STF) from 1993 to 1996 were not heard by the commission on the score that the scope of the commission is limited. But among the victims examined by the commission, 89 people were found to be victims of excesses. This is somewhat remarkable findings since independence to the effect that the STF of both the governments of Tamilnadu and Karnataka committed blatant violation of human rights of innocent tribes and forest dwellers. A mere disbursement of interim compensation is not suffice. Whereas, the commission itself observed to find out the officers who are responsible for the violations of human rights by separate investigation the concerned governments, so as to bring them to the justice. On the other hand, the victims of the atrocities committed by the STF have not been rehabilitated. Therefore the plight of the victims are very much pathetic. The TADA court in Mysore, while acquitting number of accused and convicting 4 persons for life sentences out of 121 persons foisted in the forest brigand Veerapan related cases occurred in the year 1992, observed that “these accused can’t be branded as associates of Veerappan. Whereas, the vulnerable conditions of the tribes and forest dwellers without enjoying the welfare measures of the governments. Where forced help the anti-social elements in a given situations. The atrocities committed in the so called camps of the STF are alarming and unprecedented in the history of India after independence. The victims who were taken to New Delhi and knocked the doors of the NHRC in 2005 for release of the report of the Sadasiva Commission were physically examined by the Chairman of the NHRC, Justice A.S. Anand, Former Chief Justice of India and Justice Sivaraj Patil and other members. I feel that this is the measuring yardsticks for application of human rights laws in practice. If at all the voices of those people were not represented continuously by the joint actions of human right activist and group contentiously, the stark realities could not have come out

to the lime light. Unless and until activists in the field of human right including advocates voice the voiceless people, the Acts and Commissions are only on papers. It is pertinent to note that the Human Right Act prohibits any complaint filed beyond the period of one year which is found to be a barricade to complaint before the commission as far as individual complainants are concerned. When gross and mass violations of human rights are reported, somehow or other the matter will be exposed. But not in the case of individual case.

I make it clear that we had taken separate steps to file a private complaint under HR Act even for directions that could be granted by High Court in writ proceedings, side by side, the violations of atrocities committed by STF before the NHRC and the Government, therefore we were successful in getting a landmark Judgement on the intervention of Justice V.R.Krishna Iyer.*(1997 MLJ (Cri) 655 Madras – Tamilnadu Pazhankudi Makkal Sangam –Vs- State of Tamilnadu, Crl.R.C.No.868 of 1996).* The difference between Human Rights Commission and Human Rights Court, the human rights offences defined in S.2 (d) of HR Act, 1993, procedures to be followed in HR Court adopting Cr.P.C. as rules of practice and Evidence Act have been dealt in detailed in the said judgment. The Division Bench framed 25 points and answered for all of course some of the points for the victims in 223 pages of judgment. This is landmark judgment in the annals of Indian Judiciary in protection and promotion of human rights.

Eventhough the judgment of the Madras High Court paved the way functioning of the Human Rights Courts in India, the ultimate remedy has not been given as the return of complaint was upheld by the high court.

The approach of the subordinate judiciary in dealing with the cases of human right violation of the Dalits, tribes and offences against police is very orthodox and not up to the changing needs of the society. It is to be emphasized that many of the subordinate courts are not alive to the letter and sprits of the constitution especially to the preamble and Part III and IV of the Constitution which are conscience of the Constitution.

As far as, arrest, illegal detention, custodial torture are concerned, eventhough the Apex Court and high Court in number of cases laid dictum including in *Jogindar Kumar –Vs- State of UP - AIR 1994 SC 1349* and in the *D.K.Basu case AIR 1997 SC 3017,* the mandatory provisions of S.54 of the Cr.P.C has not been complied. In number of cases of this nature, accused are

produced during night time in their homes wherein accused where unable to place their objections voluntarily as to any ill treatment in the hands of police wherefore during trial the accused were unable to prove the illegal detention and ill-treatment that resulted in failure on the part of the victims to prove the violations of the human rights in illegal arrest and torture at the hands of the police.

To prevent the abuse of power by the police, India should amend the Indian penal code to the effect that the torture is also an offence as the Geneva Convention of UN on Human Rights passed unanimous resolution.

So also, appropriate amendment has to be made in the evidence Act to draw presumption the accused that accuse has to discharge the burden of proof as far as cases relating to human right violation.

The central government immediately should frame rules for the HR Act in order to avoid difficulties in filing complaints, taking cognizance and awarding sentences. There should be suitable provisions for awarding compensations to the victims.

It is most essentials and imperative to have a independent machinery to protect the witnesses till the end of trial. The recent Ruchika case as against former Haryana DGP Rathore is an outstanding example for the gross injustice caused on the victim's family in proving case before the Court of Law.

Finally the violation of human rights can be curbed not only by a state machinery or judicial pronouncement but create a human right culture by creating a egalitarian society where all are equal before law having equal opportunities in socio, political, economic and cultural life. To put it other words, the goal of the constitution is accomplished by fulfilling the fundamental rights enshrined in constitution to all.

I conclude my address with the concluding speech of Dr. B.R.Ambedkar in the Constituent Assembly that "…. there is complete absence of two things in Indian society. One of these is equality. On the social plan, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject

poverty. On the 26th of January, 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction by evolving society of equality in all sphere of life in which independent judiciary will play a dynamite role in dealing with human rights violations with the human right perspective.

Human Rights Commissions or Human Rights Court

The definition of Human Rights as engrafted in the Protection of Human Rights Act, 1993 (herein after "the Act") is very vast. It says, "Human Rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International covenants and enforceable by courts in India. According to this definition, every constitutional or statutory right comes within the purview of Human Rights.

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It is pertinent to mention that in the Act, an effective and alternative remedy is available for investigation and trial of offences relating to the Human Rights. Section 30 of the Act provides for the constitution of the Human Right Courts. Most of the states have issued notifications in this regard and constituted and notified for the each district a court of session to be a Human Rights Court. In Madhya Pradesh too, there is a very old notification in this regard.

An application under section 30 of the Act could be filed before a Human Right Court on the basis of any of the following reasons:

1) At present, the complaints are being dealt by the Human Rights Commissions, which are overburdened and take long time in disposing cases pending before them. In the larger public interest, by applying the doctrine of "speedy trial", all cases pertaining to violation of Human Rights must be decided without any unnecessary delay. The Human Right Courts are the better instrumentalities to achieve this motive.

2) It is far better to make joint efforts to deal with the problems relating to violation of Human Rights.

3) Section 36 of the Act prescribes that the Commission shall not inquire into any matter after expiry of one year from the date of incident. This limitation is applicable only for proceedings before Commissions and not for Human Right Courts.

4) No statutory remedy is provided against the direction, order or report issued by Human Rights Commissions, but the order passed by the Human Right Court can be challenged under the Code of Criminal Procedure, 1973.

5) Under Section 31 of the Act, it is mandatory that in Human Rights Courts, the applicants shall have the assistance of Special Public Prosecutor appointed by the State Governments.

HUMAN RIGHTS PROTECTION THROUGH PART IV OF THE CONSTITUTION

Directive Principles of State Policy

JUSTICE NAGENDRA K. JAIN[1]

Article 36 to 51 in Part IV of the Constitution of India contain the Directive Principles of State Policy. The aim of these Directive Principles is establishment of a "Welfare State" which is envisaged in the preamble to the Constitution. If the U.N. Convention of Right to Development is an inalienable Human Right, the Directive Principles which also aim at development of the State, thereby stand elevated to the level of Human Rights. The Supreme Court in Unnikrishnan's case (AIR 1993 SC 2178) went to the extent of observing that the Directive Principles constitute "Conscience of the Constitution".

Briefly stated, by Article 38, the State is directed to strive to promote the welfare of the people. Article 39 directs the policy of the state to take into account the right of adequate means to livelihood, equal pay for equal work for both men and women, health and strength of the workers, ownership and control of material resources to be so distributed to serve the common goods. Article 39A refers to equal justice and free legal aid which the State is obliged to promote. Article 40 directs the State to take steps to recognize Village Panchayats and by Article 41 the State is directed to strive within the limits of its economic capacity for securing the right to work, right to education and public assistance in cases of employment, old age, sickness and disablement. Provision for just and humane conditions of work and maternity relief and provision for a living wage are the directives in Articles 42 and 43 respectively. Participation of workers in management of industries is referred to in Article 43A. Uniform Civil Code for citizens is a goal to be achieved by the State under Article 44. Provision for free and compulsory education for all children up to the age of 14 years is taken care of by Article 45 and 46 requires the State to promote educational and economic interests of Scheduled Castes and Scheduled Tribes and other weaker sections of the society. Importance with regard to standard of living and improvement of public health are the directives in Article 47 and Article 48 requires the State to organize its agriculture and animal husbandry. Environmental Protection and to safeguard the forest and wild life is what Article 48A

[1] *Former Chairperson, Rajasthan State Human Rights Commission, Former Chief Justice of Karnataka and Madras High Court*

provide for. Likewise, protection of monuments and places of objects of national importance are taken care of by Article 49. Separation of Judiciary from executive is the directive contained in Article 50 and finally promotion of international peace and security is envisaged in Article 51.

INTERPRETATION OF DIRECTIVE PRINCIPLES

In the formative years of the working of our Constitution as interpreted by the Supreme Court, Directive Principles were looked upon as merely directions to the State and it was held that the Directive Principles did not confer any enforceable rights and their alleged breach does not invalidate a law nor does it entitle a citizen to complain of its violation by the State. However, this negative aspect with which the Directive Principles were looked upon began to receive a positive aspect through later decisions of the Supreme Court and we have now reached a state wherein the Directive Principles are looked upon as equivalent to Human Rights and the directives have been held to supplement fundamental rights in achieving a welfare state. The power of the Parliament to amend fundamental rights in order to implement the Directive Principles have also been recognized by the Courts as long as the amendment does not touch the basic structure of the Constitution.

Having thus seen the importance of Directive Principles of State Policy in achieving the aims and objects of the State, it now becomes necessary to know the differences between the Directive Principles of State Policy and the Fundamental Rights.

DIFFERENCES BETWEEN DIRECTIVE PRINCIPLES OF STATE POLICYAND FUNDAMENTAL RIGHTS

Interpretation of Part III and Part IV of the Constitution by the Supreme Court in number of cases has now crystallised the differences that exist between the Directive Principles of State Policy and the Fundamental Rights. The differences between the two are as follows:

(i) The Directives (in short for Directive Principles of State Policy) are not enforceable in the Courts and they do not create any justiciable rights in favour of individuals.
(ii) The Directives require to be implemented by Legislation, but, at the same time no existing Law or Legal Right can be violated under the colour of following a Directive.

(iii) The Courts can declare any law as void on the ground that it contravenes any of the Fundamental Rights.

(iv) The Courts are not competent to compel the Government to carry out any Directive or to make any law for that purpose.
(v) The Directives per se do not confer upon or take away any Legislative Power from the appropriate Legislature.
(vi) Although it is the duty of the State to implement the Directives, yet the State can do so only subject to the limitation imposed by the Constitution itself i.e., Article 13(2) prohibits the State from making any law which takes away or abridges the Fundamental Rights conferred by Part III and the Directive Principles therefore cannot override this categorical limitation.

When one goes through the above differences between the Directive Principles in relation to the Fundamental Rights, one tends to draw the inference that the Directive Principles are rather inferior to the Fundamental Rights. But, there was a shift in the Judicial pronouncements in regard to the interpretation of the Directive Principles of State Policy and ever since Keshavananda Bharathi's case, the Directive Principles began to receive more and more importance. It therefore becomes necessary to trace these developments in judicial pronouncements starting from Keshavanand Bharathi's case in order to fully appreciate the importance of the Directive Principles of State Policy and therefore I now proceed to refer to leading Judgments of the Apex Court of our country.

KESHAVANANDA BHARATHI vs. STATE OF KERALA (AIR 1973 SC 1461)
The relationship between the Fundamental Rights and the Directive Principles has been very well explained in this land mark judgment by the Apex Court thus:

"If any distinction between the Fundamental Rights and the Directive Principles on the basis of a difference between ends or means were really to be attempted, it would be more proper, in my opinion to view Fundamental Rights as the ends of the endeavours of the Indian people for which the Directive Principles provided the guidelines".

"Perhaps, the best way of describing the relationship between the Fundamental Rights of individual citizens, which imposed corresponding obligations upon the State and the Directive

Principles would be to look upon the Directive Principles as laying down the path of the Country's progress towards the allied objectives and aims stated in the Preamble, with Fundamental Rights as the limits of that path, like the banks of a flowing river, which could be mended or amended by displacements, replacements or curtailments or enlargements of any part according to the path. In other words, the requirements of the path itself were more important".

MINERVA MILLS LTD. vs. UNION OF INDIA (AIR 1980 SC 1789)

Speaking for the Court, Justice Bhagawati (as he then was) observed: "The Indian Constitution is founded on the bed-rock of the balance between Parts III & IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution. The goals set out in Part IV have to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III & IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basis structure of our Constitution".

LINGAPPA POCHANNA vs. STATE OF MAHARASHTRA (AIR 1985 SC 389) While dealing with Maharashtra Restoration of Lands to Scheduled Tribes Act, the Court held that the said Act is an illustration of distributive Justice and observed that the Courts should as far as possible uphold the Legislation enacted by the State to ensure "distributive Justice" i.e., laws which seek to remove inequalities and also attempt to achieve a fair division of wealth amongst members of the society.

GRIH KALYAN KENDRA WORKERS UNION vs. UNION OF INDIA (AIR 1991 SC 1773) In this case the Apex Court while dealing with Article 39(d) (Equal pay for equal work) held thus: "Equal pay for equal work is not expressly declared by the Constitution as a Fundamental Right but in view of the Directive Principles of State Policy as contained in Art. 39(d) of the Constitution "equal pay for equal work" has assumed the status of the Fundamental Right in service jurisprudence having regard to the constitutional mandate of equality in Articles 14 and 17 of the Constitution".

STATE BANK OF INDIA vs. M.R. GANESH BABU (AIR 2002 SC 1955) (A) ARTS. 39(D), 16 - For applicability of the rule equal pay for equal work, the relevant criterion is nature of work and not volume of work done. Functions may be the same, but responsibility makes the difference. Persons were holding similar posts and doing similar work, difference being only in degree of responsibility, reliability and confidentiality, it was held that it affords valid ground to give them different pay scales. Further, the Officers in junior management grade of the Bank had challenged the benefit of higher starting pay given to Probationary Officer, Trainee Officer and Rural Development Officer (Generalist Officers), but denied to Specialist Officers such as Asstt. Law Officer, Security Officer, Asstt. Engineer etc. Such denial of higher start to Specialist officers was held to be justified on the ground that the Specialist Officers were not exposed to operational risk and do not take vital decisions as taken by Generalist Officers. When it comes to question of pay scales and pay benefits, the recommendations of Pay Commission, pay structure adopted by Government pursuant to such recommendation, questions regarding equivalence of posts, nature of duties and responsibilities attached to the post are the relevant considerations. (See State of Bihar Vs. S.P.M. Staff Union : AIR 2002 SC 2145). Advocates working as part-time lecturers on purely contractual basis, have no legal right to obtain writ of or in nature of mandamus directing authorities to grant minimum scale of pay of Assistant Professors. They being no in regular employment, principles of service jurisprudence cannot be extended to an advocate who is acting as part time lecturer (A.P. Angsumohan vs. State of Tripura : AIR 2004 SC 267).

RANDHIR SINGH vs. UNION OF INDIA (1992 (1) SCC 618) - In this case, the Supreme Court once again dealing with Article 39(d) of the Constitution emphasized the importance of Directive Principles of State Policy by declaring that “equal pay for equal work” is not a mere demagogic slogar but it is a constitutional goal capable of attaining through Constitutional remedies. The Court went on to declare thus:

“Directive Principles as even pointed out in some of the Judgments of this Court, have to be read into the Fundamental Rights as a matter of interpretation”.

DELHI DEVELOPMENT HORTICULTURE EMPLOYEES UNION vs. DELHI ADMINISTRATION (AIR 1992 SC 789)

Referring to Article 41 of the Constitution which deals with right to work, to education and to public assistance, the Supreme Court gave reasons why this important right has been placed in Part IV and not in Part III of the Constitution. The Court observed thus: "The country has so far not found it feasible to incorporate the right to livelihood as a Fundamental Right in the Constitution. This is because the country has so far not attained the capacity to guarantee it, and not because it considers it any the less fundamental to life. Advisedly, therefore, it has been placed in the Chapter of Directive Principles. Article 41 which enjoins upon the State to make effective provision for securing the same 'within the limits of its economic capacity and development'.

MOHINI JAIN vs. STATE OF KARNATAKA (AIR 1992 SC 1858)
In this case, the Supreme Court was called upon to deal with the question of right to education under Article 41 and once again the Court emphasized the importance of Directive Principles by holding that the right to education is concomitant to the Fundamental Rights and made the following observation:

"The directive principles which are fundamental in the governance of the country cannot be isolated from the Fundamental Rights guaranteed under Part III. These principles have to be sent into the Fundamental Rights. Both are supplementary to each other. The State is under a constitutional mandate to each other. The State is under a constitutional mandate to create conditions in which the Fundamental Rights guaranteed to the individuals under Part III could be enjoyed by all. Without making "Right to education" under Article 41 of the Constitution a reality, the Fundamental Rights under Chapter III shall remain beyond the reach of large majority which is illiterate. The Fundamental Rights guaranteed under Part III of the Constitution of India including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is education and is conscious of his individualistic dignity".

CONSUMER EDUCATION & RESEARCH CENTRE AND OTHERS vs. UNION OF INDIA AND OTHERS (AIR 1995 SC 922)

The case relating to remedial measures for the protection of health of the workers engaged in mines and asbestos industries came up before the Supreme Court for consideration in a petition filed under Art. 32 of the Constitution by way of Public Interest Litigation. The Supreme Court by interpreting the Preamble, Articles 21, 38, 39(e), 41, 43(a), 48A in the background of the concept of social justice, virtually included the Directive Principles within the fold of right to life and the expanded meaning given to the expression 'life' by the Supreme Court led to many of the Directive Principles being equated to inalienable right to life. The Supreme Court in this case observed thus:

"Right to health, medical aid to protect the health and vigour to a worker while in service or post retirement is a fundamental right under Article 21, read with Articles 39(e), 41, 43, 48A and all related Articles and fundamental Human Rights to make the life of the workman meaningful and purposeful with dignity of person".

AIR INDIA STATUTORY CORPORATION vs. UNITED LABOUR UNION (AIR 1997 SC 645) - The question of abolishing contract labour system and absorbing the employees who were contract labourers under the appellant, came up for consideration before the Supreme Court in this case. Once again, the issue of right to work was the borne of contention between the parties. The Supreme Court referring to Directive Principles observed thus:

"The Directive Principles in our Constitution are forerunners of the UNO convention of right of development as inalienable Human Rights. The said principles are embedded as integral part of our Constitution in the Directive Principles. Therefore, the Directive Principles now stand elevated to inalienable fundamental Human Rights. Even they are justiciable by themselves".

HUSSAINARA KHATOON & OTHERS vs. HOME SECRETARY STATE OF BIHAR (AIR 1979 SC 1369), In this case, though the question before the Court was about under trial prisoners being detained in jail for longer period and this fact having been found to be in violation of Article 21, the Supreme Court referring to Article 39A of the Constitution with regard to free legal aid, observed thus:

"Article 39A of the Constitution also emphasizes that free legal service is an unalienable element 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 the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer."

SUKHDAS vs. UNION TERRITORY OF ARUNACHAL PRADESH (AIR 1986 SC 991)

Once again the Directive Principles enshrined in Article 39A came up for consideration and the Supreme Court by following the law aid down in Hussainara Khatoon's case reiterated the importance of free legal assistance at the State's cost and declared that it is a Fundamental Right of a person implicit in the requirement of the procedure prescribed under Article 21.

The following are some of the recent decisions of the Apex Court in which the directive principles of state Policy have been recognized: (1) GUJARAT AGRICULTURAL UNIVERSITY vs. RATHOD LABHU BECHAR & OTHERS (2001 AIR SCW 351) —A scheme was formulated for absorption of daily wage workers of Gujarat Agricultural University completing 10 years of service, in a phased manner. Upholding its viability, it was held that the financial viability was no ground to disentitle claim of workman and financial means have to be stretched to the maximum and maximum posts should be created even at first stage of absorption. Workers who are not regularized, were entitled to minimum wage as prescribed by Govt. from time to time as proposed under the scheme and not pay scale as admissible to incumbent regularized on similar post doing similar work.

(2) In THE DENTAL COUNCIL OF INDIA vs. SUBHARTI K.K.B. CHARITABLE TRUST (2001 AIR SCW 1883)

—Decision was taken by expert bodies like Dental Council of India to established Dental College and admit 60 students instead of 100 students. Refusal to approve strength of 100 students was in view of the fact that land, building, equipment and staff etc. were adequate for only 60 admissions. It was held that the right to education was concomitant with fundamental right, if permission is straightway granted by issuing mandamus, society, education and ultimately students will suffer.

(3) In T.N. GODAVARMAN THIRUMALPAD vs. UNION OF INDIA (2001 AIR SCW 2456) —No consensus amongst deficient States regarding preservation of existing forest cover, show cause notice was issued to the Union of India directing it to bear expenses of maintaining natural forest and forest cover.

(4) In MAHATMA PHULE AGRICULTURAL UNIVERSITY vs. NASIK ZILLA SHETH KAMGAR UNION (2001 AIR SCW 3105), some daily wagers in Agricultural Universities raised dispute on the principle of equal pay for equal work. The award passed granting higher rate of wages was held to apply even to daily wagers not covered by award in view of principles of equal pay for equal work. Reservation other than constitutional reservation was held to be subversion of fraternity, unity, Integrity and dignity of individual and fundamental duties cast on citizens. They are relevant in determining reasonableness of reservation. It was further observed that extending reservation beyond under-graduate medical education is keeping the crippled, crippled for ever. {See A.I.I.M.S. STUDENTS UNION vs. A.I.I.M.S. AND OTHERS (2001 AIR SCW 3143) Arts. 14, Pre. 41, 47, 51A, 226}

(5) In A.I.C.C. OF TRADE UNIONS vs. UNION OF INDIA—(2001 AIR SCW 4825), a direction to frame a scheme ensuring adequate means of livelihood, living wages, etc. with financial assitance/grant from Govt. was sought on grounds that a similarity situated institution has been given grant and on same parity grant should be given to the petitioner's institution. The Court further directed the Union authority to deal with the said representation within a period of four months.

(6) In GOVT. OF ANDHRA PRADESH vs. P. HARI HARA PRASAD (AIR 2002 SC 3645), employees of subordinate Courts had claimed pay parity with Assistants, Typists and Seno-typists of State Secretariat, it was held that the Court cannot under its discretionary jurisdiction go into

the nature of duties performed by employees, and on that basis issue mandamus directing pay parity, mandamus issued by the High Court directing that pay parity be granted to employees of subordinate Courts on assumption that posts in subordinate Courts and Secretariat are identical and employees perform same duty, was set aside. However, the order accepting the claim of the employees of the High Court for pay parity was upheld. Equal pay for equal work is not a fundamental right of an employee, it is only a constitutional goal to be achieved by the Govt. Pay parity between employees of State Govt. and Central Govt. cannot be claimed merely on the basis of identity of designation (STATE OF HARYANA vs. HARYANA CIVIL SECRETARIAT : AIR 2002 SC 2589). Pay parity had been challenged in that case by Personal Assistants in the State Secretariat with P.A.s in the Central Secretariat. Averment in the petition ws that duties and responsibilities of the two posts were similar. Even if this is not rebuted, it cannot form the basis for grant of pay parity. High Court wrongly assuming that the averments as to similarity of duties and responsibilities remained undisputed. Ordered pay parity without comparing the nature of duties and responsibilities of the two P.A.s, the eligibility qualification was fixed for their recruitment. The order was set aside.

(7) In SISIR KUMAR MOHANTY vs. STATE OF ORISSA (AIR2002 SC 2314), erstwhile cadres of ministerial staff working in offices of DIG, IGP and DGP at Head Quarters and Ministerial staff were working in district. Their methodology of recruitment and qualifications for appointment were different. By virtue of resolution dated 7th September, 1974 there is no fusion of cadres of Ministerial Staff at DIG/IG and in districts. Subsequent rules framed in 1995 also treat them as separate cadres. Court however allowed monetary benefit available to the appellant in terms of judgment in 1998 (6) SCC 176 on grounds of equal pay for equal work.

(8) In matters like child rape cases, which constitute a crime against humanity, it is the duty of Courts to provide proper legal protection to such children. {STATE OF RAJASTHAN vs. OM PRAKASH (AIR 2002 SC 2235)}.

(9) In M.C. MEHTA vs. UNION OF INDIA (AIR 2002 SC 1696), directions were given to phase out non-CNG buses and reduce use of diesel. Time limit was fixed by Court as there was no shortage of CNG. Owners of diesel buses which continues to ply diesel buses beyond 31st January, 2002 are made liable to pay fine of Rs. 500/- per bus per day increasing to Rs. 1,000/- per day after

30 days of operation of the diesel buses. Same was directed to be deposited in Court by the Director of Transport by the 10th day of every month. Union and all governmental authorities were directed to prepare a scheme containing time schedule for supply of CNG to other polluted cities and furnish the same to the Court by 9.5.2002 for its consideration.

(10) While dealing with religious freedom vis-à-vis uniform Civil Code, it was observed that the premise behind Article 44 is that there is no necessary connection between religion and personal law in civilized society; that the Parliament is still to steep in for framing a Common Civil Code in the country, is a matter of regret; and that Common Civil Code will help the cause of national integration by removing the contradictions based on idealogies. {JOHN VALLAMATTOM vs. UNION OF INDIA (AIR 2003 SC 2902)}.

(11) In INDIAN HANDICRAFTS EMPORIUM vs. UNION OF INDIA (AIR 2003 SC 3240), the prohibition of trade in imported ivory was in question. It was observed that the trade being dangerous to ecology, it was sought to be regulated by imposing total prohibition qua Wild Life (Protection) amending Act of 1991. Held: Amending Act indirectly seeks to protect Indian Elephants and to arrest their further depletion and it was not ultra vires Article 19(1)(g).

CONCLUSION

Having thus examined the various land mark judgments of the Supreme court with regard to interpretation of Directive Principles of State Policy, it is now cleaer that in effect these judgments have lifted Directive Principles to the level of Fundamental Rights and the broad propositions laid down in the above cases will have far reaching effects in future in so far as the interpretation of Directive Principles of State Policy is concerned. Thus it can be said that though Directive Principles cannot override Fundamental Rights, but in so far as determining the scope and ambit of Fundamental Rights, the Courts now cannot entirely ignore the Directive Principles, but will have to apply the doctrine of harmonious construction so as to give effect to both Fundamental Rights and Directive Principles.

The Expectations and Challenges of Judicial Enforcement of Social Rights

By:

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1. INTRODUCTION

A discussion on the Indian jurisprudence in the area of economic and social rights has to begin with the Constitution. The Indian legal system is complex: Inherited from the colonial and common law model[1], the formal legal system is based on a written constitution, in effect since 1950. The Constitution delineates the enforceable fundamental rights and the non-enforceable Directive Principles of State Policy (DPSP) as well as the powers and obligations of the State. A significant feature of the Constitution of India is the principle of checks and balances by which every organ of state is controlled by and is accountable to the Constitution and the rule of law. The validity of the decisions of the Government can be challenged in the Supreme Court or the High Courts and writs of mandamus are available to enforce the State's obligations. Also, the laws made by the legislature can be struck down by these courts, if found contrary to the provisions of the Constitution. In addition, there are a number of statues, both at the federal and provincial (state) levels that touch upon various aspects of economic, social and cultural rights.

These broad powers of constitutional review, combined with far-reaching legislation, have proved critical in the judicial enforcement of economic, social and cultural rights, which has produced a vast body of case law in the Supreme Court and the High Courts. This piece cannot traverse the entire gamut of these sources for want of space and so is confined to discussing the broad contours of the law and some of the significant decisions handed down by the Courts seeking to enforce economic and social rights in India.

The first part of this article sets out the position of socio-economic rights in the Indian Constitution. This is followed by an overview of the position in relation to access to legal services, the growth of judicial activism and public interest litigation. The judicial decisions in areas of specific rights, including the rights to housing, health care, food, work and education are thereafter discussed. The penultimate section seeks to review the impact of

judicial intervention. The conclusion is an assessment of the Indian experience in judicial enforcement and protection of economic, social and cultural rights.

2. SOCIO-ECONOMIC RIGHTS WITHIN THE CONTEXT OF THE CONSTITUTION

The Constitution of India, in its preamble, reflects the resolve to secure to all its citizens 'justice, social, economic and political; liberty of thought, expression, belief, faith and worship and equality of status and of opportunity[2]. Among the fundamental rights guaranteed to all persons under Part III of the Constitution are the rights to life (Article 21) and the right to equality (Article 14). Freedom of speech and expression, the freedom to assemble peaceably, the freedom to form associations, the freedom of movement and residence, and the freedom to practices any profession and to carry on any occupation, trade or business[3] are also part of the chapter on fundamental rights (See Article 19). These are subject to reasonable restrictions on the grounds of sovereignty and integrity of the country, security of the State, public order, decency or morality[4]. The right to equality under article 14, the right against double jeopardy and self-incrimination under Article 20, the right to life under Article 21 and the right to be informed of the grounds of arrest and the right to consult and be defended by a legal practitioner of one's choice under article 22 are available to all persons[5], while the freedoms enumerated under Article 19 are available for enforcement only by citizens.

The remedy provided in the Constitution for violation of rights and against unlawful legislative and executive acts is to approach the High Courts under article 226 and the Supreme Court under article 32 of the Constitution. Judicial review of executive action, legislation and judicial ad quasi-judicial orders is recognized as part of the 'basic structure' of the Constitution[6]. The power of judicial review cannot be taken away even by an amendment to the Constitution[7]. The Supreme Court as the final word on the interpretation of the Constitution. The law declared by the Supreme Court is binding and enforceable by all authorities – executive, legislative and judicial[8].

Part IV of the Constitution lists out the Directive Principles of State Policy (DPSP). Many of the provisions in Part IV correspond to the provisions of the international Covenant on Economic Social and Cultural Rights (CESCR). For instance article 43 provides that the State shall endeavor to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage,

conditions of work that ensure a decent standard of life and full enjoyment of leisure and social and cultural opportunities, and in particular the state shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas. This corresponds more or less to Articles 11 and 15 of ICESCR[9]. However some of the rights in the ICESCR, for instance the right to health (Article 12 of the ICESCR) and a plethora of other economic, social and cultural rights, have been interpreted by the Indian Supreme Court to form part of the right to life under article 21 of the Constitution thus making it directly enforceable and justiciable[10]. As India is a party to the ICESCR, the Indian legislature has enacted laws giving effect to some of its treaty obligations and these laws are in turn enforceable in and by the courts[11].

At the time of drafting of the Constitution, it was initially felt that all of the rights in the DPSP should be made justiciable. However, a compromise had to be struck between those who felt that the DPSPs could not possibly be enforced as rights and those who insisted that the Constitution should reflect a strong social agenda[12]. Consequently, article 37 of the Constitution declares that the DPSP 'shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws'.

The subsequent amendments to the Constitution have emphasized the need to give priority to the DPSPs over the fundamental rights. In the context of land reforms, the 25th Amendment to the Constitution in 1971 inserted Article 31C[13] which insulated from judicial challenge a law giving effect to the DPSPs in article 39 (b)[14] and 30 (c)[15] of the Constitution. The statement of objects and reasons in the Bill that introduced this amendment made it explicit that the intention was to give priority to the directive principles over the fundamental rights[16].

2.1 COVERAGE OF DISADVANTAGED GROUPS AND NON-NATIONALS

The recognition in the Indian Constitution of the need for affirmative action provisions for socially and educationally disadvantaged groups is significant. In India, certain classes of citizens have historically and socially suffered discriminatory treatment, including those officially known as Scheduled Casts (SC) and Scheduled Tribes (ST). Article 15 (4), which prohibits discrimination on the grounds of religion, race, caste, sex or place of work, nevertheless contains a provision that permits the State to make 'any special provision for the

advancement of any socially and educationally backward classes of citizens or for the SCs and STs'[17]. In the matters of public employment also, the State can make special reservation in favour of 'any backward class of citizens, which, in the opinion of the State, is not adequately represented in the services under the State'[18]. The Traditions and customs that are followed by the tribal communities in different parts of India have been allowed to continue even after the making of the Constitution and Article 244, read with Schedule V to the Constitution, ensure the preservation and protection of the tribal culture, customs and traditions.[19]

The Indian Constitution recognises religious minorities as well as linguistic minorities. There are specific provisions in the chapter on fundamental rights that recognizes the right of 'every religious denomination or any section thereof' to have the right to establish and maintain institutions for religious and charitable purposes and to manage their own affairs in matters of religion[20]. An educational institution for a religious minority that is not financially supported by the State is free to devise its own admission procedures subject to regulation by the State[21].

2.2 HORIZONTAL APPLICATION

The specific wording of the different provisions of the Constitution indicates whether it is enforceable only against the State or also against individuals and non-state entities. For instances, article 14 requires that 'the State shall not deny to any person equality before the law or equal protection of the law within the territory of India'. Article 15 (1) also requires that 'the State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them'.[22] On the other hand, article 15 (2) which guarantees that 'no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restrictions or conditions with regard to' access to shops, public restaurants, use of wells, tanks, bathing places, roads, is enforceable even against other persons, including associations, firms or corporations[23]. Article 17, which abolishes untouchability, and article 23, which prohibits the trafficking of human beings and degrading forms of forced labour, are likewise enforceable even against individuals and non-state entities. The prohibition in article 24 against employment of children below the age of 14 years in any factory or mine or in any other hazardous employment is also enforceable not only against the State, but against corporations as well.

Part IV A of the Constitution, which was inserted by the 42nd Amendment in 1976, sets out, in article 51A, fundamental duties which, among others, require every citizen of India ' to promote harmony and spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women'[24] and a citizen who is a parent or guardian 'to provide opportunities for education to his child or as the case may be ward between the age of 6 and 14 years[25].'

Thus, there are various provisions in the Constitution that are reflective of the horizontal application of rights in the context of the universal characteristics of non-discrimination as well as the unique characteristic of the particular right.

2.3 INTERNATIONAL LAW AND THE CONSTITUTION

Article 51 (c) of the DPSP requires the State to 'foster respect for international law and treaty obligations in the dealings of organized people with one another'. Under article 253 of the Constitution, the Parliament has the power to make any law 'for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body'. For instance, the Immoral Traffic (Prevention) Act, 1956, was enacted following the ratification by the Government of India of the International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Similarly, Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, was enacted pursuant to India becoming a signatory to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region.

The Indian Judiciary has in the recent past drawn on international human rights law to redress the grievance of women facing sexual harassment at the workplace. In *Vishaka v. State of Rajasthan*[26] it was declared that the provisions of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), to which India was a State party, were binding and enforceable as such in India. The Court proceeded to adapt several of the standards and norms contained in the CEDAW provisions while formulating biding guidelines which would remain in force till such time the Parliament enacted an appropriate law[27].

2.4 LEGAL STANDING AND ACCESS TO LEGAL SERVICES

The challenge of providing equal and effective access to justice has been daunting for successive governments, legislatures and the judiciary. Although the Constitution in article 39 A, a directive e principle of State policy, requires the State to secure that 'the operation of the legal system promotes justice' and that it ought to provide free legal aid by suitable legislations or schemes, much remains to be done to deliver the constitutional promise. One response to the problem has been the judicial innovation of 'Public Interest Litigation' (PIL), which has enabled issues concerning the underprivileged sections of society to be brought before the courts. A precursor to this was the Supreme Court invoking its power of judicial review, and in assertion of its predominant role as the interpreter of the Constitution, to expand the scope and content of the right to life under article 21 of the Constitution and introduce the notion of substantive due process. This is discussed in the Section that immediately follows.

2.5 SUBSTANTIVE DUE PROCESS

In the initial phase the Supreme Court was reluctant to recognize any of the directive principles as being enforceable in the courts of law. In fact, it was held that 'the directive principles have to conform to and run subsidiary to the chapter on fundamental rights'[28]. In the *Fundamental Rights* case[29], the majority opinions of the Supreme Court of India reflected the view that what is fundamental in the governance of the country cannot be less significant than what is significant in the life of the individual. One of the judges constituting the majority in that case said: 'In building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles'[30]. This view that both the fundamental rights and DPSP are complementary, 'neither part being superior to the other', has held the filed since[31]. However, even here the Court has retained its power of judicial review to examine if in fact the legislation under examination is intended to achieve the objective or article 39(b) and (c), and where the legislation is an amendment to the Constitution, whether it violates the basic structure of the Constitution[32]. Likewise, courts have used DPSP to uphold the constitutional validity of statues that apparently impose restrictions on the fundamental rights under article 19 (freedom of speech, expression, association, residence, travel and to carry o business, trade or profession) as long as they are stated to achieve the objective of the DPSP[33]. The DPSPs are seen as aids to interpret the

Constitution and more specifically to provide the basis, scope and extent of the content of fundamental right[34].

The recognition that the fundamental rights chapter (Chapter III of the Constitution) implicitly acknowledges the right of substantive due process had to wait for nearly three decades after the commencement of the Constitution. In 1950 in *A. K. Gopalan v. State of Madras*[35], the Court felt constrained to adopt a legalistic and literal Interpretation of article 21 as excluding any element of substantive due process. It was held that as long as there was a law that was validly enacted, the Court could not examine its fairness or reasonableness. This view underwent a change in 1978, soon after the internal emergency during which there were large-scale violations of basic liberties and political rights[36]. This was done through a series of cases of which *Maneka Gandhi v. Union of India*[37] was a landmark. The case involved the refusal by the Government to grant a passport to the petitioner, which thus restrained her liberty to travel. In answering the question whether this denial could be sustained without a pre-decisional hearing, the Court proceeded to explain the scope and content of the right to life and liberty. The question posed and the answer given now was: 'Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements? Obviously the procedure cannot be arbitrary, unfair or unreasonable'[38]. Once the scope of article 21 had thus been explained, the door was open to its expansive interpretation to include various facets of life. In 1981, in *Francis Coralie Mullin v. The Administrator*[39], the Supreme Court declared:

> The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.

2.6 RIGHT TO LEGAL AID

In 1987, the Indian Parliament enacted the legal Services Authorities Act (LSAA) which gives an expansive meaning to 'legal services' to include legal advice apart from legal representation in cases. Section 12 of the LSAA lists out the categories of persons automatically entitled to legal aid without having to satisfy a means test. This includes a member of the historically and socially disadvantage groups (Scheduled Caste or Scheduled Tribe)[40]; a victim of trafficking in human being or forced labour; a person with disabilities and 'a person under circumstances of underserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster'[41]. The LSAA set up a network of legal aid institutions at the village[42], district[43], and state level[44] and the National Legal Services Authority (NALSA)[45]. These authorities usually comprise members of the judiciary and the executive at the local level.

The functions of NALSA under section 4 of the LSAA include organizing 'legal aid camps, especially in rural areas, slums or labour colonies with the dual purpose of educating the weaker sections of the society as to their rights as well as encouraging the settlement of disputes through *lok adalats'* [46] and 'taking necessary steps by way of social justice litigation with regard to consumer protection, environmental protection or any other matter of special concern to the weaker sections of the society and for this purpose, give training to social workers in legal skills'[47]. Although the LSAA envisages a proactive role for judges, its core area of activity has centered around the organizing of *lok adalats* since it is seen as a useful case management device. They are held periodically, on court holidays, within the court premises and the 'benches' comprise a judge, a lawyer and a social worker. Pending claims in courts for land acquisition compensation, motor accident compensation, insurance claims and claims by banks against defaulters are the most common categories of cases sent to the *lok adalat*. A reference to the *lok adalat* can be made by any one of the parties to the litigation. There are no appeals from the decisions of the *lok adalat* that record a compromise[48]. Encouraged by the 'settlement' of a large umber of cases[49], the LSAA was amended in 2002 to enable the setting up of 'permanent' *lok adalats* which can dispose of disputes involving certain public utilities[50] even if no settlement is reached[51].

The organization of *lok adalats* and legal aid camps has not necessarily been a success[52]. More importantly, they underscore the failures of the formal legal system. The reasons

offered the persuading the litigant to participate in the *lok adalat* are usually that the pending dispute in court would entail unforeseeable delays, prohibitive costs and uncertain results[53].

Also relevant in the context of economic and social rights is the fact that legal aid is still seen as a welfare measure to which the recipient has no 'right'. It therefore, does not come as a surprise that the legal services that are presently available are poorly untilised[54]. The reasons could be general lack of awareness of the availability of legal aid, the belief that a person who gets help for 'free' is disabled from demanding quality service and, thirdly the disinterestedness of lawyers and legal aid administrators in providing competent legal assistance.

These factors explain in large measure why civil society groups continue to approach the High Courts and the Supreme Court in PIL cases for the redress of many of the grievances of the citizens in the area of economic and social rights. As the ensuring discussion on the specific areas of these rights show, the remedies under the statutes concerning them are hardly enforced. This could be attributed to both a lack of awareness of their provisions or plain indifference of those charged with the responsibility of their enforcement.

2.7 JUDICIAL ACTIVISM AND PUBLIC INTEREST LITIGATION

A reference has already been made to the internal emergency that was in force between 1975 and 1977 and its aftermath and this contributed significantly to the change in the judiciary's perception of its role in the working of the Constitution. On the political front the new formation that emerged at the end of the internal emergency was unstable. It was already collapsing by 1978/ 1979, which was when the judiciary initiated PIL, an entirely judge-led and judge-dominated movement[55]. The judges who were responsible for this innovation had earlier submitted reports, as part of expert committees, to address the issue of providing effective legal aid[56]. The recommendations in these reports, which envisioned PIL as a tool for delivering legal services, were however not acted upon by the executive government of the day. The development of the jurisprudence of economic, social and cultural (ESC) rights is also inextricably linked to this significant development.

What made PIL unique was that is acknowledged that a majority of the population, on account of their social, economic and other disabilities, were unable to access the justice system. The insurmountable walls of procedure were dismantled and suddenly the doors of

the Supreme Court were open for issues that had never reached there before. By relaxing the rules of standing and procedure where even a postcard would be treated as a writ petition, the judiciary ushered in a new phase of activism where litigants were freed from the stranglehold of formal law and lawyering[57].

The past two decades have witnessed range of PIL cases on diverse issues – human rights, environment, public accountability, judicial accountability, education, to name but a few. In the earliest of the PIL cases, *Hussainara Khatoon v. State of Bihar*[58] the Supreme Court recommended release of the indigent prisoner on personal recognizance bonds, rather than on unaffordable monetary bail bonds. Another instance of creative judicial activism was in moulding reliefs for rickshaw pullers from Punjab facing problems of obtaining finances to purchase rickshaws[59].

3. NATURE OF ORDERS AND TECHNIQUES

In the sphere of economic, social and cultural rights, PIL orders invariably have two distinct parts- the *declaratory* part and the *mandatory* part. Declaratory orders and judgments, without consequential directions to the state authorities, require acceptance by the State as to their binding nature under article 141 and 144 of the Constitution before implementation can follow. The judgement in *Unnikrishnan J.P. v. State of Andhra Pradesh*[60] is an instance of a declaration: the 'right to education is implicit in and flows from the right to life guaranteed under Article 21' and that 'a child (citizen) has a fundamental right to *free education* up to the age of fourteen years'[62]. The State responded to this declaration nine years later by inserting, through an amendment to the Constitution, article 21-A, which provides for the fundamental right to education for children between the ages of 6 and 14: Mandatory orders, on the other hand, are specific time bound directions to the errant administrative or state authority requiring it to take specific steps. For instance, the PIL that sough strict implementation of the Pre-Natal Diagnostic Technique(Regulation and prevention of Misuse) Act 1994, aimed at preventing the malaise of female foeticide, has witnessed the Supreme Court making periodic orders for time bound compliance. The Court has explained this technique to be that of 'continuing mandamus' where the Court keeps the case on board over a length of time for ensuring the implementation of its directions.

The Court has been required to be innovative in its PIL jurisdiction and has thereby been able to overcome the apparent difficulties posed by these cases. First, the Court usually is concerned with the importance of the cause and will persist with the case even where it finds that the petitioner is not acting bona fide or where the petitioner does not wish to pursue the case further. In either case, the Court can continue with the petition, even without the presence of the petitioner, by appointing and *amicus curiae* instead.[65] Since the Court doest not insist on formal pleading and petitions in PIL, it usually appoints a senior counsel as *amicus curiae* to assist it in addressing the issue in legal terms, sifting out the relevant facts from the documents and pleadings and in helping sharpen the focus of discussion, conscious of the contingencies of judicial functioning.[66] This however can result in the petitioner losing control of the case, giving rise to understandable misgivings.

Secondly, while deciding disputed facts, the Court will in the first instance call for a response from the Government, local authority and any other opposing party. Where the objectivity or veracity of the response is in doubt, or where there is no response at all, the Court will appoint commissioners to verify the facts and submit a report to the Court.[67] The same device can be adopted at the stage of implementation of the Court's orders.[68] Where technical questions that do not admit of judicially manage-able standards are involved, the Court can take the help of commissioners or expert bodies. In environmental matters, the Court usually requests an expert or specialist body, like the National Environment Engineering Research Institute, to ascertain the facts and submit a report to the Court together with recommendation on possible corrective measures.[69] The Court will hear objections to the report before deciding to either accept[70] or reject it.[71]

The Court usually builds into its directions a fore-warning of the consequences of disobedience or non-implementation. Thus, while laying down a detailed schedule for conversion of the mode of motor vehicle plying on Delhi roads to clean fuels, the Court warned that violation of the order would invite action for contempt of court.[72] In the post judgment phase, too, the Court has often retained the case on board for monitoring the implementation of its directions. Thus, the PIL case, in which detailed guidelines concerning arrests were laid down, has been listed with fair regularity and the directions monitored till the present, six years after the main judgement.[73]

4. ANALYSIS OF SPECIFIC RIGHTS

4.1 RIGHT TO WORK

The right to work is expressed in the Indian Constitution as a directive principle of State policy, which is not enforceable in the courts. Article 41 provides that 'the State shall within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public, assistance in cases of unemployment , old age, sickness and disablement, and in other cases of undeserved want.'[74] As regards the rights in work, two of the provisions in Chapter III of the Constitution contain enforceable fundamental rights: non-discrimination(article 14) and equality of opportunity in matters of public employment(article 16). There are other DPSP provisions that recognize the rights in work.

Article 42 enjoins the State to make 'provisions for securing just and humane conditions of work and for maternity relief'. Article 43 provides that the State shall endeavour to secure a living wage and a decent standard of life for all workers. There are number of laws, as enumerated in Appendix I of this chapter, that seek to give effect to these DPSPs. The most recent is the National Rural Employment Guarantee Act, 2005, which is an acknowledgement of the minimum one content of the right and requires the State to not only identify a 'poor household' but also provide one able bodied member of such household one hundred days of work to tide over the severe problem of rural unemployment during non-agricultural seasons.

As far as the experience in case before the courts, the results have not been encouraging. In one of the early cases of enforceability of the right to work was tested. The context was the large-scale abolition of posts of village officers in the State of Tamil Nadu in the south of the country. The Court disagreed with the contention that such abolition of posts would fall foul of the DPDP, stating:

> It would certainly be an ideal state of affairs if work could be found for all the able bodied men and women and everybody is guaranteed the right to participate in the production of national wealth and to enjoy the fruits thereof. But we are today afar away from that goal. The question whether a person who ceases to be a government servant according to law should be rehabilitated by giving an alternative employment is, as the

> law stands today, a matter of policy on which the court no voice.[75]

A possible approach the Court could have adopted was to keep the case on board and require the Government to formulate a scheme for alternative employment to the workmen. The issue of non-implementation of the law abolishing the pernicious practice of bonded labour came for consideration in *Bandhua Mukti Morcha v. Union of India.* [76] This was a PIL case in the Supreme Court brought by an NGO highlighting the deplorable condition of bonded labourers in a quarry in Haryana, not very far from the Supreme Court. The Court drew on the DPSPs while giving extensive directions to the state government to enable it to discharge its constitutional obligation towards the bonded labourers:[77]

> The right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy from particularly clauses(e) and (f) of Article 39 and Article 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women and of the tender of age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State has the right to take any action which will deprive a person of enjoyment of these essentials… where legislation is already enacted by the State providing these basic requirements to the workmen and thus investing their right to live with basic human dignity, with concrete reality and content, the State can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21.[78]

To overcome the hurdle on account of the non-enforceability of the DPSP provisions, the Court drew on article 21 and in effect recognized the rights in work as being enforable.[79] But this trend has seen a slow but sure reversal, particularly in the context of the rights in work. For instance in 1988 case concerning the regularization of the services of a large number of casual (non-permanent) workers in the posts and telegraphs department of the Government, the Court was prepared to invoke the DPSP and recognize the lack of choice of the disadvantaged worker. It said:

> The Government cannot take advantage of its dominant position, and compel any worker to work even as a casual labourer on starvation wages. It may be that the causal labourer has agreed to work on such low wages. That he has done because he has no other choice. It is poverty that has driven him to that state. The Government should be a model employer. We are of the view that on the facts and in the circumstances of this case the classification of employees into regularly recruited employees and casual employees for the purpose of the paying less than the minimum pay payable to employees in the corresponding regular cadres particularly in the lowest rungs of the department where the pay scales are the lowest is not tenable.[80]

However, in October 2005 the question whether this decision requires reversal was considered by the present Supreme Court in a case involving the question of regularizing the services of causal workers who had been working for the state government in Karnataka for period ranging between ten and twenty years.[81]

This trend can also be attributed to the impact of the economic policies that have accompanied liberalization. In 1983, the Court was prepared to recognize the right of workmen of a company to be heard at the stage of the winding up of such company. The Court invoked article 43A, a constitutional directive principle , which required these State to take suitable steps to secure participation of workers of Management.[82] However, in 2001, in a challenge by workmen to the decision of the Government to divest its shareholding in a public sector undertaking in favour of a private party, the Court refused to recognize any right in the workmen to be consulted.[83] The Supreme Court has also declined to read into the law concerning abolition of contract labour any obligation on the employer to re-employ such labour on a regular basis in the establlishement.[84]

In the context of both the right to work and right in work, the trend of judicial decisions has witnessed a moving away from recognition and enforcement of such rights and towards deferring to executive policy that has progressively denuded those rights.

4.2 RIGHT TO SHELTER

There is no express recognition of the right to shelter under the Indian Constitution. The judiciary has nevertheless stepped into recognize this right as forming part of article 21 itself[85] . However, the Court has never really acknowledged a positive obligation on the State to provide housing to the homeless. Even in much cited decision in *Olga Tellis v. Bombay Municipal Corporation,*[86] where the Court held that the right to life included the right to livelihood, it disagreed with the contention of the pavement dwellers that since they would be deprived of their livelihood if they were evicted from their slum and pavement dwellings, their eviction would be tantamount to deprivation of their life and hence be unconstitutional. [87] This trend has continued ever since. In *Municipal Corporation of Delhi vs. Gurnam Kaur,* [88] the Court held that the Municipal Corporation of Delhi had no legal obligation to provide pavement squatters alternative shops for rehabilitation, as the squatters had to legal enforceable right. In *Sodan Sing v. NDMC,*[89] the Supreme Court reiterated that the question whether there can be at all be a fundamental right of a citizen to occupy a particular place on the pavement where he can squat and engage in trade must be answered in the negative. In a case concerning slum dwellers in Ahmedabad, despite the Court making observations about the DPSPs creating positive obligation on the State 'to distribute its largesse to the weaker sections of the society envisaged in Article 46 to make socio-economic justice in a reality,[90] no actual relief was granted to the slum dwellers.

As in the area of the right to work, there has been a marked regression in the area of the right to shelter, compounded by the bringing of PIL cases to the courts by other classes of residents seeking eviction of slum dwellers as part of the protection and enforcement of the former's rights to a clean and healthy environment as demonstrated by the following case.

FORCED EVICTIONS: A CASE STUDY IN MUMBAI

The PIL case brought by the Bombay Environmental Action Group (BEAG)[91] in the Bombay High Court in February 1995 contended that the Sanjay Gandhi National Park had been encroached upon in a large scale by slum dwellers who had put up unauthorized structures and that the authorities were indifferent to the resultant threat to the park. On the basis of the recommendations of a committee appointed by it to examine the problem, the High Court on May 7, 1997 passed a detailed order in regard to removal of encroachments and eviction of

unauthorized occupants. The High Court at this stage did not give any notice or hearing to the slum dwellers. A cut-off date of January 1, 1995 was fixed; those slum dwellers who did not figure in the electoral rolls for the area by the date would be ineligible for any rehabilitation and could be forcibly evicted.[92] The provincial state government was required, within eighteen months, to relocate those eligible to a place outside the boundaries of the National Park and thereafter demolish the structures occupied by them. Until such time electricity and water supply to the structure could be continued.

By the time the case heard next on July 17, 1999, 20,000 structures had already been demolished, but the rehabilitation of those eligible was yet to be completed. The Government informed the Court that at the alternate sites, which were at a considerable distance, each eligible dweller would be allotted pitches of 15 ft. by 10 ft. for which they each had to pay Rs.7000 in four installments. When the slum dwellers complained of arbitrariness in the preparation of lists of eligible persons, the High Court appointed a grievance redressal committee comprising two retired judicial officers and a bureaucrat and mandated that the committee's decision would be final and not be called into question in any court or Tribunal. It directed that the map prepared and the survey carried out by the forest department and submitted to the court was to be treated as final.[93]

In a further order passed on March 13, 2000 the High Court expedited the demolitions and decried the attempts by the association of slum dwellers to ask for resettlement on the periphery of the park. The Court said: 'There is no question of this aspect being considered either by the committee appointed by this court or by the petitioners and for that matter even by the court'[94]. The demolitions soon gained momentum ad were carried out at the rate of 1,000 structures a day with the alternate sites either not being made available of not being equipped for any form of resettlement. Only about 4,000 families could find resources to pay the amount stipulated. The rest found it plainly unaffordable. This led to protests that were brutally put down. The High Court on 17 April, 2000, passed a further order prohibiting demonstrations and agitations within 1 km of the periphery of the national park. Having no alternative, the slum dwellers on April 26, 2000, moved an application before the High Court seeking to be joined in the BEAG's writ petition and be given a hearing. The High Court refused to pass orders and adjourned the hearing on the application to a date beyond the summer recess of the court[95]. By then the demolitions were complete.

A telling feature of the above case is that at no stage did the BEAG or the Government or even the Court think it necessary to solicit the views of the slum dwellers who were in fact the ones directly affected. None of the orders reflect their point of view. To compound this, no attempt was made to find out whether the plan of the park submitted by the forest department or the list prepared by it of the eligible encroachers was in fact correct or not. The device of having the aggrieved slum dwellers approach a grievance redressal committee and preventing them from approaching any other court or even the High Court directly, meant that they would be denied access to justice and would not have any judicial remedy against an adverse order made without hearing them. Inequitably, the burden was on the slum dweller to show that he was wrongly categorized as being ineligible for an alternative site. Considering the difficulty for a person to have her name included in an electoral roll, the choice of the electoral roll as the qualifying requirement meant that a larger number of person would be rendered ineligible and faced the prospect of immediate demolition of their hutments and consequent eviction. Preservation of the national park appears to have been prioritized over the bundle of survival rights – to shelter, health and education, to name a few – of the slum dwellers.

4.3 RIGHT TO HEALTH

This has been perhaps the least difficult area in terms of justifiability for the Supreme Court, but not in terms of enforceability. Article 47 of DPSP provides for the duty of the State to improve public health. However, the Court has always recognized the right to health as being an integral part of the right to life[96]. The principle was tested in a case of an agricultural labourer whose condition, after a fall from a running train, worsened considerably when as many as seven government hospitals in Calcutta refused to admit him as they did not have beds vacant. The Supreme Court did not stop at declaring the right to health to be a fundamental right and asked the Government of West Bengal to pay him compensation for the loss suffered. It also directed the Government to formulate a blueprint for primary health care with particular reference to treatment of patients during an emergency[97].

In *Consumer Education and Research Centre v. Union of India*[98] the Supreme court, in a PIL case, tackled the problem of health of workers in the asbestos industry. Noticing that long years of exposure to the harmful substance could result in debilitating asbestosis, the Court mandated the provision of compulsory health insurance for every worker as enforcement of the worker's fundamental right to health. Other health-related issues that have been

considered in PILs include the quality of drugs and medicines being marketed in the country[99], the rights of the mentally ill[100], and the minimum standards of care to be observed in mental hospitals[101].

In the area of the right to health, the conceptual framework has not been difficult to evolve with the Court readily recognizing it as part of the enforceable right to life[102]. Secondly, the identification of emergency medical care as a core right has been a useful yardstick to evaluate the extent of State obligations. It should be possible to contend that the health policy priorities of the State will have to be tailored to meet these specific minimum obligations.

4.4 RIGHT TO EDUCATION

The insertion of article 21-A in Part III of the Indian Constitution in the year 2002[103], which provided for the fundamental right of education to all children between the ages of 6 and 14, occurred at the end of a process that was triggered of by the judgement of the Supreme Court of India in *Unnikrishnan J. P. v. State of Andhra Pradesh*[104]. The occasion was the challenge brought by private medical and engineering colleges to provincial state law regulating the charging of 'capitation' fees from students seeking admission. The college managements were seeking enforcement of their right to do business. The court expressly negated this claim and proceeded to examine the nature of the right to education. The court refused to accept the non-enforceability of DPSP and the margin of appreciation claimed by the State for its progressive realization. The Court asked:

> It is a noteworthy that among the several articles in Part IV, only Article 45 speaks of a time-limit; no other article does. Has it no significance? Is it a mere pious wish, even after 44 years of the Constitution? Can the State flout the said direction even after 44 years on the ground that the article merely calls upon it to endeavor to provide the same and on the further ground that the said article is not enforceable by virtue of the declaration in Article 37. Does not the passage of 44 years – more than four times the period stipulated in Article 45 – convert the obligation created by the article into an enforceable right? In this context, we feel constrained to say that allocation of available funds to different sectors of education in India discloses an inversion of priorities indicated by the Constitution. The Constitution contemplated a crash programme being undertaken by the State to achieve the goal set out in Article 45. It is relevant to notice that Article 45 does not

> speak of the "limits of its economic capacity and development" as does Article 41, which inter alia speaks of right to education. What has actually happened is – more money is spent and more attention is directed to higher education than to – and at the cost of – primary education. (By primary education, we mean the education, which a normal child receives by the time he completes 14 years of age). Neglected more so are the rural sectors, and the weaker sections of the society referred to in Article 46. We clarify, we are not seeking to lay down the priorities for the Government – we are only emphasizing the constitutional policy as disclosed by Articles 45, 46 and 41. Surely the wisdom of these constitutional provisions is beyond question…[105]

The Court then proceeded to examine how and to what extent this right would be enforceable[106]. The decision in *Unnikrishnan* has been applied by the court subsequently in formulating broad parameters for compliance by the Government in the matter of eradication of child labour:

> Now, strictly speaking a strong case exists to invoke the aid of Article 41 of the Constitution regarding the right to work and to give meaning to what has been provided in Article 47 relating to raising of standard of living of the population, and Articles 39 (e) and (f) as to non-abuse of tender age of children and giving opportunities and facilities to them to develop in a health manner, for asking the State to see that an adult member of the family, whose child is in employment in a factory or a mine or in other hazardous work, gets a job anywhere, in lieu of the child. This would also see the fulfillment of the wish contained in Article 41 after about half of a century of its being in the paramount parchment, like primary education desired by Article 45, having been given the status of fundamental right by the decision in *Unnikrihnan*[107].

The significance of *Unnikrishnan* has been the identification of primary education as a minimum core of the right to education, and this was implicit in the wording of article 45 which set an outer time limit for the 'progressive realization' of the right. Secondly, it prompted a constitutional amendment that formally acknowledged the transformation of this right from a DPSP to an enforceable fundamental right. The importance of the case also lies in its impact on judicial decision making where creativity and innovation are key determinants to effective intervention.

4.5 RIGHT TO FOOD

The issue of recurrent famines in some of the drought-prone regions of India has received a mixed reaction in courts. When a PIL case concerning starvation deaths in some of the poorest districts in the state of Orissa was taken up for consideration, the reaction of the Supreme Court in 1989 was to defer to the subjective opinion of the executive Government that the situation was being tackled effectively[108]. In the early 1990s, the National Human Rights Commission (NHRC) was approached by civil society groups to take action, but its intervention also had only limited success[109]. The Indian Supreme Court's current engagement, again in a PIL case, which confronted the paradox of food scarcity while the State's silos overflowed with food grains in the midst of starvation, has been a contrast to the earlier response.

In April 2001, the People's Union for Civil Liberties approached the Court for relief after several states in the country faced their second or third successive year of drought and, despite having 50 million tones of food stocks, failed to make available the minimum food requirements to the vast drought-stricken population. To being with, the Court identified the area of immediate concern, ordering governments 'to see that food is provided to the aged, inform, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them'[110]. The states were directed to ensure that all the Public Distribution System (PDS) shops were reopened and made functional. Thereafter the states were asked to identify the below poverty line (BPL) families in a time-bound schedule and information was sought on the implementation of various Government schemes that were meant to help people cope with the crisis[111].

This was followed by identification by the Court of the most vulnerable states where hunger and starvation were widespread. On November 28, 2001, the Court made a detailed order containing thee major components[112].

- The benefits available under eight nutrition-related schemes of the Government were recognized as entitlements.
- All state governments were asked to provide cooked midday meals for all children in government and government-assisted schools.

- Governments were asked to adopt specific measures for ensuring public awareness and transparency of the programme.

Acting on the information provided to it, the Court was able to specify the minimum quantities of food and nutrition that had to be made available: each child up to the age of six years was to receive 300 calories and 8-10 grams of protein; each adolescent girl 500 calories and 20-25 grams of protein; each malnourished child 600 calories and 16-20 grams of protein. Following up on this, the Supreme Court in May 2002 gave further directions empowering village administrative bodies (gram sabhas) to oversee the distribution of food supplies under the schemes and setting up grievance redressal mechanisms.

The right to food petition has been instrumental in ensuring the extension of the mid-day meal programme to most of the states in country. Civil society groups have used the Court's order as a useful campaign tool and to seek accountability and information from ration shops under the public distribution system. The Court on its part has persisted with the monitoring of its directions and the supervision of the effectiveness of the steps taking in compliance with its directions[113].

5. IMPACT OF JUDICIAL INTERVENTION

The intervention by the Court in a wide range of issues, including those involving economic, social and cultural rights, has generated a debate about the competence and legitimacy of the judiciary in entering areas which have for long bee perceived as belonging properly within the domain of the other organs of state[114]. But that by itself may not explain the necessity for the Count's intervention in the larger perspective of the development of the law and of healthy democratic practices that reinforce public accountability. To place the debate in its perspective, it may be necessary to briefly recapitulate the implications of judicial intervention through PIL in the area of ESC rights.

The positive implications include:

- Finding a space for an issue that would otherwise not have invited sufficient attention. The decision in Vishaka,[115] for instance, has brought into public discourse the issue of sexual harassment of women in the workplace, which had otherwise been ignored by the executive and the legislature. It becomes immediately useful, as a law declared by

the Supreme Court, to demand recognition and enforcement of the right to access judicial redress against the injury caused to women at the workplace.

- Catalysing changes in law and policy in the area of ESC rights. Many of the recent changes in law and policy relating to education in general, and primary education in particular, are owed to the decision in *Unnikrishnan*[116].

- Devising benchmarks and indicators in several key areas concerning ESC rights. For instance, the decision in *Paschim Banga*[117] delineates the right to emergency medical care for accident victims as forming a core minimum of the right to health and the orders in *PUCL v. Union of India*[118] underscore the right of access for those below the poverty line to food supplies as forming the bare non-derogable minimum that is essential to preserve human dignity.

- Development of a jurisprudence of human rights that comports with the development of international law. PIL cases concerning environmental issues have enabled the Court to develop and apply the 'polluter pays principale'[119], the precautionary principles,[120] and the principle of restitution.[121]

There are a host of other issues that arise in the context of the Court's intervention through PIL and to some of these we now turn.

5.1 COURT AS ARBITER OF THE CONFLICT OF PUBLIC INTERESTS

The PIL case brought before the Supreme Court in 1194 by the Narmada Bachao Andolan (NBA), a mass-based organization representing those affected by the large-scale project involving the construction of over 3,000 large and small dams across the Narmada river flowing through Madhya Pradesh, Maharashtra and Gujarat, provided the site for a contest of what the Court perceived as competing public interests: the right of the inhabitants of the water-starved regions of Gujarat and Rajasthan to water for drinking and irrigation on the one hand and the rights to shelter and livelihood of over 41,000 families comprising tribals, small farmers, and fishing communities facing displacement on the other. In its decision in 2000, the Court was unanimous that the Sardar Sarovar Project (SSP) did not require re-examination either on the ground of its cost-effectiveness or in regard to the aspect of seismic activity. The area of justifiability was confined to the rehabilitation of those displaced by the SSP[122]. By a majority of two to one[123], the Court struck out the plea that the

SSP had violated the fundamental rights of the tribals because it expected that: 'At the rehabilitation sites they will have more, and better, amenities than those enjoyed in their tribal hamlets. The gradual assimilation in the mainstream of society will lead to betterment and progress'[124]. The Court acknowledged that in deciding to construct the dam 'conflicting rights had to be considered. If for one set of people namely those of Gujarat, there was only one solution, namely construction of a dam, the same would have an adverse effect on another set of people whose houses and agricultural and would be submerged in water'[125]. However, 'when a decision is taken by the Government after due consideration and full application of mind, the court is not to sit in appeal over such decision[126]'. Even while it was aware that displacement of the tribal population 'would undoubtedly disconnect them from the past, culture, custom and traditions', the Court explained it away on the utilitarian logic that such displacement 'becomes necessary to harvest a river for the larger good'[127].

5.2 LEGITIMACY AND COMPETENCE

The majority opinion in the Narmada case further highlighted the two principal concerns of the justiciability debate – legitimacy and competence. It declared that 'if a considered policy decision has been taken, which is not in conflict with any law or is not malafides, it will not be in public interest to require the court to go into and investigate those areas which are the functions of the executive'[28]. Further, 'whether to have an infrastructural [sic] project or not and what is the type of project to be undertaken and how it is to be executive, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken'[129]. The dissenting opinion, however, found that there was in fact no environmental clearance for the project as required by the law and it directed that ill such clearance was accorded 'further construction work on the dam shall cease'[130]. The majority's concerns about lack of competence to adjudicate on the issues raised was answered in the dissent thus. 'The many interim orders that this court made in the years in which this writ petition was pending show how very little had been done in regard to the relief and rehabilitation of those ousted. It is by reason of the interim orders, and, in fairness, the cooperation and assistance of learned counsel who appeared for the states, that much that was wrong has now been redressed'[131].

The issue of displacement of large sections of the population on account of the construction of a multi-purpose dam and the question of their right to rehabilitation again came up for consideration in *N. D. Jayal v. Union of India*[132]. This was a PIL questioning the decision

taken to construct the Tehri Dam at the confluence of the Bhagirathi and Bhilangana rivers in the Garhwal region of the Himalayas in the State of Uttaranchal. The petitioners contended that the structure of the dam and its location in a seismically active zone rendered it unsafe with the potential for irreversible harm to human life as well as the environment. The other issue concerned the rehabilitation of those in the villages that would be either fully or partially affected by the dam[133]. It was contended that the environment clearance was conditional upon *pari passu* implementation of the rehabilitation and environmental plans and that in the absence of the rehabilitation of those affected, the construction of the dam ought not to be permitted. Two of the three judges constituting the bench that heard the case declined to examine the safety aspects of the dam, following the dictum in the *Narmada* decision holding that:

> [W]hen the government or the authorities concerned after due consideration of all view points and full application of mind took a decision, then it is not appropriate for the court to interfere. Such matters must be left to the mature wisdom of the Government or the implementing agency. It is their forte …. The consideration in such cases is in the process of decision and not in its merts[134].

In regards to the rehabilitation issue, the Court accepted the version of the Government that there was 'substantial compliance with all the conditions'[135], and that the monitoring of the fulfillment of the conditions for environment clearance would be done by the High Court of Uttaranchal.

The dissenting judge differed on both aspects of safety as well as rehabilitation. Applying the precautionary principle based in international environmental law, but which had also become part of domestic law, it was held that 'it is only after 3-D non-linear analysis of the dam is completed and the opinion of the experts on the safety aspects is again sought that further impoundment of the dam should be allowed'[136]. For the first time perhaps, it was thus acknowledged that:

> [T]here are economic costs as well as social costs and environmental costs involved in a project of construction of a large dam. The social cost is also too heavy. It results in widespread displacement of local people form their ancestral habitat and loss of their traditional occupations. The displacement of economically weaker sections of the society and tribals is the most serious aspect of displacement

> from the point of view of uprooting them from their natural surroundings. Absence of these surroundings in the new settlement colonies shatters their social, cultural and physicals links[137].

The conflict of right in the context of dams and power project was also noticed:

> When such social conflicts arise between the poor and more needy on one side and rich or affluent or less needy on the other, prior attention has to be paid to the former group which is both financially and politically weak. Such less-advantaged group ;is expected to be given prior attention by a welfare state like ours which is committed and obliged by the Constitution, particularly by its provisions contained in the preamble, fundamental rights, fundamental duties and directive principles, to take care of such deprived sections of people who are likely to lose their home and source of livelihood[138].

The purported major premise of the *Narmada* and *Tehri* decisions that it would neither be legitimate nor competent for courts to enter into the arena of policy decisions of the State concerning ESC rights is of course also belief in the decision in certain other PIL cases that suggest otherwise.

5.3 ENVIRONMENT V. LIVELIHOOD: AN AVOIDABLE PROBLEM

There are other contexts in which the Court's decisions exacerbate the conflicts between competing sets of rights and interests. In a PIL case concerning protection of the country's forest cover, the Supreme Court has, with a view to ensuring strict implementation of the various statues concerning forests, given wide-ranging directions, including the complete ban on the felling of trees all over the country, directing that Governments will permit cutting of trees only after obtaining prior permission of the Court on a case by case basis[139] and setting up of a High Powered Committee to take over the functions of the state administration in regard to granting of licences for felling timber and imposing penalties for violations [140]. The directions have hade the effect of not only unilaterally and severely restricting the right's of forest dwellers to remain in and access the forest for fuel and other produce for their basic survival, but have also questioned the very legality of their status[141]. This has, however, not been accounted for by the Court and the attempts by the affected persons to access the courts for redress have been either denied or severely curtailed.

A PIL case brought forth seeking clearing of solid waste/ garbage in the major metropolises in the country, witnessed a concerted attempt by the Court, inter alia, to strictly enforce municipal laws that penalize littering of streets[143], to explore the possibility of privatizing the work of clearing garbage[144] and exempting the workforce from the protective cover of labour welfare legislation[145] of equal concern was the Court's perception that slum clearance was interrelated with garbage disposal since, according to the Court, 'slums generated a great deal of solid waste'[146]. Likening slum dwellers on public land to 'pickpockets', the Court called for an explanation as to why large chunks of land acquired by the land development agency were occupied by slums[147]. This was done without affording the slum dwellers an opportunity of being hearing and oblivious to the direct conflict of two competing public interests: the right of one set of urban dwellers to a clean environment and that of the slum dwellers to shelter[148].

5.4 MASS DISASTERS, MASS TORTS

The failures of the formal legal system in India, in the context of mass disasters, are best exemplified by the litigation arising out of the Bhopal disaster as the following case study demonstrates.

THE BHOPAL GAS LEAD DISASTER : CASE STUDY

When the legal MIC gas leaked from the factory of Union Carbide India Limited (now Eveready Industries India Limited) on the night of December 23, 1984, it triggered off not just one mass disaster, but several of them. Twenty years after the event, we have voluminous data that reveals a mind-boggling myriad of multiple disasters on several fronts.

Soon after the event, the Indian Parliament in 1985 enacted the Bhopal Gas Leak Disaster (processing of Claims) Act, 1985, by which the Union of India would be the sole plaintiff representing all the victims of the disaster who would be potential claimants for com-sensation in a court of law. This, it was believed, would ensure effective access to justice for the Bhopal gas victims. Armed with this Act, the Union of India filed a suit for compensation against Union Carbide Corporation (UCC) before Judge Keenan of the Southern District Court, New York. UCC erected a preliminary defence: it sought to demonstrate that the proper forum for adjudication of this suit was not the court in New York, but the one in India. UCC's expert witness in those proceedings, Nani Palkhivala, glibly asserted on affidavit: 'There is no doubt that the Indian judicial system can fairly and

satisfactorily handle the Bhopal litigation'[149]. Accepting Palhivala's description of the Indian legal system, Judge Keenan dismissed the suit subject to UCC submitting to the jurisdiction of Indian courts. Thereafter, in September 1986, the Union of Indian filed its suit against the UCC in the District Court in Bhopal. In February 1989, the Supreme Court of India approved a settlement whereby UCC would pay the victims $US 470 million in full and final settlement of all civil and criminal claims, in the present and in the future. There was a huge public outcry that the settlement was a 'sell-out'. Review petitions were filed challenging it. The Supreme Court justified its acceptance of the settlement on February 14, 1989 on the ground that 'this court, considered it compelling duty, both judicial and humane, to secure immediate relief to the victims,[150].

Twenty years after the settlement, the relief to the victims has been neither adequate nor immediate. The presumptions on which the settlement was worked out, 3,000 dead and 100,00 injured, underestimated the extent of the figures by a factor of five. In March 2003, the official figures of the awarded death claims stood at 15,180 persons and awarded injury claims at 553,015 persons. The range of compensation which was assumed would be paid in the settlement order was Rs.100,000 to 300,000 for a death claim, Rs.25,000 to 100,000 for temporary disablement and Rs.50,000 to Rs200,000 for permanent disablement. However, each death claim has resulted in an award of not more than Rs.100,000 and overwhelmingly an injury claim has been settled for as little as Rs.25,000.

The astounding and inexplicable feature of the 'settlement' was that UCC was absolved of any liability for future claims. The defenseless population in Bhopal have been left to fend for themselves with no protocol for treatment being available to date. The report of the Gas Relief Department of the Government of Madhya Pradesh dated December 3, 1997 indicated that 22.8 per cent of the affected population suffered from general ailments, 62.46 per cent from throat disorders, 3.32 per cent from eye disorders, 5 per cent from potential disorders and 4.61 per cent from mental disorders. A study conducted in 1990 of 522 patients at two government hospitals meant for the gas victims revealed that over 35 per cent of the patients had been prescribed irrational, banned or unnecessary medicines; and 72 per cent had been given medicines that had no effect at all. A study undertaken by the International Medical Commission of Bhopal (IMCB) confirmed that the victims received at best only temporary symptomatic relief. Further, 'the inadequacies of the environment's health care system has led to a flourishing business situation for private medical practitioners. In the severely

affected areas nearly 70 per cent of the private doctors are not even professionally qualified, yet they from the mainstay of medical care in Bhopal'[151]. The petition also pointed out the findings of the Comptroller and Auditor General that there were numerous financial irregularities in the utilization of the grants already made. Another serious issue pointed out was that '70% of the equipment in the hospitals and clinics under the department of gas relief are dysfunctional'[152] and that there was a severe shortage of medicines and availability of medical facilities in Bhopal[153]. This necessitated another PIL case by the victims in which the Supreme Court has issued directions appointing expert committees to monitor the medical relief and rehabilitation aspects[154].

The continuing suffering of the Bhopal gas victims has been compounded by the inability of the legal system to provide meaningful and effective redress. The disaster answers the prognosis of Marc Galanter that 'at its best, the Indian legal system's treatment of civil claims is slow and cumbrous'[155].

6. ASSESSMENT OF INDIAN EXPERIENCE

The discussion in this piece has largely concentrated upon the decisions of the Indian Supreme Court. The decades of the 1970s and 1980s witnessed a concerted move by the Court to transcend its earlier conservative phase and give a positive direction to the Court's intervention in issues concerning the poor and the disadvantaged. It did this through a creative interpretation of constitutional provisions and a welcome assertion of its powers. The judicial innovation of PIL as a tool to enable access to justice defined a new chapter in the evolution of The Supreme Court as 'a central player in people's lives.

There has been a discernible shift in the approach of the Court over the past two decades to issues concerting economic and social rights. The explicit adaptation of international law standards has been sporadic although one instance is the case concerning the sexual harassment of women in the worksplace.[156] However, there are a number of cases where the orders passed are perfectly consistent with those norms. For instance, the directions issued in the cases concerning emergency medical care, compulsory free primary education and the right to food recognize the State obligation to provide the minimum core of the social right. However, as the decisions in the areas of the right to work and the right to shelter reveal, the judiciary appears to have unquestionably deferred to executive policy that has progressively denuded these rights. The policy decision to continue with large dams and projects that result

in the displacement of millions of people, many of them already socially and economically disadvantaged, has resulted in weakening the ability of such populations to find meaningful livelihood consistent with their right to human dignity. It results in depriving them of a host of other economic and social rights as well. The fact that many of these policies are in a draft form and are inconsistent with state obligations under constitutional and international law only adds to the difficulty.

The courts when approached with petitions seeking enforcement of economic and social rights are often required to content with barriers erected by the law and policy divide, the legitimacy and competence conundrum and the conflict of rights and public interests, to name a few. The discussion in this piece show how their efforts at overcoming these barriers are not consistent and at times ineffective. The need for intervention of the Court is nevertheless underscored by whatever positive impact it has had thus far on policy and law making in the sphere of economic and social rights. It has also helped to establish judicial standards for testing the reasonableness of executive and legislative action. Also, till the objective or providing effective access to justice through an institutionalized model of legal services delivery is achieved, the use of PIL as a legal aid tool will have to persisted with.

The unfinished agenda is a long one indeed. The Bhopal Gas disaster continues to be a grim reminder of the inability of the legal system to cope with the challenges posed by such calamities[157]. it also serves to highlight the pervasive influence of transactional corporations in both law and policy making. The increasing instances of the State withdrawing from its welfare role and resorting to privatization of the control and distribution of basic community resources like water and electricity and for providing health care and education are a cause for concern for those wishing to assert the obligation of the State in the spheres of economic and social rights. The withdrawal of the State in these areas results in a prominent role for the corporate sector in the control of common resources of the community. While on the one hand this transition requires to be contested on the political and judicial fronts, there is a need for the law to clearly demarcate the liability of the corporate sector for the violation of economic and social rights. The international law standards, as much as domestic law, have to be shaped to meet this challenge. The Indian legal system is faced with the challenge of having to learn from the past and order its future. The Indian people have much hope and expectation of it.

Appendix – I

Table showing illustrative list of statues corresponding to particular economic, social and cultural (DSC) rights in provisions in the Indian Constitution:

Provision of the Indian Constitution	**Corresponding Law Enacted by the Indian Parliament**
Article 14 – Equality before the law and equal protection of laws Article 39(d) – Equal pay for equal work	Equal Remuneration Act, 1976
Article 15(3) – Affirmative action provision for women and children	Protection of Women in Domestic Violence Act, 2005 Juvenile Justice (Care and Protection of Children) Act, 2000
Article 39(f) – Right of Children against exploitation	The Child Labour (Prohibition Regulation) Act, 1986
Article 17 – Prohibition of untouchability	Protection of Civil Rights Act, 1955 Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1986 The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993
Article 23 – Prohibition of traffic in human being and forced labour	The Immoral Traffic (Prevention) Act, 1956 The Bonded Labour System (Abolition) Act, 1976 The Contract Labour (Regulation and Abolition) Act, 1970
Article 24 – Prohibition of employment of children below 14 years in hazardous occupation	Factories Act, 1948 The Child Labour (Prohibition and Regulation) Act, 1986
Article 39 A – Equal justice and free legal aid	The Legal Services Authorities Act, 1987
Article 41 – Right to work	The National Rural Employment guarantee Act, 2005
Article 42 – Just and humane conditions of work	Minimum Wages Act, 1948
Article 43 – Living wage for workers	Payment of Wages Act, 1936 The Employees State Insurance Act, 1948 Maternity Benefit Act, 1961 The Beedi and Cigar Workers (Conditions of Employment) Act, 1966
Article 46 – Promotion of interest of SCs, STs and weaker sections	Scheduled Cases and Scheduled Tribes (prevention of Atrocities) Act, 1988
Article 47 – Right to minimum standard of living and public health	Mental Heath Act, 1987
Article 51(c) – Respect of international law and treaty obligations	The Protection of Human Rights Act, 1993 The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participations) Act, 1995

HUMAN RIGHTS OF FAIR AND IMPARTIAL INVESTIGATION

RIGHTS OF FAIR AND IMPARTIAL INVESTIGATION

The police forces are raised by the State under the Indian Police Act, 1861. The basic duty of the police forces is to register cases, investigate them as per the procedure is laid down in the Code of Criminal Procedure and to send them up for trial. In addition to the State Police Forces, the Government of India has constituted a central investigating agency called the Central Bureau of Investigation (CBI) under the special enactment called the Delhi Special Police Establishment Act, 1946. It has concurrent jurisdiction in the matters of investigation in the Union Territories. It can take up the investigation of cases falling within the jurisdiction of the states only with the prior consent of the state governments concerned. The CBI has been empowered to investigate the cases which have been transferred by the Police **Department whether of any State Government or Courts.[1] However, in the very early pasted case of *Prof. K. V. Rajendran* v. *Superintendent of Police, CBCID South Zone, Chennai & Ors*** [2], the Supreme Court of India held that "Transferring of the case to independent investigating agency like CBI must be in rare and exceptional cases. Investigation already been concluded in respect of allegations levelled against accused. Also final report has already been filed". In this case the Supreme Court referred to the case of ***State of West Bengal* v. *Committee for Protection of Democratic Rights case***[3], and clarified that "Extraordinary power to transfer the investigation from State Investigation agency to any other investigation agency must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigation or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights". In another case, the Supreme Court held that "This Court or the High Court has power under Article 136 or Article 226 of the Constitution to order investigation by the CBI. That, however, should be done only in some cases; otherwise, the CBI would be flooded with a large number of cases and would find it impossible to properly investigate all of them".[4] There are certain other specialized investigating agencies constituted by the central government, in various departments, namely, the

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[1] *Rubabbuddin Sheikh* v. *State of Gujarat & Ors*., (2010) 2 SCC 200: AIR 2010 SC 3175.
[2] 2013 Cri. L.J.4464.
[3] AIR 2010 SC 1476; see also *Ashok Kumar Todi* v. *Kishwar Jahan & Ors*., AIR 2011 SC 1254.
[4] *Sakiri Sasu* v. *State of U.P.*, AIR 2008 SC 907.

Customs Department, the Income Tax Department, the Enforcement Directorate, etc. They investigate cases falling within their jurisdictions and prosecute them in the courts of law. Thus, India has both the state police investigating agencies and a central investigating agency as mentioned above. CBI, however, is the primary investigating agency of the central government.

The courts

The cases instituted by the state police and the Central Investigating Agency are adjudicated by the courts. We have a four-tier structure of courts in India. At the bottom level is the Court of Judicial Magistrates. It is competent to try offences punishable with imprisonment of three years or less. Above it is the Court of Chief Judicial Magistrates, which tries offences punishable with less than 7 years. At the district level, there is the Court of District and Sessions Judge, which tries offences punishable with imprisonment of more than 7 years. In fact, the Code specifically enumerates offences which are exclusively triable by the Court of Sessions. The highest court in a state is the High Court. It is an appellate court and hears appeals against the orders of conviction or acquittal passed by the lower courts, apart from having writ jurisdiction. It is also a court of record. The law laid down by the High Court is binding on all the courts subordinate to it in a state. At the apex, there is the Supreme Court of India. It is the highest court in the country. All appeals against the orders of the High Courts in criminal, civil and other matters come to the Supreme Court. This Court, however, is selective in its approach in taking up cases. The law laid down by the Supreme Court is binding on all the courts in the country. c) Prosecution Wing

It is the duty of the state to prosecute cases in the courts of law. The state governments have constituted cadres of public Prosecutors to prosecute cases at various levels in the subordinate courts and the High Court. The investigation of a criminal case, however good and painstaking it may be, will be rendered fruitless, if the prosecution machinery is indifferent or inefficient. One of the well-known causes for the failure of a large number of prosecutions is the poor performance of the prosecution. In practice, the accused on whom the burden is little; he is not to prove his innocence, engages a very competent lawyer, while, the prosecution, on whom the burden is heavy to prove the case beyond reasonable doubt, is very often represented by persons of poor competence, and the natural outcome is that the defense succeeds in creating the reasonable doubt in the mind of the court.

Another important factor for the success of the prosecution is proper coordination between the prosecutor and the Investigating Officer, without in any manner, undermining the independence of the Prosecutor by making subordinate to the police hierarchy. It is to be pointed out that prior to the Code was amended in 1973; the prosecutors appearing in the courts of Magistrates were functioning under the control of the Police Department. Eminent advocates of proven merit were being appointed by the Government for a reasonable term, to function as Public Prosecutors in Sessions Courts. The Prosecutors in those days were giving advice on legal matters wherever necessary. The papers before filing in Courts would be scrutinized by the Prosecutor, and advice given wherever any deficiencies came to be noticed. Only after the rectification of the same, would the papers filed in Court. The Prosecutor would keep a close watch on the proceedings in the case, inform the jurisdictional police, and get the witnesses on dates of trial, refresh the memory of witnesses where necessary with reference to their police statements, and examine the witnesses, as far as possible at a stretch. In view of the close monitoring of the progress of trial witnesses turned hostile in very few cases.

Prisons and Correctional Services.

This is the fourth important element in the criminal justice system. The prisons in India are under the control of the state governments and so are the correctional services.

The adversarial model is characterized by two opposing parties gathering, selecting and presenting evidence for trial. The court has an adjudicative rather than an investigating function; it has no mission to go beyond the evidence presented by the partisan parties (or increasingly, their representatives), either to seek out further information or to verify the probity of that offered. That is the task of the parties themselves. Accuser and accused therefore play a central role in adversarial procedure both in the trial and the pre-trial phase, controlling the nature of the evidence on which the court will base its decision. This is demonstrated in the defendant's decision to enter a guilty plea, which has the effect of short-circuiting the court's fact finding role; the defendant's public admission becomes a formal judicial finding of guilt without the need for any further judicial scrutiny.

The parties to criminal litigation in the adversarial system are the accused on one hand and the state on the other. The criminal investigation and the criminal trial are run by these parties. The Public Prosecutor gathers and presents evidence to prove the defendant‟s guilt, and the

defendant may respond by rebutting the state‟s evidence and by gathering evidence of his own to prove his innocence. The important elements of an adversarial system, for our purposes here, are these:

1. Litigation is run by the parties, and not by the judge. The parties decide who the witnesses will be and what evidence will be presented. The two parties are, at least in theory, of equal status before the court.[5]
2. The defendant, through his counsel, is entitled to confront and cross-examine his accuser.[6]
3. The defendant is entitled to have a jury of laymen to decide the facts of his case.[7]
4. The fact-finder (the jury, or in some cases the judge) may take into account only the evidence presented in court at trial, and may not consider evidence in the pre-trial record which is not presented at trial; this is understood in our tradition as part of the presumption of innocence.
5. The victim has no role in the prosecution of the case.[8]

In case of ***Vinay Tyagi* v. *Irshad Ali @ Deepak***[9] held that Investigation can be ordered in varied forms and at different stages. Right at the initial stage of receiving the FIR or a complaint, the Court can direct investigation in accordance with the provisions of Section 156(1) in exercise of its powers under Section 156(3) of the Code.

Investigation can be of the following kinds:

(i) Initial Investigation.

(ii) Further Investigation.

(iii) Fresh or *de novo* or re-investigation.

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[5] Francis Parks, *Comparative Criminal Justice* 50-59 (Willan Publishing, 2004).

[6] John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 130-31 (Stanford University Press, 3rd edn., 2007).

[7] Erika Fairchild and Henry R. Dammer, *Comparative Criminal Justice Systems* 114 (2nd edn., 2001. [240] Giulio Illuminati, "The Frustrated Turn to Adversarial Procedure in Italy: Italian Criminal Procedure Code of 1988" 4 *Wash. U. Global Stud. L. Rev*. 567, 569 (2005).

[8] Mirjan Damaska, *Problematic Features of International Criminal Justice* 175-180 (2009). [242] [2012] 13 S.C.R. 1026.

[9] 2013) 5 SCC 762

The Initial Investigation is the one which the empowered police officer shall conduct in furtherance to registration of an FIR. Such investigation itself can lead to filing of a final report under Section 173(2) of the Code and shall take within its ambit the investigation which the empowered officer shall conduct in furtherance of an order for investigation passed by the court of competent jurisdiction in terms of Section 156(3) of the Code.[10]

Further Investigation is where the Investigating Officer obtains further oral or documentary evidence after the final report has been filed before the Court in terms of Section 173(8). This power is vested with the Executive. It is the continuation of a previous investigation and, therefore, is understood and described as a "further investigation". Scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the Court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as "supplementary report". "*Supplementary report*" would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a "reinvestigation", "fresh" or "***de novo***" investigation.[11]

However, in the case of a "*fresh investigation*", "reinvestigation" or „de novo investigation" there has to be a definite order of the court. The order of the Court unambiguously should state as to whether the previous investigation, for reasons to be recorded, is incapable of being acted upon. Neither the Investigating agency nor the Magistrate has any power to order or conduct "fresh investigation". This is primarily for the reason that it would be opposed to the scheme of the Code. It is essential that even an order of "*fresh*" or "*de novo*" investigation passed by the higher judiciary should always be coupled with a specific direction as to the fate of the

[10] *Ibid.*
[11] *Ibid.*

investigation already conducted. The cases where such direction can be issued are few and far between. This is based upon a fundamental principle of our criminal jurisprudence which is that it is the right of a suspect or an accused to have a just and fair investigation and trial. This principle flows from the constitutional mandate contained in Articles 21 and 22 of the Constitution of India. Where the investigation ex facie is unfair, tainted, mala fide and smacks of foul play, the courts would set aside such an investigation and direct fresh or de novo investigation and, if necessary, even by another independent investigating agency. As already noticed this is a power of wide plenitude and, therefore, has to be exercised sparingly. The principle of rarest of rare cases would squarely apply to such cases. Unless the unfairness of the investigation is such that it pricks the judicial conscience of the Court, the Court should be reluctant to interfere in such matters to the extent of quashing an investigation and directing a "fresh investigation".[12]

The Cr.P.C, 1973 provides in Section 2(h) that "Investigation" includes all the proceedings under "the Code of Criminal Procedure, 1973" for the collection of evidence conducted by a Police Officer or by any person (other than a Magistrate) who is authorized by a Magistrate.[13] The investigation can be conducted by the Police if it is a cognizable offence.[14] However, the offence whether it is cognizable offence or non-cognizable offence, the police officer in charge may be ordered by a Magistrate who is competent to provision of Section 190 of the Code, to investigate, if the case is decided by such Magistrate.[15]

How/when does an Investigation an offence initiate?

When we talk about criminal investigation in Indian legal system, First Information Reports is very important for the adversarial system. It is fundamental information that brings criminal offence in motion. It is not merely a substantive piece of evidence of the case file,[16] but it is very fundamental information. The Supreme Court in this case held that "FIR, it is settled, is not substantive piece of evidence, but certainly it is a relevant circumstance of the evidence produced by the investigation agency. Merely because the informant turns hostile it cannot be said

[12] *Ibid.*
[13] *Supra* note 29, s. 2(h).
[14] *Id.* s. 156(1).
[15] *Id.* s. 156(3) read with s. 190.
[16] *Bable Alias Gurdeep Singh* v. *State of Chhattisgard Tri. P.S. O.P., Kursipur,* 2012 Cri. L.J. 3676.

that FIR would lose its entire relevancy and cannot be looked into for any purpose". In another case, *Shambhu Dass*[17], the Supreme Court held that FIR under section 154 is not a substantive piece of evidence; it's only used to contradict or corroborate the matter thereof.

In in the case of ***H.N. Rishbud and Inder Singh***[18] the Supreme Court of India observed that "Investigation usually starts on information relating to the commission of an offence given to an officer in charge of a police station and recorded under Section 154 of the Code. If from information so received or otherwise, the officer in charge of the police station has reason to suspect the commission of an offence, he or some other subordinate officer deputed by him, has to proceed to the spot to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender". It is further held "thus, investigation primarily consists in the ascertainment of the facts and circumstances of the case. By definition, it includes "all the proceedings under the Code for the collection of evidence conducted by a police officer".

Thus, under the Code investigation consists generally of the following steps*:*

(1) Proceeding to the spot,

(2) Ascertainment of the facts and circumstances of the case,

(3) Discovery and arrest of the suspected offender,

(4) Collection of evidence relating to the commission of the offence which may consist of

a) the examination of various persons
b) (including the accused) and the reduction of their statements into writing, if the officer thinks fit,
c) the search of places of seizure of things considered necessary for the investigation and to be produced at the trial, and

(5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under section 173

[17] *Shambhu Dass* v. *State of Assam*, AIR 2010 SC 3300: (2010) 10 SCC 374.
[18] [1955] 1 S.C.R. 1150.

Usually, in case of cognizable offences, the investigation is initiated by the giving of information under section 154[19] of the Cr.P.C to a police officer in charge of a police station.

Sub-section (1) of Section 156 confers wide powers on the police to investigate a cognizable offence without any order of a magistrate. If, however, the FIR or other relevant materials do not *prima facie* disclose any cognizable offence, the police in that case have no authority to investigate. In such a case the High Court, in the exercise of its inherent powers under Section 482 or in the exercise of power under Art. 226 of the Constitution may stop and quash such an investigation.

The Supreme Court in ***Babubhai Jamnadas Patel* v. *State of Gujarat***[20] held that in appropriate cases, the courts (Magistrates) may monitor an investigation in to an offence when it is satisfied that either the investigation is not being proceeded with or is being influenced by interested persons.

The issues considered was to whether the Court had power to direct the investigation agency to submit a report in accordance with the view taken by the Court. While concerning with the provisions of sections 156(3), 169, 173 and 190, this Court cited its previous judgment in ***M.C. Abraham* v. *State of Maharashtra***[21], in which the Bench of this could held that while investigation is in progress the court cannot direct the investigation agency to submit a report in accordance with the Court‟s own view. In the facts and circumstances of that case, the court observed that it was open to the Magistrate, to whom the report is submitted by the Investigation Agency after a full and complete investigation to either accept the same or to order a further

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[19] The Section 154 (1) had been amended by the Act No 13 of 2013 (3-2-2013).

Provided that if the information is given by the woman against whom an offence under section 326A, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer:

Provided further that;

(a) in the event that the person against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;

the recording of such information shall be videographed;

[20] (2013) 7 SCC 45

21 (2003) 2 SCC 649; See also *Director, Central Bureau of Investigation* v. *Niyamavedi,* 1995 Cri .L.J. 2917; *State of Haryana* v. *Bhajan Lal & Others* AIR 1992 SC 604.

inquiry. Here, the principle is to prevent the court not to interfere with the investigation agency while the investigation is in progress.

Before a Magistrate directs investigation under Section 156(3) he has to notionally decide that investigation by police is needed and inquiry by him might not be sufficient. It has been suggested that the magistrate should be required to record reasons for his decision.[22] The police in complaint sent to them under Section 156(3) may make the investigation of the offence and send a report to the magistrate under Section 173. In such a case when cognizance is latter taken by the magistrate, it would be deemed to have been taken on the police report and not on the original complaint. The question whether cognizance of the offence has been taken by the magistrate on a complaint or on a police report, is of some importance, because the trial procedure in respect of cases instituted on a police report is different from that in order cases. This is particularly so in trial before a court of session.[23]

The power conferred upon the Magistrate under Section 156(3) can be exercised by the Magistrate even after submission of a report by the investigating officer which would mean that it would be open to the Magistrate not to accept the conclusion of the investigating office and direct further investigation.[24] A Magistrate empowered to take cognizance of an offence under Section 190[25]may, instead of ordering an investigation under Section 156(3), proceed to take cognizance of the offence on a complaint and examine complaint under Section 200. The Magistrate may, if he thinks fit, postpone the issue of process (summons or warrant) against the accused, and either make inquiry into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fits for the purpose of deciding whether or not there is sufficient ground for proceeding. When complaint is sent to a police officer under Section 202 of the Code for investigation and report, the officer has all the power which may be exercised by a police

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22 *Suresh Kumar Kupta* v. *State of Gujarat*, 1997 Cri. L.J. 3948 (Guj); see also *Silk Import and Export Inc.* v. *Exim Aides Silk Exporter*, 1997 Cri. L.J. 4366 (Kant).

23 *Supra* note 29, Ss. 207 & 208, Ss. 238-243 and Ss. 244-247,

24 *State of Bihar* v. *J.A.C. Saldanha*, 1980 SCC (Cri) 272, 286: (1980) 1 SCC 554; *Ram Autar* v. *State of Bihar*, 1986 Cri. L.J. 51 (Pat).

25 Provisions of this Chapter generally applicable to summons and warrants of arrest.

The provisions contained in t Chapter relating to a summons and warrants, and their issue. Service, and execution, shall, so far as may be, apply to every summons and every warrant of arrest issued under this Code.

officer in the course of an investigation as provided in Section 156(1). He is to investigate in precisely the same manner as he would have done if his powers have been first invoked by a First Information Report under Section 154.[26]The report of the police officer is useful for the purpose for deciding whether or not there is sufficient ground for proceeding i.e. whether the process is to be issued against the accused or whether the complaint is to be dismissed under Section 203.The cognizance of the offence being already taken by the Magistrate on the complaint, the subsequent police investigation and report under Section 202 will not make the case as one instituted on a police report. It has been ruled by the Patna High

Court that if the Magistrate takes the cognizance of the offence on the inquiry report of the police officer, otherwise than under Section 173, the case made would not be treated as one instituted on police report inasmuch as the report would not amount to an investigation report.[27]

From the above discussion one can briefly conclude that the process of investigation may start at (a) where FIR is given under Section 154; or (b) where the police officer has otherwise reason to suspect the commission of a cognizable offence (Section 157(1) and 156 (1) or (c) where a competent Magistrate orders the police to investigate;

(i) A non-cognizable case (Section 155(2))

(ii) By sending a complaint to the police officer under Section 156(3) without

(iii) taking cognizance on a complaint under Section 200;

After taking cognizance of the offence on a complaint for the purpose of deciding as to the issue of process against the accused (Section 202(1)) and Section 203

Preliminary Inquiry vs. Registration of FIR

The Problem of whether the police before registering FIR is required to conduct preliminary inquiry to the offence or not, has been the unsettled problems and it is coming to the Court until today. In the case of ***Ramesh Kumari* v. *State (NCT of Delhi)***, (2006) 2 SCC 677. [28]genuineness or otherwise of the information can only be considered after registration of the case. Genuineness or credibility of the information is not a condition precedent for registration of a case.

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26 *Emperor* v. *Bika Moti*, AIR 1938 Sind 113, 114: (1938) 39 Cri. L.J. 681 (FB).

27 *Tung Nath Ojha* v. *Haji Nasiruddin Khan*, 1989 Cri. L.J. 1846 (Pat).

We are also clearly of the view that the High Court erred in law in dismissing the petition solely on the ground that the contempt petition was pending and the appellant had an alternative remedy. The ground of alternative remedy or pending of the contempt petition would be no substitute in law not to register a case when a citizen makes a complaint of a cognizable offence against a police officer. That a police officer mandatorily registers a case on a complaint of a cognizable offence by the citizen under Section 154 of the Code is no more *res integra*.

In the case of ***Lalita Kumari* v. *U.P.***, (2012) 4 SCC 1, an important question has been raised about the issue or Registration of FIR and Preliminary Inquiry to the reported case. An extremely important issue which arose in this petition is whether under Section 154 of the Code of Criminal Procedure Code, a police officer is bound to register an FIR when a cognizable offence is made out or he has some latitude of conducting some kind of preliminary enquiry before registering the FIR. The conflicting of interpretation of the provision of section 154 had continued. The Supreme Court directed and held in this case that;

(i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

(ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

(iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

(iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed.

Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

(v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

(vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

(vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

(viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

In some judgment of the Court, whenever the information of a cognizable offence has been received by the police about the alleged commission of offence, there is duty of the police to register the FIR. In the case of ***Aleque Padamsee* v. *Union of India***[29], the Court referred to the judgment in the case of *Ramesh Kumari* v. *State (NCT of Delhi),* (2006) 2 SCC 677In paragraph 2 of the judgment has observed that "*whenever cognizable offence is disclosed the police officials are bound to register the same and in case it is not done, directions to register the same can be given".*

[29] (2007) 6 SCC 171.

The true meaning of Section 154(1) is that any information relating to the commission of a cognizable offence if given orally, to an officer in charge of a police station shall be reduced in writing by him or under his directions. The provision is mandatory. The use of the word "*shall*" by the legislation is indicative of the statutory intent. In case such information is given in writing or is reduced in writing on being given orally, it is required to be signed by the persons giving it. It is further provided that the substance of commission of a cognizable offence as given in writing or reduced to writing "shall" be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. Sub-section (2) provides that a copy of such information as recorded in sub-section (1) shall be given forthwith free of cost to the informant. So that the informant has to be given a copy of such information which he has reported to the police. In order to constitute the FIR, the information must reveal commission of act which is a cognizable offence.[30] It is submitted that all that the Court has to see at the very outset is what does that provision say. If the provision is unambiguous and if from that provision, the legislative intent is clear, the Court need not call into it the other rules on construction of statutes.[31] This judgment is referred to and followed in a recent decision of this Court in ***B. Premanand* v. *Mohan Koikal*** (2011) 4 SCC 266. It is submitted that the language employed in Section 154 is the determinative factor of the legislative intent. That's meant it is very constructive intent of the legislation. There is neither any defect nor any omission in words used by the legislature. The legislative intent is clear. The language of Section 154(1), therefore, admits of no other construction.

The Court in *Lalita Kumari* case the Court denied the concept of preliminary enquiry as contained in Chapter IX of the CBI (Crime) Manual, first published in 1991 and thereafter updated on 15.7.2005 as unreliable upon to import the concept of holding of preliminary enquiry in the scheme of the Code of Criminal Procedure. The interpretation of Section 154 cannot be depended upon a Manual regulating the conduct of officers of an organization, i.e., C.B.I. But this Court in the case could settle the doubtfulness of the two doctrines.

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[30] *Damodar* v. *State of Rajasthan* 2004 (12) SCC 336; *Ramsinh Bavaji Jadeja* v. *State of Gujarat* 1994 (2) SCC 685.

[31] *Hiralal Rattanlal* v. *State of U.P*, 1973(1) SCC 216.

In ***Rajinder Singh Katoch* v. *Chandigarh Administration*, 2007 (10) SCC 69**, the police in sake of meaning of Article 21 of the Constitution, before registering an FIR shall conduct preliminary inquiry to the case. Therefore, Section 154 must be read in the light of Article 21 and so read preliminary inquiry is implicit in Section 154. The registration of an FIR should be effective and it can be effective only if further investigation is to be carried out and further investigation can be carried out only if the police officer has reasonable ground to suspect that the offence is committed. If, therefore, there is no reasonable ground to suspect the commission of cognizable offence, the police officer will not investigate and if that is a situation, then on the same footing he may decline to register the FIR.

The Supreme Court in this case observed that "although the officer in charge of a police station is legally bound to register a first information report in terms of Section 154 of the Code of Criminal Procedure, if the allegations made by them give rise to an offence which can be investigated without obtaining any permission from the Magistrate concerned, the same by itself, however, does not take away the right of the competent officer to make a preliminary enquiry, in a given case, in order to find out as to whether the first information sought to be lodged had any substance or not. In this case the authorities had made investigations into the matter. In fact, the Superintendent of Police himself has, pursuant to the directions issued by the High Court, investigated into the matter and visited the spot in order to find out the truth in the complaint of the petitioner from the neighbours. It was found that the complaint made by the appellant was false and the same had been filed with an ulterior motive to take illegal possession of the first floor of the house."[32]

While referring to the decision of this Court in *Ramesh Kumari* in para 11 of the judgment in *Rajinder Singh'*s case, it was observed that "we are not oblivious to the decision of this Court in *Ramesh Kumari v. State (NCT of Delhi*) wherein such a statutory duty has been found in the police officer. But, as indicated hereinbefore, in an appropriate case, the police officers also have a duty to make a preliminary enquiry so as to find out as to whether allegations made had any substance or not."

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[32] *Ibid.*

Procedure for Investigation

The Procedure for Investigation in Indian Criminal Justice system is prescribed by section 157 of the Code, the section requires that immediate intimation of every complaint or information preferred to an officer in charge of a police station of the commission of a cognizable offence shall be sent to the Magistrate having jurisdiction. The object of this provision is obvious, and it involves more than a mere technical compliance with the law. The Magistrate is primarily responsible for the condition of the district as regards repressible crime, and he is not at liberty to divest himself of that responsibility or to relax that supervision over crime which the law intends that he should exercise and execute his functions. In considering with the question of whether accusation made in the complaint makes out a case for commission of offence or not, the police while reaching to the *prima facie* satisfaction of suspecting the commission of cognizable offence, cannot ignore the general exception was provided under IPC.

In ***Ahmad Nabi* v. *State of U.P***., 1987 (1) Crime 85 (All), it was held that after registering FIR, he must send the report to the Magistrate and it is a duty-bound of the police officer in charge. It is mandatory in nature. The report is to be sent forthwith to the competent Magistrate. The word "forthwith" in section 157(1) does not mean that the prosecution is required to explain every hour"s delay in sending the copy of FIR to the Magistrate. Of course the same has to be sent with reasonable despatch, which means within a reasonable time, (***Alla China Apparao* v. *State of A.P***., AIR 2002 SC 3648: (200) 8 SCC 440). The word "forthwith" in such section means promptly and without any undue delay, (***Ahmad Nabi* v. *State of U.P***., 1987 (1) Crime 85 (All)) Then he must start to proceed upon the investigation into the case registered if it is a mere cognizable offence. He must forthwith proceed to the spot and without delay take all necessary measures for the discovery and arrest the offenders. The ordinary investigation is undertaken on information he received, the receipt of information is not a condition precedent for investigation. Section 157 prescribes the procedure in the matter of such investigation which can be initiate either on information or otherwise. It is clear from the said provision that a police officer in charge a police station may start investigation either on information or otherwise, (***State of U.P.* v. *Bhagwant Kishore Joshi,*** AIR 1964 SCC 221). The commencement of investigation in a cognizable offence by a police officer is subject to two conditions, firstly, the police officers should have reason to suspect the commission of a cognizable offence as required by section

157(1) and secondly the police officer should subjectively satisfy as to whether there is sufficient ground for entering on an investigation even before he starts an investigation into the facts and circumstances of the case as contemplated under clause (b) of the proviso to section 157(1). As the clause permits the police officer to satisfy himself about the sufficiency of the ground even entering the investigation, it postulates that the police officer has to draw satisfaction only on materials which were placed before him at that stage, namely, the FIR together with the documents, if any, enclosed. In other words, the police officer has to satisfy himself only on the allegations mentioned in the FIR before he enters on an investigation as to whether those allegations to constitute a cognizable offence warranting an investigation. The law is designed to keep the Magistrate informed of the investigation so as to be able to control the investigation and if necessary to give appropriate direction under section 159.

The condition precedent to the commencement of an investigation under section 157 as earlier mentioned is that the FIR must disclose, *prima facie*, that a cognizable offence has been committed. It is wrong to suppose that the police have an unfettered discretion to commence investigation under this section, it was held that their right of inquiry is conditioned by the existence of reason to suspect the commission of a cognizable offence.

After receiving the report sent by the police officer (through superior officer of police as mentions in section 158), such Magistrate may direct an investigation, or, if he thinks fit, at once proceed, or depute an Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in the manner provided in the Cr.P.C. By the meaning of this provision to dispose of means he has powers to dismiss the case if there is no sufficient ground for investigation. The section is primarily provides power of the Magistrate directing an investigation in cases where the police decide not to investigate the case under section 157(1), and it is in those cases that, if he thinks fit, he may choose the second alternative of proceeding himself or deputing any subordinate Magistrate to hold a preliminary inquiry.

Procedure when investigation cannot be completed in 24 hours

As provided by section 157 of the Code, it has been already seen that a police officer cannot detain an accused person arrested without a warrant for more than 24 hours.[33] When the accused is arrested with a warrant, the police officer may keep him in police custody for a period not exceeding 24 hours. Before expiration of such a period, the arrested person has to be produced before the nearest Magistrate, who can, under section 167, order his detention for a term not exceeding fifteen days on the whole, or he may be taken to a Magistrate who has jurisdiction to try the case, and such Magistrate (the competent Magistrate) may remand the person to custody for a term which may exceeding fifteen days but not more than sixty or ninety days. The computation of total period of sixty or ninety days is to be computed from the time when the Magistrate authorized the detention for the first time but not include the 24 hours of police custody (***L.R. Chawla* v. *Murari***, 1976 Cri. L.J. 212 (Del). . The Magistrate who has no jurisdiction to try the case cannot order to put accused in custody whether police or judicial custody more than fifteen days. The intention of the legislature is to that an accused person should be brought before a Magistrate competent to try or commit with, as little delay as possible. Section 57 of the Code is pointer to the intendment to uphold liberty and to restrict to the minimum the curtailment of liberty (***Mohd. Ahmed Yasin Mansuri* v. *State of Maharashtra***, 1994 Cri. L.J. 1854 (1859)). There cannot be any detention in police custody after the expiry of first fifteen days even in a case where some more serious offences, either serious or otherwise committed by an accused in the same transaction come to light at a later state (***Dudh Singh* v. *State of Punjab***, (2000) 9 SCC 266 (267)). As provided above, remand to police custody is permissible within first fifteen days of surrender and not thereafter. The law does not make distinction whether the accused himself surrenders or is arrested by the police (***Public Prosecutor, A.P. High Court* v. *J.C. Narayana Reddy***, 1996 Cri. L.J. 462 (464)). The right of the prosecution to obtain police custody remand under section 167(2) cannot be frustrated by the Court by granting long time to the accused to file

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33 "Person arrested not to be detained more than twenty-four hours".

No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

revision in the high Court and obtain stay order against the order allowing police remand. The remand of accused person to police custody for two days to interrogate them, to know the hide-outs and whereabouts of absconding accused and to recover offence weapons subject to the condition that the police will not ill treat them was held proper.

The extension of remand of the accused is restricted with special reason. The scheme of the Code clearly establishes that the considerations that would weigh with the Magistrate who is competent to try the case at the time of remanding an accused person for a period of 15 days at the first instance is different from the ground on which the period of remand is extended beyond the period of fifteen days as per the proviso. Special reasons must be given for extending the period of remand originally granted *(**G.K. Moopanar* **v.** ***State***, 1990 Cri. L.J. 2685). Where the accused is produced before the Magistrate before the completion of statutory period and prayer is made for extension of remand, the Magistrate must examine the grounds and only extend the period where adequate grounds exist.

CONSTITUTIONAL RIGHTS OF THE ACCUSED TO FAIR AND EFFECTIVE INVESTIGATION

Liberty is the most precious of all the human rights. It has been the founding faith of the human race for more than 200 years.[34] Both the American Declaration of Independence, 1776 and the French Declaration of the Rights of Man and the Citizen, 1789, spoke of liberty being one of the natural and inalienable rights of man. The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948, contains several articles designed to protect and promote the liberty of individual. So does the International Covenant on Civil and Political Rights, 1966.[35] One of equal importance is the maintenance of peace and law and order in the society. Unless there is peace, no real progress is possible. Societal peace lends stability and security to the polity. It provides the necessary conditions for growth, whether it is in the economic sphere or in scientific and technological spheres. Just as liberty is precious to an individual, so is the society interested in peace and maintenance of law and order in the society. Both are equally important. A major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license.[36] Whether it is for securing the liberty of an individual or for maintaining the peace and law and order in the society, law is essential. Not only should there be a proper law, there should also be proper implementation of law. In short, the society should be governed by the rule of law and not by the rule of an individual, however benevolent he may be. Failure of rule of law is a sure indication of the liberty of the individual coming into peril and so does the peace of the society. It is therefore required of law that it should try to promote both these contending concepts and to maintain a balance between them, viz., the balance between the necessity to protect and promote the liberty of the individual and the necessity to maintain peace and law and order in the society. In this Chapter, the comparative analysis of the Cambodian Constitutional provisions and

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34 Government of India, Law Commission of India Report 177th, "Law Relating to Arrest" 5 (December 2001).

35 *Ibid.*

36 Arthur T. Vanderbilt "United We Stand" *A.B.A.J.* 639 (Aug 1938).

Indian Constitutional provisions in light of right to fair and effective investigation by the investigating agency (officers) is to be divided into particular subordinate parts of the Chapter. The Fourth Chapter covers the following subordinate points in each part of Constitutional provisions of Cambodia and India. These are included *i) Right to protect against arbitrary arrest and detention, ii) Right to protect against unlawful search and seizure, v) Right to Legal aid Counsel, iv) Right to protection against self-incrimination and v) Right to Speedy Trial*.. In each point, a comparative analysis is concluded at the end of explanation. The analysis will also be emphasizing on the aspects of International Conventions and norms regarding with right to fair, just, reasonable, non-arbitrariness law in criminal proceeding of investigative phases

Right to Protection against Arbitrary Arrest and Detention

To arrest and detain anyone without observing due process of law is a serious infringement of individual liberty. Anyone who has been arrested will lose educational, employment and other opportunities seriously. In fact, an act of arrest and detention which damage reputation of person irreparably tarnishes the name of his family and deprive the source of sustenance. The stigma of arrested person remains subsequent to the release after 24 hours of his arrest. Thus, it is said that the arrest is a "*doomsday*" device. The freedom from unlawful arrest and detention is the one of the most fundamental and important right among the civil and political right. Any arrest should be justified to avoid unsecured life of individual in society.

Generally, it can be justified on the grounds that individual's prosecution is actually intended or at least contemplated as a possibility. The police, as important agency of state to maintain the law and order, required to justify the every exercise of their powers of arrest by reference to the legal source of these powers. Otherwise, the arrest without justification considers as a serious encroachment upon the liberty of person or persons arrested.

Arrest is not desirable to sue in each and every case. But it accepted that arrest is the most effective method of securing attendance of the accused at his trial. Sometime arrest may become necessary as a precautionary measure in respect of person intending to commit an offence and sometime it becomes necessary for obtaining the correct name and address of a person committing an offence.

Each country has its own constitutional and statutory provisions and judicial decisions regulating the exercise of arrest powers. It is significant to mention here that the law of arrest in the United States of America has not varied significantly from the law of arrest that involved 350 years back under the English Common Law. The Fourth Amendment to the Constitution of the United States of America designed to make the arrest on suspicion impossible.

b) Meaning of Arrest and Detention

The word "arrest" is amorphous. Generally, the word arrest means apprehension of a person by an authority resulting in deprivation of his liberty. But the term defined operationally, as taking a person into physical custody for the alleged commission of an offence in order to initiate a criminal action in a court of competent jurisdiction. Arrest is the taking of a person into custody in order that he may forthcoming to answer for the commission of an offence. A mere pronouncement of arrest or touching of body would be sufficient to put someone under arrest unless the person or persons sought to be arrested surrenders himself to arresting officer. A person or persons deemed to be under arrest either after the submission of himself to police or police overpowers such person. Therefore, where police orders some to stop and the person(s) obeys the command of the police consider that he is under arrest. If a person stopped in connection to the investigation by police and his command to stop obeyed, would constitute a valid arrest. A mere threat to arrest, which is not accomplished by an overt act on the part of police, does not constitute an arrest. Thus, arrest implies apprehension or restraint or deprivation of one's personal liberty. Arrest defined as it consists in taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing him the commission of a criminal offence.

c) Grounds of Arrest to be Informed

The police arrest powers are indeed awesome even though they protect society, they can destroy a life of a person. There are numerous jurists that support the idea that the law of arrest unduly hamper police in the performance of their duties. Public makes the work of the police more difficult by their captious attitude and the public expects and demands that police should provide protection and should give justice to accused person promptly. Thus, the practical problem falls primarily under the police, Prosecutor, or Investigating Judge. Anyone arrested has right to

enquire with police, Prosecutor, or Investigating Judge that on what ground he has been arrested. If a person or persons arrested with warrant, he is entitled to ask to show warrant to him. He has to be satisfied himself that he is being arrested properly. Arrest will be illegal if warrant is not shown to the person arrested with warrant. It is considered that warrant is a media of information of arrest. Thus, the person arrested with warrant will be able to know the grounds of his arrest immediately. The person arrested without warrant has to be served with separate note of information of grounds of arrest.

In ***Christie and another* v. *Leachinsky and another*** [1947] AC 573, the House of Lords of the United Kingdom held that:

> *If a policemen arrests without warrant upon reasonable suspicion of felony, or of the other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason, in other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.*

Thus, the arrested person must be informed of precise act done by him for which he would be tried. In a landmark Judgment regarding with arrest, the Supreme Court of India in the case of ***Joginder Kumar* v. *State of U.P.***, 1994 SCC 260 case held that "Constitutional and legal provisions requiring an arrested person to be informed about the grounds of arrest, her/his right to be represented by a lawyer and to be promptly produced before a court must be strictly followed.

d) Making Presence of Accused before the Court

Legally arrested person is liable to lawful detention in police custody in further criminal proceeding. However, detention can only be done in accordance with law and the police custody must follow the procedures for detaining an arrested person. As per law, the arrested person can be detained up to 24 hours in police custody and it can be extended up 48 hours according to Cambodian Criminal Procedure Code 2007 with the high degree of restriction and very reasonable grounds and circumstances of the case. It is an absolute and mandatory of 24 hour of police custody under Indian Criminal Procedure Code, 1973. Police is required to produced such detainee before a judicial officer within the said period of his arrest excluding period of journey. The arrested person cannot be detained more than the statutory period provided. During this period,

police has to investigate into the involvement of accused in offence committed. If police found him guilty he will be charged formally otherwise he would be released. Though, the permissible period has been claiming insufficient there is no reason at all, to extend statutory period provided by law of police custody. This extension will harm the individual liberty. The Police have power to detain accused for longer period than the statutory period by the order of the court for thorough investigation. Such detention may be termed as arrest and pre-trial detention or provisional detention, for investigation. It assumed that after the police have brought the detained person before a judicial officer, police cease to have control over such person. The police will not dare to resort physical abuse leaving visible welts and bruises on the body of the detainee. By prompt production of the detainee before the judicial officer, it will help not to resort to unlawful acts against the accused.

The right to be brought before a Magistrate (Judicial Officer) within a period not more than 24 hours of arrest have been created with a view (i) to prevent arrest and detention for the purpose of extracting confessions, or as a means of compelling people to give information; (ii) to prevent police stations being used as though they were prisons, a purpose for which they are unsuitable; (iii) to afford an early recourse to a judicial officer independent of the police on all questions of bail or discharge.

It has been standing rule that a police is under a duty to produce detainee before the judicial officer immediately. As well, it is a right of arrested person and detainee also that he should be produced before judicial officer as soon as possible, i.e., within the statutory period of his arrest. This enables the judicial officer to apply his judicious mind. But the question arises that whether a person arrested with warrant should be produced before judicial officer within the said period or not. The judicial mind applied at the time of presence of arrest will be reasonable as the judicial officer will be able to hear arrested person. Reason behind producing arrested person before judicial officer is to examine the legality of the arrest. Thus, the arrested person, even by warrant, is required to produce him before the judicial officer immediately within the statutory provided by law.

The act of arbitrary arrest and detention or police custodial torture etc. are also under the provisions of international laws, especially the Universal Declaration of Human of the United

Nations. The state parties to the international declaration, conventions or whatsoever regarded as the international instruments, the states signatory and ratified them, are binding with obligation to enforce them as their own municipal laws. The following table is containing of the international instruments speak on laws of arrest, detention and torture, adopted by the United Nations.

Table 2.

Nº	Name of International Instruments/Laws	Year
1	Universal Declaration of Human Rights	1948
2	Standard Minimum Rules for the Treatment of Prisoners	1955
3	International Covenant on Civil and Political Rights (ICCPR)	1966
4	Code of Conduct for Law Enforcement Officials	1979
5	Declaration on the Human Rights of Individual who are not Nationals of the Country in which they live	1985
6	Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988	1988

While reviewing the above international instruments it can be concluded that the international laws of arrest, detention and torture are exhaustively adopted by the United Nations from time to time.

To sum up, right to be informed of grounds of arrest and right to be produced before the judicial officer of a court which is competent to jurisdiction of the case are the fundamental principle of criminal jurisprudence.

While reviewing the above international instruments it can be concluded that the international laws of arrest, detention and torture are exhaustively adopted by the United Nations from time to time.

To sum up, right to be informed of grounds of arrest and right to be produced before the judicial officer of a court which is competent to jurisdiction of the case are the fundamental principle of criminal jurisprudence.

In the very landmark judgement regarding with arrest procedure, police custodial violence, and compensation in the case of ***D.K. Basu* v. *State of West Bengal***[37] the Supreme Court of India observed that custodial torture is a naked violation of human dignity. The situation is aggravated when violence occurs within the four walls of a police station by those who are supposed to protect citizens. The Court accepted that the police have a difficult task in light of the deteriorating law and order situation, political turmoil, student unrest, and terrorist and underworld activities. They agreed that the police have a legitimate right to arrest a criminal and to interrogate her/him in the course of investigation. However, the law does not permit the use of third degree methods or torture on an accused person. Actions of the State must be right, just and fair; torture for extracting any kind of confession would neither be right nor just nor fair. This

Court laid down certain basic "*requirements*" to be followed in all cases of arrest or detention till legal provisions are made in that behalf as a measure to prevent custodial violence. The requirements read 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 the 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 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 a 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

[37] (1997) 6 SCC 642

the Legal Aid Organisation 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 made 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 arrest and major and minor injuries, if any present on his body, must be recorded at that time. The „*Inspection Memo'* must be signed both by the arrestee and the police officer of effecting the arrest and its copy provided to the arrestee. 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. The 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 *Illaqa Magistrate* for his 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 headquarters, 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."

This Court also opined that failure to comply with the above requirements, apart from rendering the official concerned liable for departmental action, would also render him liable to be punished for contempt of court and the proceedings for contempt of court could be instituted in any High Court of the country, having territorial jurisdiction over the matter.

Article 22 of the Indian Constitution has been composed to cover all cases of arrest, including "protective detention". If a person apprehended by a legal authority he must be deemed

to be arrested within the meaning of Article 22. Therefore, it is immaterial whether the term *arrest* has been used or not in the statute or the rules.[38] Article 22 lays down certain safeguards to the arrested and detained person. However, the safeguards enshrined in Article 22 are not available in all cases of ordinary arrest or detention. These safeguards are only for punitive reasons. The safeguards of Article 22 do not apply in the case of arrest made for protection and in view of benefit for arrested person.

The guarantee provided in Article 22 and detained person in custody will become meaningless if the magistrate act mechanically without applying judicial mind to see whether the arrest of the person produced before him is legal in accordance with law. The arrest to deport alien to his country also does not come under the authority of this Article. An under-trial person should not be handcuffed and also not be taken into possession through the principles against humanity

[38] *Ajaib Singh* v. *State of Punjab*, AIR 1952 Punjab. 309 F.B.

OVERCROWDING OF PRISON: HUMAN RIGHTS OF PRISONERS IN DANGER

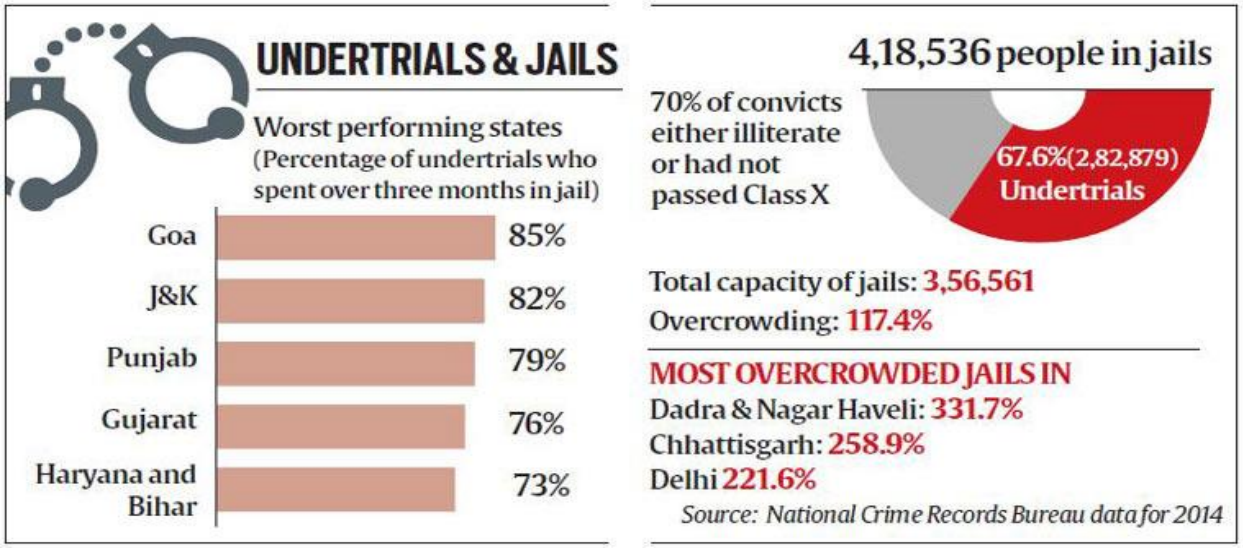
NCRB data: Almost 68 percent inmates' under trials[1]

The Indian Express

The percentage of under trial prisoners who remain in jail for more than three months has also gone up from 62 per cent in 2013 to 65 per cent in 2014.

Almost 68 per cent of all inmates in the 1,387 jails in the country are undertrials, according to the latest figures released by the National Crime Records Bureau (NCRB) for 2014. Over 40 per cent of all undertrials remain in jail for more than six months before being released on bail.

The percentage of undertrial prisoners who remain in jail for more than three months has also gone up from 62 per cent in 2013 to 65 per cent in 2014. The data looks worse when compared to previous years which showed a declining trend. In 2012, the figure stood at 62.3 per cent.

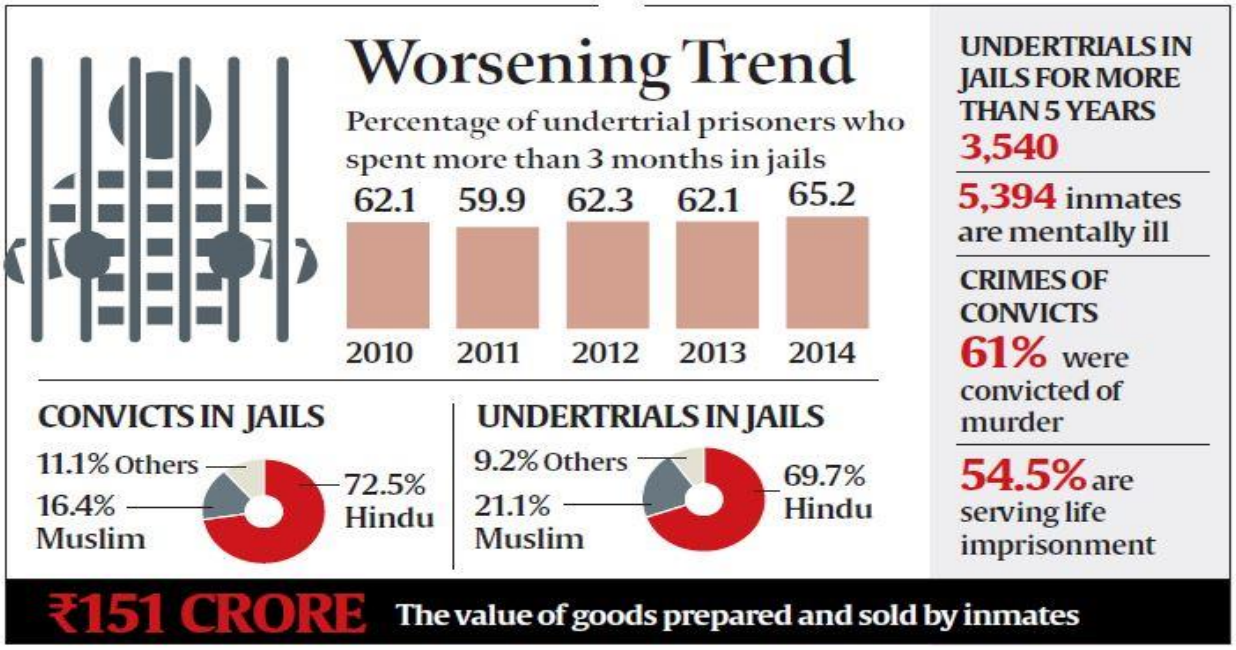


According to the NCRB data, Goa, Jammu and Kashmir, Gujarat and Punjab are the worst performing states, with over 75 per cent of undertrials remaining in jail for over three months. On the other hand, Kerala and Tripura recorded the lowest such cases — 35 per cent and 32 per cent respectively.

A large number of undertrials remain in jails due to their inability to secure bail. The highest percentage (27.3 per cent or 63,225 of the total 2,31,962) of undertrials under IPC crimes were

[1] Retrieved from: http://indianexpress.com/article/india/india-news-india/almost-68-inmates-undertrials-70-of-convicts-illiterate/, on 16/02/2016, Written by Deeptiman Tiwary, October 2, 2015 9:02

charged with murder. Uttar Pradesh reported 17.9 per cent of such undertrials, followed by Bihar at 8.8 per cent. A total of 6,274 convicts were habitual offenders.



The NCRB data shows that there were 4, 18,536 inmates in various jails against a capacity of 3, 56,561. Chhattisgarh (259 per cent) and Delhi (222 per cent) were among those which reported high overcrowding. Muslims continue to form a large share of the undertrial population, with their numbers being disproportionate to their overall population. According to the 2011 census, Muslims constitute 14.2 per cent of India's population. But the community accounts for 21.1 per cent of all undertrials. Among the convicted inmates, however, the Muslim share is just over 16 per cent.

An analysis of the caste-based classification of undertrials reveals that 37.4 per cent are from general category, 31.3 per cent OBCs, 20 per cent Scheduled Castes and 11 per cent Scheduled Tribes. A total of 318 convicts, including eight women, lodged in different jails were facing capital punishment at the end of 2014. Of these, 95 were awarded death sentences in 2014 alone. As many as 112 inmates had their death sentences commuted to life imprisonment last year. The data also show that 1,702 inmates died in jails due to various reasons, of which 1,507 were recorded as natural deaths.

Case Laws on prisoner's Rights[1]

Charles Sobraj v. Superintendent Central Jail, Tihar, New Delhi
AIR 1978 SC 1514

Charles Sobraj, an inmate at Tihar Jail complained of barbaric and inhuman treatment meted out to him whilst in custody. These allegations led the Supreme Court to examine the limits and purpose of judicial intervention into prisons.

Supreme Court Observations

"Whenever fundamental rights are flouted or legislative protection ignored, to any prisoner's prejudice, this Court's writ will run, breaking through stone walls and iron bars, to right the wrong and restore the rule of law."

"The criminal judiciary has thus a duty to guardian their sentences and visit prisons when necessary."

Judicial policing of prison practices is implied in the sentencing power, thus the 'hands off' theory is rebuffed and the Court must intervene when the constitutional rights and statutory prescriptions are transgressed to the injury of the prisoner.

The right to life of a person is more than mere animal existence, or vegetable subsistence. Therefore, the worth of the human person and dignity and divinity of every individual inform Articles 19 and 21 of the constitution even in a prison setting. There must be some correlation between deprivation of freedom and the legitimate functions of a correctional system.

Imprisonment does not spell farewell to fundamental rights laid down under part III of the constitution. Prisoners' retain all rights enjoyed by free citizens except those lost necessarily as an incident of confinement. Therefore, it is a court's "continuing duty and authority to ensure that the judicial warrant which deprives a person of his life or liberty is not exceeded, subverted or stultified."

[1] RIGHTS BEHIND BARS, Landmark Judicial Pronouncements by Commonwealth Human Rights Initiative, 2009.

Supreme Court Directives

Although in its final pronouncement the Court dismissed the petition, however the principles that were laid down are still considered as "having laid bare the constitutional dimension and rights available to a person behind stone walls and iron bars."[2]

Sunil Batra v. Delhi Administration & Ors
AIR 1978 SC 1675

Two petitioners, Sunil Batra and Charles Sobraj, filed writ petitions in the Supreme Court against their traumatic treatment by jail authorities. Batra, facing death sentence, challenged his being subject to solitary confinement without judicial sanction. Sobraj complained against the distressing disablement of prisoners by barfetters for unlimited durations.

Supreme Court Observations

The "court has a distinctive duty to reform prison practices and to inject constitutional consciousness into the system." It must not adopt a 'hands off' attitude with regard to the problem of prison administration because a convict is in prison under the order and direction of the court.

The Court reiterated the constitutional mandate that no prison law can deny any fundamental right of the prisoner. Disciplinary autonomy in the hands of the jail staff violates human rights and prevents prisoners' grievances from reaching the judiciary.

The rule of law disallows infliction of supplementary sentences under disguises which defeat the primary purpose of imprisonment. Therefore, infliction of additional torture by forced cellular solitude or iron fetters can be struck down as unreasonable, arbitrary and unconstitutional.

Rehabilitation is a necessary component of incarceration and this philosophy is often forgotten when justifying harsh treatment of prisoners. Consequently, the disciplinary need of keeping apart a prisoner must not involve inclusion of harsh elements of punishment. The Court opined that "liberal paroles, open jails, frequency of familial meetings, location of convicts in jails nearest to

2 See *Ramamurthy v State of Karnataka* AIR 1997 SC 1739.

their homes tend to release stress, relieve distress and insure security better than flagellation and fetters."

Supreme Court Directives

- Solitary confinement is the seclusion of a prisoner, from the sight of and communication with other prisoners. It is a severe and separate punishment which can be imposed only by the court.

- Prisoners sentenced to death cannot be kept under solitary confinement. However, their segregation from other prisoners during the normal hours of lockup is legal.

- Such prisoners shall not be denied any of the community amenities including games, newspapers, books, moving around and meeting prisoners and visitors, subject to reasonable regulation of prison management.

- A prisoner shall be considered to be 'under sentence of death' only when his appeals to the High Court and the Supreme Court, and mercy petitions to the Governor and the President have been rejected.

- Under-trial prisoners shall be deemed to be in custody but not undergoing punitive imprisonment. They shall be accorded relaxed conditions than convicts.

- Bar fetters shall be shunned as violative of human dignity, within and without prisons. Indiscriminate resort to handcuffs when accused is produced before the court and forcing iron on prison inmates is illegal. It shall be stopped forthwith, save a few exceptions.

- A prisoner shall be restrained only if there is clear and present danger of violence or likely violation of custody. The following preconditions should be observed while imposing fetters:

i. There is an absolute necessity to use fetters,

ii. There exist special reasons as to why no other alternative butfetters can ensure a secure custody,

iii. These special reasons must be recorded in detail simultaneously,iv. This record must be documented in both the journal of the superintendent and the history ticket of the prisoner,

v. Before the imposition of fetters, natural justice in its minimal form shall be complied with,

vi. No fetters shall be kept beyond day time,vii. The fetters shall be removed at the earliest opportunity, viii.There should be a daily review of the absolute need for the fetters, and

ix. Any continuance of the fetters beyond a day shall be illegal unless an outside agency like the district magistrate or sessions judge, on materials placed, directs its continuance.

④ The discretion of imposing fetters or other iron restraints is subject to quasi judicial oversight, even if imposed for security.

Legal aid shall be given to prisoners to seek justice from prison authorities and to challenge the decision in court where they are too poor to secure a lawyer on their own.

Prem Shankar Shukla v. Delhi Administration
AIR 1980 SC 1535

Prem Shankar Shukla - an under-trial prisoner at Tihar Jail - sent a telegram to the Supreme Court that he and some other prisoners were being forcibly handcuffed when they were escorted from prison to the courts was contended that routine handcuffing and chaining of prisoners was continuing despite the Supreme Court directive in Sunil Batra's cases that fetters/handcuffs should only be used if a person exhibits a credible tendency for violence or escape

Supreme Court Observations

Using handcuffs and fetters [chains] on prisoners violates the guarantee of basic human dignity, which is part of our constitutional culture. This practice does not stand the test of Articles 14 [Equality before law], 19 [Fundamental Freedoms] and 21 [Right to Life and Personal Liberty] of the constitution. To bind a man hand and foot; fetter his limbs with hoops of steel; and shuffle him along in the streets. To stand him for hours in the courts, is to torture him; defile his dignity; vulgarise society; and foul the soul of our constitutional culture.

Strongly denouncing routine handcuffing of prisoners, the Supreme Court stated that to manacle a man is more than to mortify him; it is to dehumanise him; and therefore to violate his very personhood. The Court rejected the argument of the state that handcuffs are necessary to prevent prisoners from escaping. Insurance against escape does not compulsorily require handcuffing. There are other methods whereby an escort can keep safe custody of a detenue [detained person] without the indignity and cruelty implicit in handcuffs and other iron contraptions.

The Supreme Court asserted that even orders from superiors are not a valid justification for handcuffing a person. Constitutional rights cannot be suspended under the garb of following orders

issued by a superior officer. There must be reasonable grounds to believe that the prisoner is so dangerous and desperate, that he cannot be kept in control except by handcuffing.

Supreme Court Directives

- Handcuffs are to be used only if a person is:

i. involved in serious non-bailable offences,[3] and/or ii. previously convicted of a crime, and/or

iii. of desperate character- violent, disorderly or obstructive, and/or iv. likely to commit suicide, and/or v. likely to attempt escape.

- The reasons why handcuffs have been used must be clearly mentioned in the Daily Diary Report. They must also be shown to the court.

- Once an arrested person is produced before the court, the escorting officer must take the court's permission before handcuffing him from the court to the place of custody.

- The magistrate before whom an arrested person is produced must inquire whether handcuffs or fetters have been used. If the answer is yes, the officer concerned must give an explanation.

Sunil Batra (II) v. Delhi Administration
AIR 1980 SC 1579

This petition originated from a letter by a prisoner, Sunil Batra, complaining of the brutal assault meted out to another prisoner Prem Chand by the head warder of Tihar Jail. The victim had attained serious anal injury due to forced insertion of a stick by the warder on the premise of an unfulfilled demand for money.

Supreme Court Observations

"No iron curtain can be drawn between the prisoner and the constitution."

The Court reaffirmed the importance of judicial oversight of prisons. Quoting from its earlier judgments, it observed that, "The court has a continuing responsibility to ensure that the constitutional purpose of the deprivation is not defeated by prison administration."

3 Non-bailable offences are laid out in the First Schedule of the Cr.P.C.

It also noted that there was widespread prevalence of legal illiteracy even among lawyers about the rights of prisoners. The Court suggested that in order to make the law accessible to prisoners, large notice boards displaying the rights and responsibilities of prisoners, in the local language, maybe hung up in prominent places within the prison.

Discussing the importance of the institution of the Board of Visitors, the Court stated that judicial members of the Board have special responsibilities and must act as independent overseers of the prison system. The Court quoted the duties and functions of visitors from the relevant manual including:

i. Inspection of barracks, cells, wards, workshed and other buildings of the jail,

ii. Inspection of the cooked food,

iii. Ascertain compliance of set standards for health, hygiene and sanitation,

iv. Inquire whether any prisoner is illegally detained or detained for anundue length of time while awaiting trial, and

v. Examine jail registers and records.

Supreme Court Directives

The Court issued the following directives to the state and the prison staff:

- Grievance deposit boxes shall be maintained by or under the orders of the district magistrate and the sessions judge, within 3 months of this judgment.

- These shall be opened as frequently as required and suitable action will be taken on the complaints made.

- District magistrates and sessions judge shall visit prisons in their jurisdiction, give opportunities for ventilating legal grievances, make expeditious enquiries and take suitable remedial action.

- The prison authorities shall not in any manner obstruct or noncooperate with reception of or enquiry into the complaints by the judicial officers, and if they do, prompt punitive action must follow.

- Judicial appraisal by the sessions judge shall be required to impose any additive punishment including:

i. solitary or punitive cell,

ii. hard labour,

iii. Dietary change,

iv. denial of privileges and amenities, and

v. transfer to other prisons with penal consequences.

- In the case of emergency to take such action, information shall be given to the sessions judge within two days of the action.

- Lawyers will be nominated by the district magistrate, sessions judge, High Court and Supreme Court to make periodical visits and record and report to the concerned court, results which have relevance to legal grievances.

- These lawyers will be given all facilities for interviews, visits and confidential communication with prisoners. This is subject to discipline and security considerations.

- The concerned state shall take steps to prepare and circulate the Prisoners' Handbook in the regional language.

- The state shall take steps to conform with the Standard Minimum Rules for the Treatment of Prisoners 1955 as recommended by the United Nations.

- There is need for reviewing the Prisons Act and overhauling the prison manuals as well as the model manual. The changes must include constitutional values, therapeutic approaches and tension free management.

- Prisoners' rights shall be protected by the court by its writ jurisdiction and contempt power.

- Free legal services to the prisoners shall be promoted by professional organisations recognised by the court.

- The District Bar shall keep a cell for prisoner relief.

Francis Mullin v. Union Territory of Delhi & Ors
AIR 1981 SC 746a

The petitioner, a British national, filed a petition in the Court challenging the constitutional validity of certain provisions restraining her from having interviews with her lawyer and members of her family. The petitioner, accused under the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974, was detained in the Central Jail, Tihar.

Whilst under detention, the petitioner had difficulty having interviews with her 5 year old daughter and lawyers. The order of detention under the Act permitted only one interview per month whereas under-trial prisoners are granted the facility of interview with friends and relatives twice a week. The petitioner challenged this discriminatory provision as violative of her rights under the constitution of India.

Supreme Court Observations

Whilst considering the question of 'conditions of detention' the Court stated that it was necessary to make a distinction between 'preventive' and 'punitive' detention. 'Punitive detention' is intended to inflict punishment on a person, who is found by the judicial process to have committed an offence, while 'preventive detention' is not by way of punishment at all, but it is intended to pre-empt a person from indulging in conduct injurious to the society.

The Court observed that a person's liberty must be curtailed with caution and must be proportional to necessity. It noted that a prison rule may regulate the right of a detenue to have interview with a legal adviser in a manner which is reasonable, fair and just. However, it cannot prescribe an arbitrary or unreasonable procedure for regulating such an interview as that would be violative of Articles 14 and 21 of the constitution.

Supreme Court Directives

④ A detenue must be permitted to have at least two interviews in a week with relatives and friends.

④ It should be possible for a relative or friend to have interviews with the detenue at any reasonable hour on obtaining permission from the superintendent of the jail. It should not be necessary to seek the permission of the District Magistrate, Delhi, as the latter procedure would be cumbrous and unnecessary from the point of view of security and hence unreasonable.

④ No arbitrary or unreasonable rule can be prescribed for regulating interviews of detenues. Therefore the clauses of the detention order regulating the right of the detenues to have interviews with a legal advisor of their choice are unconstitutional and void.

Rakesh Kaushik v. Bl Vig Superintendent Central Jail, New Delhi
AIR 1981 SC 1767

The petitioner complained with facts and figures, that his life in the prison was subjected to intimidation by overbearing toughs' inside, and he was forced to be party misappropriation of jail funds, homosexual and sexual indulgence with the connivance of officials. He also reported of a drug racket being run, and alcoholic and violent misconduct by gangs, and that the whole goal of reformation of sentences was being defeated by this combination of criminal activities.

Supreme Court Observations

The Court expressed concern over the deterioration of conditions in Tihar Jail despite the numerous guidelines on prison reforms issued by it. It noted that such indifference could not deter the writ of the court running into prisons and compelling compliance, however tough the resistance, however high the officials.

The Court directed the state to comply with the action-oriented conclusions given in *Sunil Batra's case*. Some important ones were reiterated including:

i. the nomination of lawyers by the judiciary to visit prisons as part of the visitorial and supervisory judicial role,

ii. provision of grievance deposit boxes in every prison,iii. periodical prison visits by district magistrates and sessions judges, iv. no solitary or punitive cell, no other punishment or denial of privileges without a judicial appraisal by the sessions judge, and

v. preparation of Prisoners' Handbook in hindi and circulation of copies among prisoners to create awareness.

It emphasised that there can be human rights conscious reform in the prison only when there is transformation in the awareness of the topbrass, introduction of new techniques instilling dignity and mutual respect among prisoners, and curative techniques pervade the staff and inmates.

Supreme Court Directives

The Court directed the district and sessions judge to hold an open enquiry within the jail premises to enquire into the allegations contained in the petition. Certain relevant instructions include:

- He shall ascertain whether the directions given in *Sunil Batra's case* are substantially complied with and where there is default, enquire into the reasons thereof.
- Being a visitor of jail, it is part of his visitorial functions to acquaint himself with the condition of tension, vice and violence and prisoners' grievances.
- The focus of the sessions judge should not be solely upon the warden and warders of the jail but also on the medical officers.
- He will enquire into the above mentioned aspects and suggest remedial action.

Ramamurthy v. State Of Karnataka
AIR 1997 SC 1739

A prisoner in the Central Jail, Bangalore sent a letter to the Chief Justice of India complaining against the 'non-eatable food' mental and physical torture' in prisons, and the denial of rightful wages to the prisoners Treating the letter as a writ petition, the Supreme Court passed an order to the District Judge to visit the Central Jail and find out the pattern of payment of wages and the general conditions of the prisoners such as residence, sanitation, food, medicine etc. The District Judge compiled and submitted a thorough report to the Court.

Treating the letter as a writ petition the Supreme Court passed an order to the District Judge to visit the Central Jail and find out the pattern of payment of wages and the general conditions of the prisoners such as residence, sanitation, food, medicine etc. The District Judge compiled and submitted a thorough report to the Court.

"A sound prison system is a crying need of our time," the Supreme Court observed. The Court emphasised that the cases of *Charles Sobraj* and *Sunil Batra*, should be considered as "beacon lights insofar as management of jails and rights of prisoners are concerned."

Having reviewed the available literature on prisons, the Court observed that there were nine major problems which afflicted the prison system in India and required immediate attention. These were:

overcrowding, delay in trial, torture and ill-treatment, neglect of health and hygiene, insubstantial food and inadequate clothing, prison vices, deficiency in communication, streamlining of jail visits; and management of open air prisons.

The Court noted that the production of under-trial prisoners before the court on remand dates is a statutory obligation. Such production gives an opportunity to the prisoner to bring to the notice of the court, if he has faced any ill-treatment or difficulty during the period of remand.

Thus the actual production of the prisoner is required to be insured by the trial court before ordering for further remand.

The Court did not issue any directives on the issue of torture and illtreatment in prisons. However, it stressed the strong need for a new all India jail manual that would serve as a model for the country. This new manual should acknowledge the previous directions and observations that the Court has given on the permissible limits of punishment within prisons.

Similarly, the Court did not issue any directions on the health and hygiene of prisoners, but it noted that prisoners suffer from a double handicap. First, they do not enjoy the same access to medical expertise that free citizens have. Secondly, because of the conditions of their incarceration, inmates are exposed to more health hazards than free citizens.

Supreme Court Directives

The Supreme Court directed the concerned authorities to take appropriate steps, which included:

General

- Enacting a new Prisons Act to replace the century old Prisons Act, 1894.
- Framing a new All India Jail Manual.

Overcrowding

- Taking appropriate decision on the recommendations that the Law Commission of India made in its 78th Report on the subject of ‘Congestion of under-trial prisoners in jail’ within 6 months of the date of judgment.
- Applying mind to the suggestions of the Mulla Committee relating to streamlining the remission system and premature release (parole), and doing the needful.

- Taking recourse to alternatives to incarceration such as fine, community service and probation.

Delay in Trial

- Considering the feasibility of entrusting the duty of producing undertrial prisoners on remand dates to the prison staff.

- Implementing the directions given in recent judgments of the court requiring the release of under-trial prisoners on bail when a trial is protracted.

Living Conditions in Prisons – Health, Hygiene, Food and Clothing

- Reflecting on the recommendations of the Mulla Committee on the subject of giving proper medical facilities and maintaining appropriate hygienic conditions, and to take appropriate steps.

- Pondering on the need of complaint box in all the jails.

- Inspecting jails after giving a *shortest* notice so as to assure the compliance of rules laid down in the jail manual.

Deficiency in Communication and Jail Visits

- Thinking about liberalisation of communication facilities as there is no reason to deny the facility of communication by post to inmates.

- Taking needful steps for streamlining the jail visits.

Open Air Prisons

- Ruminating on the question of introduction of open prisons at least in all the district headquarters of the country.

State of Gujarat &Anr v. Hon'ble High Court of Gujarat
AIR 1998 SC 3164

Several appeals were filed by some state governments challenging the judgments by their respective High Courts on the issue of prisoners' wages. The state governments were in agreement with the view that the present rates of wages paid to prisoners are too meagre and hence they must be enhanced.

The main question required to be addressed by the Supreme Court was whether prisoners, who were required to do labour as part of their punishment should be paid wages for such work at the rates prescribed under minimum wages law

Supreme Court Observations

Observing that there are four categories of prisoners *viz*. under-trial prisoners, convicted prisoners, those detained as a preventive measure and those undergoing detention for default of payment of fine, the Court stated that only convicted prisoners can be required to do labour in prison. The Court further noted that persons sentenced to simple imprisonment cannot be required to work unless they themselves volunteer to work. Therefore, jail authorities can by law impose hard labour on only those convicted prisoners who are sentenced to rigorous imprisonment.

On the question of quantum of wages, the Court stated that it should be permissible for the government to deduct a reasonable percentage of wages from the minimum wages, for expenses that the state incurs for providing food, clothing and other amenities to prisoners. On the fixation of wages, the Court discussed the Mulla Committee Report quoting that the "[r]ates of wages should be fair and equitable and not merely nominal or paltry. These rates should be standardised so as to achieve a broad uniformity in wage system in all the prisons in each state and union territory."

Supreme Court Directives

- It is lawful to employ prisoners sentenced to rigorous imprisonment to do hard labour whether he consents to do it or not.

- Jail officials may permit other prisoners to do any work which they choose to do, provided such prisoners make a request for that purpose.

- The prisoners must be paid equitable wages for the work done by them.

- To determine the quantum of equitable wages payable to prisoners, the state government shall constitute a wage fixation body for making recommendations.

- The concerned state should consider making laws for setting apart a portion of the wages earned by the prisoners to be paid as compensation to deserving victims of the offence for which the prisoner was convicted.

Sharad Keshav Mehta v. State of Maharashtra & Ors
MANU/MH/0054/1988

The petitioner, Sharad Mehta, was sentenced to life imprisonment for murder in October 1983. In October 1985 he made an application for release on furlough, however the application was rejected. He re-applied for release in March 1986 and April 1986 but was again denied. He challenged the denial of furlough in the Bombay High Court arguing that the denial was in contravention of the rules framed under the Maharashtra Prison Manual.

High Court Observations

Disagreeing with the contentions made by the state government, the Court observed that, "It is not open to the Home Department of the state government to prescribe rules giving facility of release of the prisoner on furlough by one hand and then providing that the prisoner has no legal right to be released on furlough."

The Court also highlighted the difference between parole and furlough. Parole is granted for certain emergency and the release on parole is a discretionary right. However, release on furlough is a substantial right and accrues to a prisoner on compliance with certain requirements. The idea of granting furlough to a prisoner is that the prisoner should have an opportunity to come out and mix with the society and the prisoner should not be continuously kept in jail for a considerable long period.

High Court Directives

- The right to be released on furlough is a substantial and legal right conferred on the prisoner.
- A prisoner can claim as of right to be released on furlough after having complied with the requirements of the rules framed for release of prisoner on furlough.
- The Commissioner of Police must apply his mind to the facts of each case and should not as a formality submit a report denying the substantial and legal right of the prisoner.
- Unless the Commissioner of Police has material from which a reasonable inference can be drawn, the right to release on furlough cannot be deprived by resort to any exceptions to the rule.

Madhukar B Jambhale V State Of Maharashtra & Ors
1987 Mah LJ 68

The petitioner sent a letter to the Bombay High Court complaining about the ill- treatment meted out to him by the prison staff. The Court treated this as an application under Article 226 of the constitution, thus what was initiated as an individual complaint assumed the character of a class action on behalf of all convicts undergoing sentence.

The petition had raised many vital issues regarding the validity of rules framed under the Prisons Act, namely:

1. The classification of prisoners on the basis of education, higher status, standard of living as violative of Article 14 of the constitution,
2. Undue censorship and restrictions on the rights of prisoners to correspond as violative of Articles 19 and 21 of the constitution,
3. The double lock up system in some cells of jail amounted to solitary confinement, which is impermissible in law, and
4. The grievance procedure prescribed under the various rules is grossly inadequate and does not conform to the guidelines set by the Supreme Court in *Sunil Batra's case*

High Court Observations

The Court did not deal with the first grievance of the prisoner i.e. discriminatory classification of prisoners, as it had already been abolished.

On the questions of censorship and restrictions on communication of prisoners, the Court observed, "We fail to see why the prisoner should not give vent to his grievances against the prison administration to the outside world through his letter...[when] the prisoner is not prevented from making these grievances in the interviews which are permitted under the rules." The Court further stated that, "By reason of conviction and being lodged in jail, the prisoner does not lose his political right or rights to express the views on political matters…."

The grievance of the petitioner of the double lock up system was held incorrect, therefore no directions were issued. Similarly no directions were issued on the allegations of the petitioner regarding food, ill treatment and torture owing to the inconsistencies present in the statements of the petitioner.

High Court Directives

The Court struck down the rules, which resulted in undue censorship on prisoners' correspondence with the outside world and prohibited the inmates to correspond with inmates of other prisons, as unwarranted, unjust and unreasonable thus violative of the constitution.

On the question of grievance redressal procedures, the Court issued several directions after perusing the draft submitted on behalf of the government for the implementation of directives issued by the Supreme Court in this regard:

- Grievance Deposit Box: A sealed grievance deposit box shall be kept at a conspicuous place inside the prison under lock and key, and the key will remain exclusively with the district judge. The Box shall be opened at regular intervals and a detailed record of the complaints shall be maintained by the concerned sessions judge who will investigate such cases and take all appropriate action.
- Complaint Register: The district and sessions judge shall maintain a complaint register in prison office which shall contain the complaints found in the grievance deposit box and action taken in respect of such complaints.
- Visits by District and Sessions Judge/District Magistrate: They shall personally visit prisons in their jurisdiction and offer effective opportunities for ventilating the legal grievance of the prisoners and shall make expeditious enquiries and take suitable remedial action. They shall also ascertain that the conditions prevailing in prisons conform to the state rules.
- Visits by Lawyers: The sessions judge shall nominate lawyers to make separate visits to jails. The lawyers so appointed shall be given access by the prison administration to inspect the prison premises and the record relating to complaints. They will also be permitted to interview and receive confidential communications from the inmates of the prison subject to disciplinary and security conditions. The lawyers shall report to the court, results which have relevance to legal grievances.
- A prisoner shall also be able to send letters or address a petition containing grievances, through the superintendent, to the following authorities:

  i. Regional Deputy Inspector General of Prisons,

  ii. The Inspector General of Prisons, Pune,

  iii. The Secretary, Home Department, Bombay,

  iv. The Home Minister/Chief Minister, Bombay,

v. The District Judge, High Court Judge or Supreme Court Judge,

vi. Lawyers nominated by the District Judge or Prison Visitors,

vii. Lokpal, Lokayukta, and

viii.Secretary, District Legal Committee/Secretary, State Legal Aid Committee.

A Convict Prisoner in the Central Prison v. State Of Kerala
1993 Cri LJ 3242

This petition was filed in the High Court of Kerala by a convict lodged in Thiruvananthapuram Central Jail complaining against the sub-human conditions prevailing in the prison.

He further complained about the:

1. Connivance of jail officials with certain prisoners due to which some convict enjoyed liberty to do what they like, making others feel indignant and ignored,
2. Association of first time offenders with habitual offenders which was converting them into hard core criminals,
3. Presence of homosexuality and other forms of physical assault in prison, and
4. Access to money and drugs through silent channels.

High Court Observations

"With imprisonment, a radical transformation comes over a prisoner, which can be described as prisonisation. He loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity and autonomy of personal life."

The Court observed that while one does not expect life in prison to be the same in the free world, yet the human dignity of the prisoner must be maintained under all circumstances. Imprisonment may strip a person of certain facets of life, but he does not become a non-person and rights that human dignity requires and circumstances justify, must be granted to him.

High Court Directives

- The state shall build sufficient number of prisons to accommodate prisoners. It should also consider the construction of open jails within the state.
- High security prisons shall be built to house the category of prisoners who are considered dangerous.
- The state shall effectively implement segregation, keeping habitual offenders away from freshers, to avoid the possibility of hard core criminals turning jails into schools of crime.
- The state will ensure that short-term appointments of prison staff are not made, and that adequate trained staff is provided in jails, keeping in view needs of security.
- The state will take appropriate action to pay reasonable wages to prisoners, so that, motivation for work is generated.
- The state will consider the possibility of registering societies for managing economic activities in jails on a profitable basis.
- The state may consider the advisability of avoiding short term imprisonment and simple imprisonment, wherever possible. Necessary statutory amendments could be thought of, substituting short term sentences with free work or work with regulated wages.
- The registry shall make appropriate arrangements for providing a meeting place in the premises of the High Courts where prisoners can meet their counsel and give instructions by prior appointment. For this purpose a desk in the Criminal Section can be considered.
- Sufficient provision will be made to segregate civil prisoners and military prisoners, from prisoners convicted of criminal charges.
- Proper arrangements will be made for escort of prisoners from jails to courts and back.
- A rational parole policy must be evolved by the state.
- Blades for shaving, sterilized needles in dispensaries and sufficient fans should be provided. Sanitary napkins which are not included in the clothing supplied to female prisoners, should also be supplied
- Necessary facilities for the jail staff must be provided as a congenial working environment alone can ensure a contented service.
- Reservation of a nominal percentage of jobs for convict prisoners of good behaviour can be an incentive and it would be consistent with the concept of rehabilitation.
- Educational and recreational facilities, within reasonable limits may be provided in prisons.

MH Hoskot v. State Of Maharashtra
1978) 3 SSC 544

The petitioner, a reader at Saurasthra University, convicted for offences of cheating and forgery, filed a special leave petition in the Supreme Court challenging the High Court order enhancing his punishment from one day simple imprisonment to 3 years rigorous imprisonment. In his petition, he also complained of the actions of the jail authorities denying him a copy of the judgment (which he obtained in 1978 i.e. 5 years after the pronouncement of the judgment against him.

"When only the rich can enjoy the law...and the poor...cannot have it, because its expense puts it beyond their reach, the threat to...free democracy is not imaginary but very real, because, democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness."

Emphasising upon the importance of rendering legal aid, the Court observed that our laws have laid great emphasis on the procedural and substantive safeguards designed to assure fair trials in which every defendant stands equal before the law. An important ingredient of fair procedure to a prisoner, who has to seek his liberation through the Court process, is lawyer's services. The Court further observed that the right of appeal for the legal illiterates is nugatory in the absence of any statutory provision for free legal service to a prisoner. This negates the 'fair legal procedure' which is implicit in Article 21 of the constitution.

Supreme Court Directives

The Court considered two main aspects of the criminal justice delivery system in India, namely, service of a copy of the judgment to the prisoner in time to file an appeal and the provision of free legal services to a prisoner. The Court issued the following directions:

- Courts shall forthwith furnish a free transcript of the judgment when sentencing a person to prison term.

- In the event of any such copy being sent to the jail authorities for delivery to the prisoner, by the appellate, revisional or other court, the official concerned shall, with quick dispatch, get it delivered to the sentenced and obtain written acknowledgment thereof from him.

- A jailor who withholds the copy of the judgment hinders the court process thus violating Article 21 of the constitution.

- Where the prisoner seeks to file an appeal or revision, every facility for exercise of that right shall be made available by the jail administration.

- Where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the court shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign competent counsel for the prisoner's defence, provided the party does not object to that lawyer.[4]

- The state - which prosecuted the prisoner and set in motion the process which deprived him of his liberty - shall pay to assigned counsel, such sum as the court may equitably fix.

Motiram & Ors v. State Of Madhya Pradesh
AIR 1978 SC 1594

Motiram, a mason appealed to the Supreme Court that despite being granted bail by the Court, he was unable to secure his release because the Chief Judicial Magistrate fixed an exorbitant sum of Rs 10,000, as the surety amount. Motiram said that the magistrate rejected the suretyship offered by his brother simply because his brother resided in another district and his assets were located there. Motiram wanted the Supreme Court to either reduce the surety amount or order his release on a personal bond.

The Court had to decide:

1. Whether a person can be released on bail under the Cr.P.C., 1973 on a personal bond, without having to get other people to stand as surety for him?,
2. The criteria for fixing the bail amount, and
3. Whether a surety offered by a person can be rejected because he resides in a different district or state or because his property is situated in a different district or state?

4 *The Legal Services Authorities Act 1987* imbibes the directions of the court. In fact, it entitles all persons in custody to avail free legal services at state cost.

Supreme Court Observations

The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family."

The Court acknowledged that many poor persons are forced into cellular servitude for little offences because trials never conclude, and bail amounts are fixed beyond their meagre means. The poor are being priced out of their liberty in the justice market. Whenever excessive amounts are fixed as surety for bail, the victims invariably happen to be from disadvantaged sections of society; belonging to linguistic or other minorities; or are from far corners of the country.

There is no sanction in any law to make geographical discriminations such as not accepting sureties from another part of the country or not accepting an affirmation in a language other than the one spoken in the region. India is one and not a conglomeration of districts untouchably apart. A person accused of a crime in a place distant from his native residence cannot be expected to produce sureties who own property in the same district as the trial court. The Supreme Court asserted that provincial or linguistic divergence cannot be allowed to obstruct the course of justice.

The Court further observed that bail provisions contained in the Cr.P.C. must be liberally interpreted in the interest of social justice, individual freedom and indigent persons. It shocks one's conscience to ask a mason to furnish a sum as high as Rs 10,000 for release on bail.

Supreme Court Directives

- An accused person should not be required to produce a surety from the same district especially when he is a native of some other place. Bail covers release on one's own bond, with or without sureties.
- Bail should be given liberally to poor people simply on a personal bond, if reasonable conditions are satisfied.
- The bail amount should be fixed keeping in mind the financial condition of the accused.

- When dealing with cases of persons belonging to the weak categories in monetary terms - indigent young persons, infirm individuals or women - courts should be liberal in releasing them on their own recognizance.

Hussainara Khatoon & Ors (II) v Home Secretary, Bihar, Patna
AIR 1979 SC 1369

The Court held that the right to free legal aid is an unalienable element of 'reasonable, fair and just' procedure. Without it, a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice.

The Court also observed that 'speedy trial' is an essential ingredient of 'reasonable, fair and just' procedure guaranteed by Article 21 of the constitution. It is the constitutional obligation of the state to devise such procedures as would ensure speedy trial to the accused. The state cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that it does not have adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus.

Supreme Court Directives

- The state government should provide under-trial prisoners a lawyer at its own cost for the purpose of making an application for bail.

- The state is under a constitutional mandate to ensure speedy trial.

- The state must take positive action to enforce the fundamental rights of the accused to speedy trial. Such action may include augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional judges and other measures calculated to ensure speedy trial.

Supreme Court Legal Aid Committee v Union of India & Ors
1994(3) Crimes 644 (SC

The Supreme Court Legal Aid Committee filed a writ petition complaining against the excessive delay in the disposal of cases registered under the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). It prayed that all under-trial prisoners who were in jail for the commission of any offence under the Act for a period exceeding 2 years on account of the delay in the disposal of their case should be released from jail declaring their further detention to be illegal and void.

"[T]o refuse bail on the one hand and to delay trial of cases on the other is clearly unfair and unreasonable and contrary to…the Act,…the Code and…the Constitution."

The Court observed that in cases under the NDPS Act, a certain amount of deprivation of liberty could not be avoided. However, if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 receives a jolt. Therefore, for all accused persons who have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation would be violative of the right to liberty enshrined in the constitution.

Supreme Court Directives

The Court issued the following direction pertaining to the release of under-trial prisoners accused under the Act:

Term of punishment	Period undergone	Action to be taken
5 yrs or less and fine	Not less than half the punishment	• Shall be released on bail • Where the maximum fine is prescribed, the bail amount shall be 50 per cent of the said amount with two sureties for the said amount • Where the maximum fine is not prescribed, the bail amount shall be to the satisfaction of the judge with two sureties for like amount.

Exceeding 5 yrs and fine	Not less than half the punishment	• Shall be released on bail on the term set out above, but in no case shall the bail amount be less than Rs. 50,000 with two sureties for like amount.
Min. 10 yrs of imprisonment and a fine of Rs. 1 lakh	Not less than five years	• Shall be released on bail, provided he furnishes bail in the sum of Rs. 1,00,000 with two sureties for like amount.

Supreme Court Observations:

- Any accused charged of an offence under Sections 31 and 31A of the Act shall not be entitled to bail under this order.

- Under-trial prisoners released under these directives are subject to a number of conditions including depositing their passport with the concerned judge, presenting themselves before the relevant police station once a month, and not leaving the area without the permission of the concerned judge etc.

- The cases of those under-trial prisoners who are not entitled to be released will be accorded priority by the special court.

In the matter of news reports published in the Times of India dated 26 June 2006 v. State Of Bihar & Ors.
CWJC No 7363 of 2006

A bench of the Patna High Court *moto* initiated a public interest litigation for the efficient and effective enforcement and implementation of the amended provision of Section 436A Cr.P.C. This Section proscribes detention of an under-trial beyond the maximum period of imprisonment

prescribed for the offence with which he has been charged. It also entitles an under-trial to be released on bail once he undergoes half the period of prescribed punishment for that offence.

High Court Observations

Pursuant to the directions issued by the High Court, the government filed an affidavit stating that 247 under-trial prisoners were entitled to bail under Section 436A Cr.P.C. In its interim order, the Court issued directions for the constitution of a jail cell for districts and sub-divisions which would have a free hand in evolving procedure to regularly monitor such cases of under-trial prisoners.

The jail superintendent has been given the primary duty to inform the accused person of the availability of the benefit under Section 436A to him. The task of monitoring the process rests with the Inspector General of Prisons. The role of the Legal Services Authority has also been emphasised for providing requisite free legal aid to the under-trial prisoners.

High Court Directives

- With regard to the 247 under-trial prisoners, the respective jail superintendents were directed to bring to the notice of each prisoner, by writing and orally, that he is entitled to the benefit of the provision of Section 436A Cr.P.C.

- The notice should further mention that they are entitled to apply for bail and entitled for their production at the concerned court at the earliest.

- The jail superintendent shall also furnish a statement of such persons, the follow up actions taken by him and the number of inmates of the jail who have availed the benefit and those who have not yet availed, by informing the Inspector General of Prisons.

- The Inspector General of Prisons is directed to maintain such up-to-date records in his office, which is also to be made available on the website.

- The Inspector General of Prisons is responsible for monitoring the actions taken and subsequent follow up actions to be taken for prisoners to avail the benefit of Section 436A regularly.

- The jail superintendent must furnish such periodical statements and status reports in respect of each accused person who is qualified and entitled to avail the benefit of Section 436A of the Code

with his affidavit before the registry of the High Court on every quarter beginning from January 2007.

④ The Member Secretary of the Bihar State Legal Services Authority is directed through the District Legal Services Authority and Sub Division Legal Services Committee, to provide free legal aid to the qualified under-trial prisoners. He shall also monitor the progress under the guidance of the Hon'ble Executive Chairman.

④ A Committee shall be constituted to monitor the actions taken and which shall periodically report to the court. The Committee shall comprise of the:

i. District Magistrate,

ii. Jail Superintendent, and

iii. Public Prosecutor.

Court on Its Own Motion In Re: Regarding Various Irregularities at Central Jail, Tihar
Crl MA No 7030/2007 & Crl Ref 1/2007

A bench of the High Court of Delhi took notice of the problem of overcrowding in Central Jail, Tihar. An inquiry report was called for, which brought out many issues of concern regarding prison conditions. Acting upon this report, the Court issued a number of directives for the reduction of number of inmates.

High Court Observations

The High Court expressed concern about the huge number of under-trials prisoners and the problem of overcrowding at Central Jail, Tihar. It observed that if the number of inmates is reduced, many of the problems at the jail would get rectified on their own as a consequential measure. The effect of excess number of inmates not only enhances the need for space, but necessities like water etc. get strained as well.

Emphasising the large under-trial population i.e. 65 per cent of the total prison population, the Court expressed concern over the incarceration of those who had been admitted to bail but were unable to furnish surety.

High Court Directives Dated 18 June 2007

The Court issued the following directions with regard to persons incarcerated due to proceedings initiated under Section 107 read with Section 151 Cr.P.C.:

- All inmates lodged under these sections due to non-furnishing a surety bond would be released on furnishing a personal bond in sum of Rs. 2000.
- The bond would be furnished to the satisfaction of the Superintendent Central Jail, Tihar.
- The personal bond should contain an undertaking in the terms given below.
- The inmates so released should:

i. report to the local police station within the jurisdiction where proceedings were registered. This should be done daily, twice at 10.00 AM and 6.00 PM, and ii. mark their attendance on a register maintained in each police station and available with the duty officer incharge.

High Court Directives Dated 22 August 2007

The Court issued the following directions with regard to release of undertrial prisoners from Central Jail, Tihar:

- Those under-trial prisoners who have been admitted to bail but have been unable to furnish sureties for more than 2 months, shall be released on their furnishing personal bond to the satisfaction of the trial court.
- As regards the 20 under-trials, who are reported terminally ill and suffering from 'incurable disease', the jail authority shall consider their case for early release on humanitarian grounds.
- In case of under-trial prisoners who are from states other than Delhi, local surety shall not be insisted upon while granting bail. It shall be sufficient to verify the identities and actual places of residence outside Delhi of the under-trials and their sureties to release them on personal bonds, with or without sureties, as the case may be.
- In case of under-trial prisoners who are senior citizens, the courts should take up their cases on day to day basis as far as possible, if they are not found fit to be admitted to bail.
- Those cases where the maximum prescribed punishment for the offence committed is upto 7 years shall be put up by the jail authorities before the visiting judge every 3 months for review and release on bail.
- The jail authorities shall sensitise and inform all jail inmates of the provision of 'plea bargain' and also benefits thereof.

- The jail authorities shall also take special care to place these cases before the special court/judge who visits the jail every month.
- In case of under-trial prisoners who are senior citizens, the courts should take up their cases on day to day basis as far as possible, if they are not found fit to be admitted to bail.
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- The jail authorities shall also take special care to place these cases before the special court/judge who visits the jail every month.

RIGHTS OF WOMEN AGAINST SEXUAL HARASSMENT AT WORKPLACE: HUMAN RIGHTS OF WOMEN IN DANGER

VIOLATION OF WOMEN HUMAN RIGHTS IN INDIA[1]

ABSTRACT:

Human rights are those minimum rights which are compulsorily obtainable by every individual as he/she is a member of human family. The constitution of India also guarantees the equality of rights of men and women. However, in the sphere of women's human rights in India, there exists a wide gulf between theory and practice. Indian society is a male dominated society where men are always assumed to be superior to society. The women in India very often have to face discrimination, injustice and dishonour. Though women in India have been given more rights as compared to men, even then the condition of women in India is miserable. The paper will throw light on the human rights of women in India and that how all the fundamental rights given to the women are being violated in India, by focussing on the various crimes done against them.

The constitution of India has granted equal rights to the men and women. According to article 14 – „The State shall not deny to any person equality before law or the equal protection of laws within the territory of India". And Article 15 states – „State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them,. But today, it seems that there is a wide gulf between theory and practice. The women in India have always been considered subordinate to men. Though the articles contained in the constitution mandates equality and non – discrimination on the grounds of sex, women is always discriminated and dishonoured in Indian society. Although various efforts have been taken to improve the status of women in India, the constitutional dream of gender equality is miles away from becoming a reality.

Though, Human Rights are the minimum rights which are compulsorily obtainable by every individual as he/she is a member of human society. But it has been found that each and every right of the women is being violated in one or another way. The crimes against women in India are increasing at a very fast pace. The National Crime Records Bureau (NCRB) had predicted that growth rate of crime against women would be higher than the population growth by 2010, which was found to be true. The table below represents a list of top 5 most dangerous cities in India in terms of crimes against women

RANK	NAME OF THE CITY	PERCENTAGE OF CRIMES AGAINST WOMEN IN INDIAN CITIES
1ST	DELHI	16

[1] By RITU DHANOA: International Journal in Multidisciplinary and Academic Research (SSIJMAR), Vol. 1, No. 4, November-December (ISSN 2278 5973)

2nd	HYDRABAD	8.1
3rd	BANGALORE	6.5
4th	AHMADABAD	6.4
5th	MUMBAI	5.8

Source: crimes in India – 2010, NCRB, Ministry of Home Affairs

There is a need to discuss the rights of the women separately as women represents more than half the population of India, yet she is discriminated and violated in every sphere of her life. Only women are a prey to crimes such as rape, dowry, bride burning, sexual harassment, selling and importation, prostitution and trafficking etc. Have you heard the men as a victim to all these crimes? The answer is "NO". This year there has been 20% increase in women trafficking, procurement of minor girls accounted for 19.8%, importation of girls accounted for 4.9% and buying of girls for prostitution accounted for 2.3% approx. Then how these Human Rights are beneficial to women? Though government is taking a number of steps to improve the condition of women in India, but there is a long way to go.

The paper will study the various human rights of women in India and how they are being violated. Although special rights are being given to woman as compared to men, yet they are least beneficial to them.

WOMEN HUMAN RIGHTS IN INDIA:

- Right to equality
- Right to education
- Right to live with dignity
- Right to liberty
- Right to politics
- Right to property
- Right to equal opportunity for employment
- Right to free choice of profession
- Right to livelihood
- Right to work in equitable condition
- Right to get equal wages for equal work
- Right to protection from gender discrimination
- Right to social protection in the eventuality of retirement, old age and sickness
- Right to protection from inhuman treatment
- Right to protection of health
- Right to privacy in terms of personal life, family, residence, correspondence etc. and Right to protection from society, state and family system.

VIOLATION OF WOMEN HUMAN RIGHTS:

It has been repeatedly said these days that women in India are enjoying the rights equal to men. But in reality, the women in India have been the sufferers from past. Not only in earlier times but even now days also, women have to face discrimination, injustice and dishonour. Let us now discuss the crimes done against the women in spite of being given rights equal to men. These points will explain that continues violation of human rights of women in India.

VIOLATION OF WOMEN HUMAN RIGHTS IN PAST:

The Indian women exploitation is not the present phenomenon. Rather she is being exploited from the early times. The women in Indian society never stood for a fair status. The following crimes were done against the women in the past times.

- DEVADASIS:
  Devadasis was a religious practice in some parts of southern India, in which women were married to a deity or temple. In the later period, the illegitimate sexual exploitation of the devadasi‟s became a norm in some part of the country.
- JAUHAR:
  Jauhar refers to practice of the voluntary immolation of all wives and daughters of defeated warriors in order to avoid capture and consequent molestation by the enemy. The practice was followed by the wives of Rajput rulers, who are known to place a high premium on honour.
- PURDAH:
  Purdah is a practice among some communities of requiring women to cover their bodies so as to cover their skin and conceal their form. It curtails their right to interact freely and it is a symbol of the subordination of women.
- SATI:
  Sati is an old custom in Indian society in which widows were immolated alive on her husband‟s funeral pyre. Although the act was supposed to be voluntary on thw widow‟s part, it is believed to have been sometimes forced on the widow.

VIOLATION OF HUMAN RIGHTS IN GENERAL:

- VIOLATION OF „RIGHT TO EQUALITY‟ AND „RIGHT TO PROTECTION AGAINST GENDER DISCRIMINATION‟:
  Discrimination against the girl child starts the moment she enters into the mother‟s womb. The child is exposed to gender differences since birth and in recent times even before birth, in the form of sex – determination tests leading to foeticide and female infanticide. The home, which is supposed to be the most secure place, is where women are mort exposed to violence. If a girl child opens her eyes in any way, she is killed

after her birth by different cruel methods in some parts of the country. Thus the very important „right to life‟ is denied to women. In India, men are always assumed to be superior to women and are given more preference.

The „World Human Rights Conference in Vienna‟ first recognised gender – based violence as a human rights violation in 1993. The same was declared by „United Nations Declaration „in 1993.

- VIOLATION OF „RIGHT TO EDUCATION‟:

  Education is considered as means of development of personality and awareness.

  Education is one of the most important human rights but the position of women‟s education in India is not at all satisfactory. Young girls may be bought up to believe that they are suited only to certain professions or in some cases to serve as wives and mothers.

  Despite in the improvement in the literacy rate after independence, there continues to be large gap between the literacy levels of men and women. Almost half the women population are even unable to recognise language characters. Al least 60 million girls lack access to primary education in India. Due to large percentage of uneducated women in India, they are not even aware of their basic human rights and can never fight for them.

- VIOLATION OF „POLITICAL RIGHT‟:

  The political status of women in India is very unsatisfactory, particularly their representation in higher political institutions – Parliament and provincial Legislation which is of great under – representation which hampers their effective role in influencing the government initiatives and policies regarding women‟s welfare and development. Their representation has been unable to reach even 10% in Lok Sabha. Thus it is clear that: a) There is male domination in Indian politics and almost all the parties give very little support to women in election despite their vocal support for 33% reservation of seats for women in Parliament and Provincial Legislation. b) Women have made initiatives in political participation but they have not been accepted in politics.

- VIOLATION OF „RIGHT TO PROPERTY‟:

  In most of the Indian families, women do not own property in their own names and do not get share of parental property. Due to weak enforcement of laws protecting them, women continue to have little access to land and property. In fact, some of the laws discriminate against women, when it comes to land and property rights. Though, women have been given rights to inheritance, but the sons had an independent share in the ancestral property, while the daughter‟s shares were based on the share received by the father. Hence, father could anytime disinherit daughter by renouncing his share but

the son will continue to have a share in his own right. The married daughters facing harassment have no rights in ancestral home.

- VIOLATION OF „RIGHT TO PROTECTION OF HEALTH‟:
  According to the World Bank report, malnutrition is the major cause of female infertility. The presence of excessive malnutrition among female children as compared to male children is basically due to differences in the intra – family allocation of food between the male and female children. Normally, the male members are fed before the female members of the family. According to Human Development Report, in rural Punjab, 21% of girls in low income families suffer from severe malnutrition as compared with 3 % of boys in the same family. Even the low income boys are far better than upper income girls. Girl babies are less breast – fed than boy babies. 60% of girl babies are born with low birth weight. Sometimes due to economic distress and natural calamities like floods, droughts or earthquakes, the discrimination against the female child increases. Moreover it has been confirmed by various studies that the girl‟s diet is inferior to the boy‟s diet both in quality and quantity. Boys are given more nutritive foods like milk, eggs, butter, ghee, fruits, and vegetables as compared to girls. Due to this inferior quality diet, girls are more vulnerable to infections and diseases. The reason again is that families spend less on medication for girls than for boys.

- VIOLATION OF „RIGHT TO EQUAL OPPERTUNITY FOR EMPLOYMENT„ AND „RIGHT TO GET EQUAL WAGES FOR EQUAL WORK‟ :
  The employment of the women in agriculture, traditional industries and in sizeable section of new industries is declining at a very fast rate. The reason is that the adoption of new technological changes requires new skill, knowledge and training. And women in India, who constitute a large share of world‟s illiterate lacks such skills and knowledge. The studies have also showed that for the same task, women are paid less than the males. Technological changes in agriculture and industry are throwing out women from the production process. The women workers are concentrated only for certain jobs which require so – called female skills. Thus, Indian labour market is adverse to women workers. It shows that, the role of women in large scale industries and technology based businesses is very limited. But even in the small- scale industries their participation is very low. Only 10.11% of the micro and small enterprises are owned by women today. Statistics show that only 15% of the senior management posts are held by the women. In agriculture where women comprise of the majority of agricultural labourers, the average wage of women on an average is 30 – 50 % less than that of men.

- VIOLATION OF „RIGHT TO LIVE WITH DIGNITY‟: EVE TEASING AND SEXUAL ABUSE:

Eve teasing is an act of terror that violates a woman‟s body, space and self – respect. It is one of the many ways through which a woman is systematically made to feel inferior, weak and afraid. Whether it is an obscene word whispered into a woman‟s ear; offensive remarks on her appearance; any intrusive way of touching any part of women‟s body; a gesture which is perceived and intended to be vulgar: all these acts represent a violation of woman‟s person and her bodily integrity. Thus, eve teasing denies a woman‟s fundamental right to move freely and carry herself with dignity, solely on the basis of her sex. There is no particular places where eve – teasers congregate. No place is really "safe" for women. Roads, buses, train, cinema halls, parks, beaches, even a woman‟s house and neighbourhood may be sites where her self – worth is abused.

- VIOLATION OF „RIGHT FROM SOCIETY, STATE AND FAMILY SYSTEM‟:

  1) CHILD MARRIAGE

  Child marriage has been traditionally prevalent in India and continues to this date. Discrimination against the girl begins even before their birth and continues as they grow. According to the law, a girl cannot be married until she has reached the age of 18 at least. But the girl in India is taken as a burden on the family. Sometimes the marriages are settled even before the birth of the child. In south India, marriages between cousins is common as they believe that a girl is secured as she has been marries within the clan. Parents also believe that it is easy for the child – bride to adapt to new environment as well as it is easy for others to mould the child to suit their family environment. Some believe that they marry girls at an early age so as to avoid the risk of their unmarried daughters getting pregnant. This shows that the reasons for child marriages in India are so baseless. Basically, this phenomenon of child marriage is linked to poverty, illiteracy, dowry, landlessness and other social evils.

  The impact of child marriage is widowhood, inadequate socialisation, education deprivation, lack of independence to select the life partner, lack of economic independence, low health/nutritional levels as a result of early/frequent pregnancies in an unprepared psychological state of young bride. However, the Indian boys have to suffer less due to male dominated society.

  Around 40% child marriages occur in India. A study conducted by „Family Planning Foundation‟ showed that the mortality rates were higher among babies born to women under 18. Another study showed that around 56% girls from poorer families are married underage and became mothers.

  So, all this indicated that immediate steps should be taken to stop the evil of Child Marriage.

2) DOWRY HARASSMENT AND BRIDE BURNING:
   The demand of dowry by the husband and his family and then killing of the bride because of not bringing enough dowry to the in – laws has become a very common crime these days. In spite if the Dowry prohibition Act passed by the government, which has made dowry demands in wedding illegal, the dowry incidents are increasing day by day. According to survey, around 5000 women die each year due to dowry deaths and at least a dozen die each day in „kitchen fires".

3) RAPE:
   Young girls in India often are the victims of rape. Almost 255 of rapes are of girls under 16 years of age. The law against rape is unchanged from 120 years. In rape cases, it is very torturing that the victim has to prove that she has been raped. The victim finds it difficult to undergo medical examination immediately after the trauma of assault. Besides this, the family too is reluctant to bring in prosecution due to family prestige and hard police procedures.

4) DOMESTIC VIOLENCE:
   Wife beating, abuse by alcoholic husbands are the violence done against women which are never publicly acknowledged. The cause is mainly the man demanding the hard earned money of the wife for his drinking. But an Indian woman always tries to conceal it as they are ashamed of talking about it. Interference of in – laws and extra marital affairs of the husbands are the another cause of such violence. The pity women are unwilling to go to court because of lack of alternative support system.

Thus, all these violence done against women raises the question mark that how these special rights being given to women are helping them? What are the benefits of framing such laws for the women? Are they really helping them? Will the women really be given an equal status to men one day? All these questions are still unanswered. There is still long way to go to answer such questions

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CASE LAWS ON SEXUAL HARASSMENT AT WORK PLACE

Sexual harassment is a common problem affecting all women in this world irrespective of the profession that they are in, but legal system is sleeping and so they fail in providing them security. It's not all, women living in those countries having developed legal system faces other problems like being fired out of work, ridiculed, societal pressure or promises of desired promotion, etc. that makes them left with no words. Sexual harassment is about male dominance over women and it is used to remind women that they are weaker than man. In a society where violence against women is posed just to show the patriarchal value operating in society, these values of men pose the greatest challenge in curbing sexual harassment. Studies have shown that 1 out of every 3 working women are touched by sexual harassment. Every country is facing this problem today. No female worker is safe and the sense of security is lacking in them. There are certain developments in laws of many countries to protect women workers from sexual harassment. During 2007 alone, the U.S. Equal Employment Opportunity Commission and related state agencies received 12,510 new charges of sexual harassment on the job. Sexual harassment is rooted in cultural practices and is exacerbated by power relations at the workplace. Unless there is enough emphasis on sensitization at the workplace, legal changes are hardly likely to be successful. Workplaces need toframe their own comprehensive policies on how they will deal with sexual harassment. Instead of cobbling together committees at the court's intervention, a system and a route of redress should already be in place.

India is a democratic country. All citizens have the fundamental right to live with dignity under article 21 of the constitution of India. But there is no law specifically dealing with sexual harassment. Laws are not able to provide justice to the victims. There are various cases brought before the supreme court of India but all cases were not successful in laying down new laws for sexual harassment. In 1997, Supreme court tried to lay down guideline in Vishakha's case .These guideline were somewhat successful because in this case supreme court argued that there is a need for separate laws but it was not given the required attention. Sexual harassment: the law According to the law in India, sexual harassment violates the women's fundamental right of gender equality and life with dignity under article 14 and article 21 respectively. Indian Penal Code, provides protection against women's sexual harassments such as in IPC: · Section 294 deals with obscene acts and songs at public place. · Section 354 deals with assault or criminal force against women. · Section 376 deals with rape. · Section 510 deals with uttering words or making gestures which

outrages a women's modesty. There is another act passed by legislature for protecting women's interest namely, Indecent Representation of Women, Act (1997). This act has not been used in cases of sexual harassment but there are certain provisions in this act which can be used in 2 ways: 1) If a person harasses another by showing books, photographs, paintings, films,etc. containing indecent representation of women than he will be liable with minimum 2yrs. imprisonment. 2) Section 7 of this act punishes companies, if there is indecent representation of women like showing pornography. The harassed women can also go to civil courts for tortious actions like mental anguish, physical harassment, loss of income in employment of victim, etc Sexual harassment can be distinguished on two basis, one of them is quid pro quo in which a woman gets sexually harassed in exchange of work benefits and sexual favours this also lead to some retaliatory actions such as demotion and making her work in difficult conditions. Another is 'hostile working environment' which imposes a duty on employer to provide the women worker with positive working environment and prohibits sexist graffiti, sexual remarks showing pornography and brushing against women employees.

On 9th December, 2013 "The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013" has come into force. The Act is based on the Supreme Court guidelines in the case of *Vishakha vs. State of Rajasthan* [1997 JT (7) 384]. Vishakha guidelines, as laid down by the Supreme Court put the onus of a safe working environment on the employer. The guidelines also state that it shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or redressal of acts of sexual harassment by taking all steps required. The guidelines also lay down a grievance redressal mechanism that mandates all companies, whether operating in the public or private sector, to set up Complaints Committee within the organisation to look into such offences. The new law brings in its ambit even domestic workers in both organized and unorganized sectors. The Act makes it the duty of every employer to provide a safe work environment which shall include safety from all the persons with whom a woman comes into contact at the workplace; organize workshops and awareness programmes; provide assistance to the woman if she so chooses to file a criminal

complaint; initiate criminal action against the perpetrator and treat sexual harassment as a misconduct under the service rules and initiate action for such misconduct.[1]

CONCEPTION OF SEXUAL HARRASMENT LAWS IN INDIA

Sexual harassment in workplace is a serious irritating factor that renders women's involvement in works unsafe and affects right to work with dignity[2]. It is unwelcome verbal, visual or physical conduct of a sexual nature that is severe or pervasive and affects working conditions or creates a hostile work environment. Generally sexual harassment is a sexually oriented conduct that may endanger the victim's job, negatively affect the victim's job performance or undermine the victim's personal dignity. It may manifest itself physically or psychologically. Its milder and subtle forms may imply verbal innuendo, inappropriate affectionate gestures or propositions for dates and sexual favours. However it may also assume blatant and ugly forms like leering, physical grabbing and sexual assault or sexual molestation.

To fit in the concept of sexual harassment the relevant conduct must be unwelcome. That is unwelcome to the recipient of that conduct. Conduct is not sexual harassment if it is welcome. So in order to determine if the conduct was welcome or unwelcome, Courts would naturally look to the complainant's reaction at the time the incident occurred and assess whether the complainant expressly, or by his or her behaviour demonstrated that the conduct was unwelcome. If the evidence shows that the complainant welcomed the conduct the complaint of sexual harassment would fail. For this reason, it is important to communicate (either verbally, in writing, or by your own actions) to the harasser that the conduct makes you uncomfortable and that you want it to stop.

However, before 1997, women experiencing sexual harassment at workplace had to lodge a complaint under Section 354 of the Indian Penal Code that deals with the criminal assault of women to outrage women's modesty, and Section 509 that punishes an individual or individuals for using a word, gesture or act intended to insult the modesty of a woman. These sections left the interpretation of 'outraging women's modesty' to the discretion of the police officer. The entire scenario changed in 1997 with the introduction of Vishaka guidelines.

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[1] Retrieved from: http://www.foxmandal.com/wp-content/uploads/2015/04/Laws-against-sexual-harassement-at-work-place.pdf

[2] (Alok Bhasin, Sexual Harassment at Work, EBC, 2007)

Case Laws:

Mrs. Rupan Deol Bajaj v. Kanwar Pal Singh Gill

1996 AIR 309

Judges: Mukherjee M.K. (J) & Anand, A.S. (J)

Modesty, outraging of modesty meaning, Section 354 IPC- Assault or criminal force to woman with intent to outrage her modesty. Since the word `modesty' has not been defined in the Indian Penal Code we may profitably look into its dictionary meaning. According to Shorter Oxford English Dictionary (Third Edition) modesty is the quality of being modest and in relation to woman means "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct". The word `modest' in relation to woman is defined in the above dictionary as "decorous in manner and conduct; not forward or lewd; shamefast". Webster's Third New International Dictionary of the English language defines modesty as "freedom from coarseness, indelicacy or indecency; a regard for propriety in dress, speech or conduct". In the Oxford English Dictionary (1933 Ed) the meaning of the word `modesty' is given as "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct (in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions".

Vishaka & others Vs. State of Rajasthan & others

J.S. Verma C.J.I., Mrs. Sujata V. Manohar and B.N. Kirpal. JJ.

(AIR 1997 SUPREME COURT 3011)

SUPREME COURT GUIDELINES ON SEXUAL HARASSMENT

The Supreme Court for the first time recognized, acknowledged and explicitly defined sexual harassment as an – unwelcome sexual gesture or behaviour aimed or having a tendency to outrage the modesty of woman directly or indirectly. Defining sexual harassment as an act aimed towards gender based discrimination that affects women's right to life and livelihood, the Supreme Court developed broad based guidelines for employers. This mandatory guidelines known as Vishaka guidelines are aimed towards resolution and prevention of sexual harassment. These guidelines bring in its purview all employers in organized and unorganized sectors by holding them responsible for providing safe work environment for women.

The Vishaka guidelines apply to all women whether students, working part time or full time, on contract or in voluntary/honorary capacity. Expressly prohibiting sexual harassment at work place these legally binding guidelines put a lot of emphasis on appropriate preventive and curative measures. (The guidelines include the following as acts of sexual harassment: Physical contact and advances, Showing pornography, a demand or request for sexual favours, any other unwelcome physical, verbal/non-verbal – such as whistling, obscene jokes, comments about physical appearances, threats, innuendos, gender based derogatory remarks, etc. Some of the important guidelines are:

- The onus to provide a harassment free work environment has been laid down on the employers who are required to take the following steps:
- Employers must form a Complaints Committee.
- Express prohibition of sexual harassment in any form and make the employees aware of the implications through in house communication system / posters / meetings.
- Must include prohibition of sexual harassment with appropriate penalties against the offender in Conduct rules.
- Prohibition of sexual harassment in the standing orders under the Industrial Employment (Standing Orders) Act, 1946 to be included by private employers.
- Provision of appropriate work conditions in respect of- work, leisure, health, hygiene to further ensure that there is no hostile environment towards women.
- No woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.
- Victims of sexual harassment to be given an option to seek transfer of the perpetrator or their own transfer.

Thus the Vishaka guidelines stipulated that all organisations would form a complaints committee to look into any such allegation. It would be headed by a woman employee and not less than half of its members would be women. All complaints of sexual harassment by any woman employee would be directed to this committee. The committee would advise the victim on further course of action and recommend to the management the course of action against the person accused of harassment.

However in *Medha Kotwal Lele v Union of India*[3] coordinator of Aalochana, a centre for documentation and research on women and other women's rights groups, together with others, petitioned the Court highlighting a number of individual cases of sexual harassment and arguing that the Vishaka Guidelines were not being effectively implemented. In particular, the petitioners argued that, despite the guidelines, women continued to be harassed in the workplace because the Vishaka Guidelines were being breached in both substance and spirit by state functionaries who harass women workers via legal and extra legal means, making them suffer and by insulting their dignity.

The Court stated that the Vishaka Guidelines had to be implemented in form, substance and spirit in order to help bring gender parity by ensuring women can work with dignity, decency and due respect. It noted that the Vishaka Guidelines require both employers and other responsible persons or institutions to observe them and to help prevent sexual harassment of women. The Court held that a number of states were falling short in this regard. It referred back to its earlier findings on 17 January 2006, that the Vishaka Guidelines had not been properly implemented by various States and Departments in India and referred to the direction it provided on that occasion to help to achieve better coordination and implementation. The Court went on to note that some states appeared not to have implemented earlier Court decisions which had required them to make their legislation compliant with the Vishaka Guidelines.

Apparel Export Promotion Council vs. A.K. Chopra

Judges: Dr. Anand, CJI & V.N. Khare

2000(1) SLJ SC 65: AIR 1999 SC 625

Facts: The respondent was Private Secretary to the Chairman of the Apparel Export Promotion Council, the appellant in the case. It was alleged that the respondent tried to molest a woman employee of the council, Miss X (name withheld by the Supreme Court), who was at that time working as a clerk-cum-typist, on 12-8-88. Though she was not competent or trained to take dictations, he took her to the business Centre at Taj Palace Hotel for taking dictation and type out the matter. There he tried to sit too close to her and despite her objection did not give up his

[3] Application Number: 2012 STPL (Web) 616 SC Jurisdiction

objectionable behavior. After she took dictation from the Director, he (respondent) took her to the Business Centre in the basement of the Hotel for typing the matter and taking advantage of the isolated place he again tried to sit close to her and touch her despite her objections. He repeated his overtures. He went out for a while but came back and resumed his objectionable acts. He tried to molest her physically in the lift also while coming to the basement but she saved herself by pressing the emergency button, which made the door of the lift open.

The respondent was placed under suspension on 18-8-88 and a charge sheet was served on him. A Director of the Council was appointed as Inquiry Officer and he held that the respondent acted against moral sanctions and that his acts against Miss X did not withstand the test of decency and modesty and held the charges levelled against the respondent as proved. The Disciplinary authority agreeing with the report of the Inquiry Officer imposed the penalty of removing him from service with immediate effect, on 28-6-1989. The respondent filed a departmental appeal before the Staff Committee and it was dismissed. The respondent thereupon filed a writ petition before the High Court and a Single Judge allowing it opined that "the petitioner tried to molest and not that the petitioner had in fact molested the complainant". The Division Bench dismissed the appeal filed by the Council against reinstatement of the respondent, agreeing with the findings of the Single Judge.

The Supreme Court observed: The High Court appears to have over-looked the settled position that in departmental proceedings, the Disciplinary authority is the sole judge of facts and in case an appeal is presented to the Appellate Authority, the Appellate Authority has also the power and jurisdiction to re-appreciate the evidence and come to its own conclusion, on facts, being the sole fact-finding authorities. Once findings of fact, based on appreciation of evidence are recorded, the High Court in Writ jurisdiction may not normally interfere with those factual findings unless it finds that the recorded findings were based entirely on no evidence or that the findings were wholly perverse and /or legally untenable. The adequacy or inadequacy of the evidence is not permitted to be canvassed before the High Court. Since, the High Court does not sit as an Appellate authority, over the factual findings recorded during departmental proceedings, while exercising the power of judicial review, the High Court cannot normally speaking substitute its own conclusion, with regard to the guilt of the delinquent, for that of the departmental authorities. Even insofar as imposition of penalty or punishment is concerned, unless the punishment or penalty imposed by

the Disciplinary or the Departmental Appellate Authority, is either impermissible or such that it shocks the conscience of the High Court, it should not normally substitute its own opinion, and impose some other punishment or penalty.

The Supreme Court held: Judicial Review is directed not against the decision, but is confined to the examination of the decision making process. Lord Haltom in Chief Constable of the North Wales Police vs. Evans, (1982)3 ALL ER 141, observed: "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches, on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the Court."

The Supreme Court further held: The material on the record, thus, clearly establishes an unwelcome sexually determined behavior on the part of the respondent against Miss X which is also an attempt to outrage her modesty. Any action or gesture, whether directly or by implication aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of the definition of sexual harassment. The evidence on the record clearly establishes that the respondent caused sexual harassment to Miss X, taking advantage of his superior position in the Council.

The Supreme Court referred to the definition of sexual harassment suggested in Vishaka vs. State of Rajasthan, (1997) 6 SCC 241 and held: An analysis of the definition shows that sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for affecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate.

The Supreme Court further held: 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. The Supreme Court set aside the order of the High Court and upheld the departmental action.

D S Grewal V. Vimmi Joshi[4]

The court noted that Vimmi Joshi was working as principal of the school and was drawing a salary. The Army Public School was a public enterprise. Joshi had been humiliated by the letter, and by Bahadur's alleged advances. The court held that Joshi had reasonable grounds to believe that her objections would be a disadvantage in connection with employment, or would create a hostile working environment. According to Joshi, adverse consequences followed as a result of her job termination. The Supreme Court noted that neither had a mechanism for redressal of Joshi's complaints been put in place, nor had a complaints committee been constituted as required under law. It observed that it was a matter of "great regret" that the army had failed to put a complaints mechanism in place and had ignored the ruling of the apex court in the Visakha case. The judgment held that disciplinary proceedings could be instituted after a prima facie finding as to the role of the delinquent. The purported inquiry by the army exonerating Hitendra Bahadur was found not to have provided a complete picture. The apex court held that the high court could not have reached a finding of it being a clear case of sexual harassment without further enquiry into the matter. The Supreme Court directed the high court to appoint a three-member committee headed by a woman. And in the event that the finding was of sexual harassment, the report should be sent to the army authorities for initiation of disciplinary proceedings. The management of the Army Public School was held guilty of violating the guidelines laid down in the Visakha case and directed to pay Rs 50,000 to Joshi towards expenditure incurred on the case.

Arati Durgaram Gavandi V. Managing Director, Tata Metaliks Limited and Others[5]

There is the Civil Writ Petition, which came up in the Bombay High Court in a case involving Tata Mettaliks Limited. Here, a lady supervisor was subject to sexual harassment at the hands of the Deputy GM at the plant. The lady sought an inquiry and the Management, with the help of an advocate, conducted an inquiry. The perpetrator was exonerated on the basis of this and the services of the woman concerned was terminated. She challenged her termination in a complaint

[4] 2009 (1) SCALE 54
[5] Civil Writ Petition No. 8826 of 2004

under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, which decided in her favour and declared that the employer was guilty of unfair labour practices and granted reinstatement with consequential benefits. However, the Management failed to comply with the order of reinstatement by the order of the Labour Court. The matter was filed in the Bombay High Court which observed that Vishaka Guidelines are a law under Article 141 of the Constitution and that the powers to deal with the complaint of sexual harassment of an employee and inquiry vests with the CC and it cannot be decided by the Management.

The Delhi High Court order in a judgement involving S.K. Mallick, Director of National Academy of Audit and Account (NAAA), is another case in point: Mallick filed a petition before the Delhi High Court after the Central Administrative Tribunal (CAT) refused to stay the departmental proceedings of allegations of sexual harassment against him by a senior woman colleague. Mallick had allegedly entered the room of the woman officer at Shimla in an inebriated condition and misbehaved with her. The woman filed an FIR the next day and also intimated senior officials of Mallick's conduct. This led to a departmental inquiry. Mallick was suspended on the basis of a criminal case pending against him. He then approached the CAT seeking to stay the departmental inquiry. When the CAT refused to stay the departmental proceedings, Mallick approached the Delhi High Court.

The Delhi High Court while dismissing the petition made the following observations in respect of certain key definitions: (I) "Workplace" - The HC noted that in the case of the private sector, it is common for senior officials to run their businesses from their residences with the advancements in information technology. Accordingly, a person can interact or do business with other persons, while located in some other country by means of video conferencing, even while an officer or teacher may work from the accommodation allotted to her or him. Therefore, if an officer indulges in an act of sexual harassment with the employee, it would not be open for him to claim that the act had not been committed at the workplace but at his residence and get away with that argument. (II) "Any woman" - This expression is broad enough to include women of all ages, including women who may be senior in years and status. The HC said this in response to a plea by the accused that that he could not be accused of sexually harassing a senior officer towards whom he was not in position to extend any sort of favour.

HUMAN RIGHTS OF VICTIMS

TEMIDA
Jun 2007, str 51-62
ISSN: 1450-6637
DOI: 10.2298/TEM0702051S

Victims and the Criminal Justice System in India: Need for a Paradigm Shift in the Justice System

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Until 1970s the victims of crime were a forgotten entity in the criminal justice system. The attitude began to change as the discipline of victimology came into its own. The past few decades have witnessed a revolution in the way society deals with victims of crime. Many countries have now recognized the need to provide services to victims to help them recover from the eff ects of crime and assist them in their dealings with the criminal justice system. But in India, there has not been any signifi cant improvement in the position of victims in the criminal justice system. The present paper has attempted to examine the position of victims of crime in India and the criminal justice system. The paper also emphasizes the need to provide assistance to crime victims. The authors of the present paper have also suggested some of the immediate steps that are to be implemented by the law enforcement agencies in India to improve the position of victims in the criminal justice system.

Keywords: *victims of crime, assistance to crime victims, victim justice, restitution, India*

Introduction

Across the globe in diff erent countries, victims of crime are protected, assisted, restituted and compensated by appropriate laws and acts. But in India the victims of crime play only an insignifi - cant role in the criminal justice process. In recent times, among the many reforms canvassed for improving the criminal justice system is the one that advocates a victim-orientation to criminal justice administration. Victim-orientation includes greater respect and consideration towards victims and their rights in the investigative and prosecution process, provisions for greater choices to victims in trial and disposition of the accused, and a scheme of reparation/compensation particularly for victims of violent crimes (Madhava Menon, 2004: 362363). Though there are some provisions under the Indian Constitution and some sections in the Code of Criminal Procedure, 1973 to protect the rights of the victims and for providing compensation, the criminal courts at the lower level in India have ignored those provisions for a long time and not utilized them during their sentencing processes. But it is heartening to observe that several judgments in both the High Courts and the Supreme Court in the last two decades or so have come to the rescue of victims of not only traditional crimes where the off ender is another citizen but also in cases where the victimization has been caused by the instrumentalities of the state itself. In addition to the existing provisions under the Indian criminal laws, a considerable importance was given in the Report of the Committee on Reforms of Criminal Justice System, headed by Justice V. S. Malimath on the need to provide "justice to victims of crime". Under these circumstances, the present paper includes an overview of the crime victimization and the present legal provisions which are available to protect the victims of crime in India. The paper also has briefl y analyzed some of the landmark judgments that have provided justice to victims of crime. Finally,

the present paper provides certain practical suggestions taking into account the experiences at the international level to improve the condition of crime victims in India.

Crime Scenario in India

Table 1 provides an overview of the crime scenario in India. In the year 2004, there was a sharp increase in the number of cases registered and in the year 2005, the number of cases registered declined drastically by 16.7 percent when compared to the year 2004. In the year 2004, the Indian Penal Code (IPC) and Special and Local Laws (SLL) crimes constituted 30.4 and 69.6 percent, respectively and during 2005, 63.7 percent accounted for SLL crimes and 36.3 percent for IPC crimes. The rate (per 1,00,000 population) of total IPC and SLL crimes was 455.8 in 2005, showing a decline over the previous years.

S. No	Year	Number of offences			Ratio IPC:SLL	Rate per (1,00,000 population)
		IPC	SLL	Total		
1.	2001	17,69,308	35,75,230	53,44,538	1:1.02	520.4
2.	2002	17,80,330	37,46,198	55,26,528	1:2.10	526.0
3.	2003	17,16,120	37,78,694	54,94,814	1:2.20	514.4
4.	2004	18,32,015	41,96,766	60,28,781	1:2.30	555.3
5.	2005	18,22,602	32,03,735	50,26,337	1:1.76	455.8

Table 1 Cognizable[1] crimes registered in India during 2001–2005

IPC, Indian Penal Code; SLL, Special and Local Laws.
Source: National Crime Records Bureau, 2006, p. 26

According to Crime in India, 2005 (offi cial crime statistics compiled and published by the National Crime Records Bureau, Ministry of Home Aff airs, Government of India), 39 percent of the off ences were crimes against body, crimes against property were 35.3 percent, crime against public order were 5.9 percent, economic crimes were 6.3 percent, 8.2 percent of the cases comes under burglary, theft comes to 24.8 percent and so on. There was an increase of about 31.1 per cent in the number of cases registered under cheating, a high percentage of increase (67.4 percent) was seen in importation of girls (from foreign country)[2], 15 percent increase was seen in cases registered under Narcotic Drugs and Psychotropic Substances Act, 1985, 13.7 percent increase in gambling, a huge percentage (119.6) of increase was seen in cases registered under Indecent Representation of Women (Prohibition) Act, 1986, also 63.5 percent increase was seen in copyright violations (National Crime Records Bureau, 2006:31–39).

Also, national crime statistics show a grim picture of women's status in India, which is driven by social, economic and cultural factors. An analysis of the offi cial statistics for India for the period 1991–2001 shows an overall increase in the crimes committed against women. During the period, there was an increase in the off ence of rape committed on women by 5.34 percent, cruelty by husband and relatives by 11.32 percent, and molestation by 6.8 percent (Srinivasan, 2004).

The above statistics provide a bird's eye view on the nature and extent of crime victimization in India. Besides, data about the loss

[1] The Criminal Procedure Code (CrPC) divides all crimes into two categories. They are (a) cognizable (Sec. 2 (c)) (b) non-cognizable (Sec. 2 (1)). The CrPC defi nes a cognizable off ence or a cognizable case as the one in which a police offi cer may arrest without a warrant. Noncognizable crimes are defi ned as those regarding which a police offi cer has no authority to arrest without a warrant (Ranchhoddas and Thakore, 2002).

[2] Section 366B, IPC defi nes **importation of girl (from foreign country)** as 'whoever imports into India from any country out-side India or from the State of Jammu and Kashmir any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fi ne.'

of lives due to natural calamities and consequent misery is really mind boggling. To cite an example, in December 2004, due to Tsunami, thousands of lives were lost and hundreds of people—particularly children and women—were orphaned in the State of Tamil Nadu alone. Such people are also vulnerable to various forms of crime victimization. Thousands of children are being used in exploitative forms of labor and thousands of children are living and working in the streets where they have often been subjected to diff erent forms of exploitation.

The impact of victimization on diff erent kinds of victims due to diff erent types of crimes has been varied such as physical, psychological and fi nancial. Researchers have indicated that the impact of victimization not only aff ects the victim but also the victims' immediate family and next of kin, relatives, neighbors and acquaintances. This holds true for the emotional as well as the fi nancial consequences and the eff ects can last for a few months or years or in some cases for life long. Hence, the consequences of victimization emphasize the urgent need, not only to prevent victimization but also to protect the victims and provide them with all kinds of assistance during and after the criminal justice process. The traditional approaches of handling of crime have not altered the position of victims of crime for better in anyway. Contrary to the common belief held by criminal justice offi cials that victims would expect retaliation or retribution to their off enders, many victims are found to be interested in restorative approaches in order to deal with disputes rather than punishments and penalties to the off ender. One recognized method of protection of victims is compensation to victims of crime. For providing monetary compensation and for protecting certain other rights of the victims, there are some provisions both in the Constitutional Law of India and in the criminal laws.

Constitutional Law of India and Victims of Crime

The Indian Constitution has several provisions which endorse the principle of victim compensation. The constellation of clauses dealing with Fundamental Rights (Part III) and Directive Principles of State Policy (Part IV) laid the foundation for a new social order in which justice, social and economic, would fl ower in the national life of the country (Article 38). Article 41, which has relevance to victimology in a wider perspective, mandates, *inter alia*, that the state shall make eff ective provision for "securing public assistance in cases of disablement and in other cases of undeserved want". Surely, crime victims and other victimized people swim into the haven of Article 41. Article 51-A makes it a fundamental duty of every citizen of India "to protect and improve the natural environment … and to have compassion for living creatures" and "to develop humanism". If empathetically interpreted and imaginatively expanded, we fi nd here the constitutional beginnings of victimology (Krishna Iyer, 1999). Further, the guarantee against unjustifi ed deprivation of life and liberty (Article 21) has in it elements obligating the state to compensate victims of criminal violence (Basu, 2003).

Provisions in Indian Criminal Laws

The Code of Criminal Procedure, 1973 has recognized the principle of victim compensation. Section 250 authorizes magistrates to direct complainants or informants to pay compensation to people accused by them without reasonable cause. Again Section 358 empowers the court to order a person to pay compensation to another person for causing a police offi cer to arrest such other person wrongfully. Finally, Section 357 enables the court imposing a sentence in a criminal proceeding to grant compensation to the victim and order the payment of costs of the prosecution. However, this is on the discretion of the sentencing court and is to be paid out of the fi ne recovered.

Though the principle underlying Section 357 of the Code of Criminal Procedure, 1973 is very much the same sought to be achieved by the UN Basic Principles of Justice for Victims of Crime, its scope is extremely limited as:

1. The section applies only when the accused is convicted;
2. It is subject to recovery of fi ne from the accused when fi ne is part of the sentence;
3. When fi ne is not imposed as part of the sentence, the magistrate may order any amount to be paid by way of compensation

for any loss or injury by reason of the act for which the accused person has been so sentenced
(Sec. 357(3)); and

4. In awarding the compensation, the magistrate is to consider the capacity of the accused to pay.

Given the low rates of conviction in criminal cases (less than 10 percent), the inordinate delay in the conclusion of proceedings and the relatively low capacity of the average accused persons, it is preposterous to say that a victim compensation scheme really operates in administration of justice in India (Madhava Menon, 2004: 363). Besides the above provisions relating to restitution to victims under the Code of Criminal Procedure, 1973, Section 5 of the Probation of Off enders Act, 1958 has also empowered the courts to require released offenders to pay the restitution and costs as under:

1. The court directing the release of an offender under Section 3 or Section 4 may, if it thinks fi t, make at the same time a further order directing him to pay:
   a. Such restitution as the court thinks reasonable for loss or injury caused to any person by the commission of the off ence; and
   b. Such cost of the proceeding as the court thinks reasonable.
2. The amount ordered to be paid under subsection (1) may be recovered as a fi ne in accordance with the provisions of Sections 357 and 358 of the Code.
3. A civil court trying any suit out of the same manner for which the off ender is prescribed, shall take into account "any amount paid or recovered as restitution under subsection (1) in awarding damages" (Ranchhoddas and Thakore, 2002).

In addition to the existing provisions under the Indian criminal laws, a considerable importance was given in the Report of the *Committee on Reforms of Criminal Justice System*, headed by Justice V. S. Malimath on the need to provide "justice to victims of crime".

Committee on Reforms of Criminal Justice System

The Government of India, Ministry of Home Aff airs by its order dated 24 November 2000 constituted the Committee on Reforms of Criminal Justice System to consider measures for revamping the criminal justice system. One of the objectives of the committee was "to suggest ways and means of developing synergy among the judiciary, the prosecution and the police to restore the confi dence of the common man in the criminal justice system by protecting the innocent and the victim and by punishing unsparingly the guilty and the criminal". While referring to the position of victims in the criminal justice system in India today, the committee observed "that victims do not get at present the legal rights and protection they deserve to play their just role in criminal proceedings which tend to result in disinterestedness in the proceedings and consequent distortions in the criminal justice administration" (Government of India, 2003: 75). With this general observation the committee reviewed the position of victims under the criminal justice system, including the present role that the victim is assigned under the existing criminal law; provisions for compensation of victims of crime and so on. The report has also highlighted how the Supreme Court and the High Courts in India have evolved the practice of awarding compensatory remedies not only in terms of money but also in terms of other appropriate reliefs and remedies. The report stated "medical justice to the Bhagalpur blinded victims, rehabilitative justice to the communal violence victims and compensatory justice to the Union Carbide victims are examples of the liberal package of reliefs and remedies forged by the apex court. The decisions in *Nilabati Behera* v. *State of Orissa* (1993 2 SCC 746) and in *Chairman, Railway Board* v. *Chandrima Das* (2000 Cr LJ 1473 SC, cited in Government of India, 2003: 81) are illustrative of this new trend of using constitutional jurisdiction to do justice to the victims of crime. Substantial monetary compensations have been awarded against the instrumentalities of the state for the failure to protect the rights of the victims". The committee also examined the rights of the victims of crime in diff erent criminal justice systems worldwide. The

committee was impressed with the report on "Criminal Justice: The Way Ahead" presented to the British Parliament in February 2001, as the report proposed various amendments and recommendations.

The Committee on Reforms of Criminal Justice System was of the opinion that the strategies being introduced in the United Kingdom for reforming the criminal justice system to give a better deal for victims should be considered for adoption in India. Taking into account the UK Report of 2001, the Committee made the following recommendations:

1. The victim, and if he/she is dead, his legal representative shall have the right to be impleaded as a party in every criminal proceeding where the charge is punishable with 7 years imprisonment or more.
2. In select cases notifi ed by the appropriate government, with the permission of the court an approved voluntary organization shall also have the right to implead in the court proceedings.
3. The victim has a right to be represented by an advocate of his/her choice; provided that an advocate shall be provided at the cost of the State if the victim is not in a position to aff ord a lawyer.
4. The victim shall have the right to participate in criminal trial.
5. The victim shall have a right to prefer an appeal against any adverse order passed by the court acquitting the accused, convicting for a lesser off ence, imposing inadequate sentence, or granting inadequate compensation. Such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court.
6. Legal services to victims in select crimes may be extended to include psychiatric and medical help, interim compensation and protection against secondary victimization.
7. Victim compensation is a state obligation in all serious crimes, whether the off ender is apprehended or not, convicted or acquitted. This is to be organized in a separate legislation by the Parliament. The draft bill on the subject submitted to the Government in 1996 by the Indian Society of Victimology provides a tentative framework for consideration.
8. The victim compensation law will provide for the creation of a victim compensation fund to be administered possibly by the Legal Services Authority. The law should provide for the scale of compensation in diff erent off ences for the guidance of the Court. It may specify off ences in which compensation may not be granted and conditions under which it may be awarded or withdrawn.

The above analysis of the provisions in the Constitutional Law of India, criminal laws and the recommendations of the Committee on Reforms of Criminal Justice System has provided the current status of victims of crime in India. In this context it is also important to discuss some of the judgments wherein the principle of restitution to victims of crime has been introduced or were upheld by the courts in India. But in all these cases discussed below the word "compensation" has been used to refer to "restitution" which is the accepted terminology by the international scholars for payment made by off enders to victims of crime. As observed by Chockalingam (1993: 74), the Indian courts use the term "compensation" to refer to restitution as well as the real compensation, wherein the money is paid to the victim by the state or other agency for abuse of power.

Case Laws – Towards Victim Justice

The fi rst landmark judgment where compensation to the victim ordered by the Madras High Court and upheld with some modifi cations by the Supreme Court of India was *Palaniappa Gounder* v. *State of Tamil Nadu* (AIR 1977 SC 1323). In this case, the High Court after commuting the sentence of death on the accused to one of life imprisonment, imposed a fi ne of Rs.20,000 on the appellant and directed that out of the fi ne, a sum of Rs.15,000 should be paid to the son and daughters of the deceased under Section 357 (1) (c) of the Code of Criminal Procedure, 1973. The Supreme Court while examining the special leave petition of the appellant observed that there can be no doubt that for the off ence of murder, courts have the power to impose a sentence of fi ne under Section 302 of the IPC but the High Court has put the "cart before the horse" in leaving the propriety

of fi ne to depend upon the amount of compensation. The court further observed, “the fi rst concern of the court, after recording an order of conviction, ought to determine the proper sentence to pass. The sentence must be proportionate to the nature of the off ence and sentence including the sentence of fi ne must not be unduly excessive.” In fact, the primary object of imposing a fi ne is not to ensure that the off ender will undergo the sentence in default of payment of fi ne but to see that the fi ne is realized, which can happen only when the fi ne is not unduly excessive having regard to all the circumstances of the case, including the means of the off ender. The Supreme Court thus reduced the fi ne amount from Rs.20,000 to a sum of Rs.3,000 and directed that the amount recovered shall be paid to the son and daughters of the deceased who had fi led the petition in the High Court. This is a case wherein the Supreme Court reduced the amount of fi ne and achieved a proper blending of off ender rehabilitation and victim compensation. The important point, which emerged in the case, was the Supreme Court upholding the order of compensation (Chockalingam, 1993: 76–77).

In the case of *Sarwan Singh* v. *State of Punjab* (AIR 1978 SC 1525), the Supreme Court not only reiterated its previous standpoint but also laid down, in an exhaustive manner, points to be taken into account while imposing fi ne or compensation. The Honorable Court observed that while awarding compensation, it is necessary for the court to decide whether the case is fi t enough to award compensation. If the case is found fi t for compensation, then the capacity of the accused to pay the fi xed amount has to be determined.

And the court also observed that:

> It is the duty of the court to take into account the nature of the crime, the injury suff ered, the justness of the claim for compensation, the capacity of the accused to pay and other relevant circumstances in fi xing the amount of fi ne or compensation. After consideration of all facts of the case, we feel that in addition to the sentence of 5 years rigorous imprisonment, a fi ne of Rs. 3,500 on each of the accused under Section 304 (1), IPC should be imposed.

In *Guruswamy* v. *State of Tamil Nadu* (1979 Cr LJ 704), the accused was convicted on a charge of murder. The victims were his father and brother. While reducing the sentences, the Supreme Court held that the off ence was committed during a family quarrel and though the victims are the father and brother of the appellant, in the circumstances of the case, the extreme penalty was not called for. The accused had also been under sentence of death for a period of six years. But in reducing the death sentence to imprisonment for life, it was held that the widow and her minor children should be compensated for the loss they have suffered by the death of the second deceased. The court imposed a fi ne of Rs.10,000 to the appellant and ordered the same to be paid as compensation to the dependents of the victim.

The case of *Hari Krishnan and the State of Haryana* v. *Sukhbir Singh and others* (AIR 1988 SC 2127) is the most important case after *Sarwan Singh* where the court repeated its fi rm understanding once again in the following words:

> The power under Section 357 Criminal Procedure Code is a measure of responding appropriately to crime as well as reconciling the victim with the off ender. It is, to some extent, a recompensatory measure to rehabilitate to an extent the beleaguered victims of the crime, a modern constructive approach to crime, a step forward in our criminal justice system … The payment by way of compensation must, however, be reasonable. What is reasonable may depend upon the facts and circumstances of each case.
>
> *Rachhpal Singh* v. *State of Punjab*
> (2002 Cr LJ 3540 SC)

The present case occurred due to a civil dispute pending between the deceased and the appellant. The deceased obtained an interim order pertaining to the civil dispute. This in turn led to a fi ght between the deceased and the appellants. The fi rst appellant armed with a gun and the second appellant armed with a rifl e along with three other accused attacked the deceased. The fi rst and second appellant fi red shots at the two deceased and they received two bullet injuries each and died on the spot. The Sessions Judge after considering

the materials placed before him, found the appellants guilty and convicted and sentenced the fi rst two appellants to death for an off ence under Section 302 IPC and the other accused to life imprisonment. They were also sentenced to varying terms of imprisonment with fi ne with regard to other offences. Against this order the accused preferred an appeal challenging the convictions and sentences. The complainant separately preferred a Criminal Revision Petition praying for compensation under Section 357 CrPC. The High Court concurred with the fi ndings of the Sessions Court on the conviction imposed but held that the imposition of capital punishment was uncalled for as the case was not one of the rarest of rare case and hence their sentence was reduced to imprisonment for life. With regard to the other three accused, they were acquitted under Section 302 read with 148 IPC. However, the conviction under Section 449 IPC was maintained but the period of sentence was reduced to the period undergone. Considering the revision petition, the High Court held that it was a fi t case for exercising the jurisdiction under Section 357 CrPC and directed each of the appellant to pay a sum of Rs. 2,00,000, totaling Rs. 4,00,000 and in default, was to undergo a sentence of fi ve years rigorous imprisonment. Against this order the appellants fi led an appeal before the apex court. The Court after hearing the learned counsels, held that there was no ground to diff er from the reasoning of the court below and upheld the conviction and sentence.

With regard to the award of compensation under Section 357, the Court held that the High Court in the instant case did not have suffi cient material before it to correctly assess the capacity of the accused to pay compensation but keeping the object of the Section, it is a fi t case in which the court was justifi ed in invoking Section 357. The court after having gone through the records and materials found that the appellants were reasonably affl uent. Hence, the appellants were capable of paying at least Rs.1,00,000 per head as compensation. Therefore, the order of the High Court is modifi ed by reducing the compensation payable from Rs.2,00,000 each to Rs.1,00,000 each.

Further the Supreme Court in *Mangilal* v. *State of Madhya Pradesh* (AIR 2004 SC 1280) held that the power of the court to award compensation to the victims under Section 357 is not ancillary to other sentences but in addition thereto. The basic diff erence between subsection (1) and (3) of the Section 357 is that in the former case, the imposition of fi ne is the basic and essential requirement, while in the latter even the absence thereof empowers the court to direct payment of compensation. Such power is available to be exercised by an appellate court, the High Court or the Court of Sessions when exercising revisional powers.

Bipin Bihari v. *State of Madhya Pradesh* (2005 Cr LJ 2048 MP)

The facts of the present case is that the complainant while grazing his ox in his fi eld heard his sister-in-law's cry and rushed towards her. He found that the appellant had entered into an altercation with his sister-in-law and restrained her from cutting the crop. The appellant was carrying a gun and threatened of dire consequences. Despite the threat, the complainant tried to get hold of the gun and in the scuffl e the appellant threatened to kill him. He fi red a shot which struck on the right calf of the complainant and as a result the fl esh was ripped off . Further, the appellant tried to load the gun again but was not able to do so as the complainant was grappling with him. At this point of time, some persons arrived on the spot and on seeing them the appellant fl ed from the scene leaving the gun. The incident was reported and charge was framed under Section 307 IPC against the appellant. The trial court convicted the appellant under Section 307 IPC and sentenced him to undergo rigorous imprisonment for life and pay a fi ne of Rs. 5000 in default of which he was to undergo two years of simple imprisonment. The trial court directed that the fi ne amount be paid to the complainant as compensation under Section 357, Criminal Procedure Code (CrPC). The appellant preferred an appeal against this order in the High Court. The court after hearing the learned counsels held that it was not justifi ed to impose sentence of life imprisonment on the appellant. Further, it was held that it would be proper to impose two years rigorous imprisonment. Regarding the award of compensation, the court referred to the case of

Bhaskaran v. *Sankaran Vaidhyan Balan* (AIR 1999 SC 3762), in which the apex court while considering the scope of Section 357(3) CrPC laid down
that the Magistrate cannot restrict itself in awarding compensation under Section 357(3), since there is no limit in sub-section (3) and therefore
the Magistrate can award any sum of compensation. Further, it was also held that while fi xing the quantum of compensation, the Magistrate should consider what would be the reasonable amount of compensation payable to the complainant. In *Hari Krishnan and the State of Haryana* v. *Sukbir Singh and others* (AIR 1988 SC 2127), the court held "that the power of imposing fi ne intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the off ender. It is to some extent a constructive approach to crime and a step forward in a criminal justice system. It is because of this that it was recommended that all criminal courts should exercise this power liberally so as to meet the ends of justice, by cautioning that the amount of compensation to be awarded must be reasonable". The court held that "in order that collective may not loose faith in criminal adjudication system and the concept of deterrence is not kept at a remote corner we are disposed to enhance the amount of compensation to Rs.30000/-". The court referred to the case of *Sarup Singh* v. *State of Haryana* (AIR 1995 SC 2452), wherein the apex court while reducing the sentence for the period already undergone by the accused under Section 304 IPC, directed to pay a sum of Rs. 20000 by way of compensation. The court further emphasized that the amount of compensation was enhanced taking into consideration the gravity of the injury, the strata to which the accused belongs, the milieu in which the crime has taken place and further keeping in view the cry of the society for the victims at large. The entire amount shall be paid to the injured on proper identifi cation. The amount shall be deposited before the trial court within four months failing which the appellant shall have to undergo further rigorous imprisonment of four years. The sentence of conviction of the appellant under Section 307 IPC is maintained with modifi cation in the sentence.

Manjappa v. *State of Karnataka* (2007 SCCL COM 599)

In this case, the appellant–accused had voluntarily caused simple hurt to the complainant. The appellant was also said to have assaulted the complainant with a stone resulting in grievous injuries to the complainant. Moreover, the appellant–accused intentionally insulted the complainant by using abusive language thereby provoking him, knowing fully well that such provocation would make the complainant to break public peace or to commit other off ences. The charge was framed against the accused for off ences punishable under Sections 323, 325 and 504 of the IPC. The trial court, after appreciating the prosecution evidence, by its judgment, dated 8 March 1999 held that it was proved by the prosecution that the accused caused simple as well as grievous injury to the complainant, and thereby, he had committed off ences punishable under Sections 323 and 325 IPC. However, regarding the third charge—that the accused committed an off ence punishable under Section 504 IPC—according to the court, the prosecution was not able to establish it and the accused was ordered to be acquitted. So far as sentence was concerned, the trial court awarded simple imprisonment for three months and a fi ne of Rs. 500, in default to undergo simple imprisonment for fi fteen days for the off ence punishable under Section 323 IPC. He was also ordered simple imprisonment for one year and fi ne of Rs. 3000, in default to undergo simple imprisonment for three months for the off ence punishable under Section 325 IPC. The court also ordered that out of the fi ne amount so received, the injured-complainant will be paid compensation of Rs. 2000 under Section 357(1) (b) of the CrPC, 1973. Against this order of conviction and sentence, the appellant preferred an appeal in the court of Sessions Judge. The Sessions Judge, after considering the evidence and hearing the arguments, acquitted the appellant for the off ence punishable under Section 323 IPC and set aside the order of conviction and sentence. He, however, confi rmed the order of conviction of the accused for the off ence punishable under Section 325 IPC. The appellate court, however, was of the view that it was a fi t case to reduce sentence of simple imprisonment from one year to six months. The

appellate court also directed the accused to pay compensation of Rs. 3000 to the complainant who had sustained grievous injuries, independently of what the trial court awarded. The sentence of fi ne and compensation passed by the trial court was confi rmed. The appellant fi led a revision petition in the High Court challenging the order of the Court of Sessions. The High Court confi rmed the order of conviction. The High Court also partly allowed the revision by reducing sentence and ordering the appellant to undergo simple imprisonment for one month and to pay a fi ne of Rs. 1000 in addition to what was ordered by the courts below. The appellant then approached the Supreme Court against the order passed by the High Court. The Honorable Judges of the Supreme Court in their order stated that "keeping in view all the facts and circumstances, in our opinion, ends of justice would be met, if we order that the substantive sentence which the appellant has already undergone is held suffi cient. We are also of the view that it would be appropriate if over and above the amount which the appellant herein has paid towards fi ne and also towards compensation to the injured victim, the appellant is ordered to pay an additional amount of Rs.10000/- to the complainant by way of compensation."

An analysis of the above case laws gives an indication that the courts in India, at least at the higher level, have started realizing the importance of the victim and the necessity to ameliorate the plight of the victim to the extent possible by restitution.

Victim Justice – An International Perspective

In 1985, virtually simultaneously two powerful documents were issued urging the international community to enhance the status of victims. The fi rst one was the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The second one was the Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure which was also adopted in 1985. Although diff erences in language and in details cannot be overlooked, the content of the Declaration and the Recommendation were to a large extent overlapping and had subsequently been echoed and expanded on in other international documents of a similar nature, such as the Statement of Victims' Rights in the Process of Criminal Justice, issued by the European Forum for Victim Services in 1996, and the European Union Framework Decision on the Standing of Victims in Criminal Proceedings. The most recent and most comprehensive example is the Council of Europe Recommendations (2006)8 on assistance to crime victims, adopted on 14 June 2006 (Groenhuijsen and Letschert, 2006:2-3).

The Basic Principles included in the UN Declaration for Victims are:

1. Access to justice and fair treatment;
2. Restitution;
3. Compensation; and4. Assistance.

With regard to the restitution and compensation in the above Declaration, it is stated that offenders should make a fair restitution to victims or their families; restitution should be part of the sentencing in criminal cases; and when compensation is not fully available from the off ender, the state should provide monetary compensation to victims who suff ered serious physical or mental injury for which a national fund should be set up (United Nations, 1985).

Some of the important recommendations of the Council of Europe Recommendations (2006)8 on the assistance to victims and prevention of victimization include the following elements: assistance, role of the public services, victim support services, information, rights to eff ective access to other remedies, state compensation, insurance, protection, mediation, raising public awareness of the eff ects of crime and so on. It has also recommended for provision of restitution and compensation to victims of crime. It recommends provision of compensation by the state for victims of serious, intentional, violent crimes, including sexual violence. It further states that the state compensation should be awarded to the extent that the damage is not covered by other sources such as the off ender, insurance or state-funded health and social provisions (Groenhuijsen and Letschert, 2006: 170-171).

It is also important to learn from the experiences of the United States in providing

justice to victims of crime. Without the report of the victims or witnesses, most crimes would not come to the attention of the police. Without the cooperation of the victim or witness in identifying the off ender, most crimes could not be solved, and the off ender could not be brought to justice. In the United States, during the late 1960s, the Federal Government launched a series of surveys designed to estimate the number of crime victims. This research showed that, while arrest rates are high, many victims failed to report crimes. Other studies noted that once an arrest had been made, many victims failed to co-operate in the prosecution of off enders. Victims cited poor treatment by the criminal justice system—long waits for trials, confusing instructions and inadequate child care and transportation resources as the reasons for their reluctance to co-operate. The victim assistance movement began shortly thereafter to respond to these needs. In the United States, spurred by research on victims' needs, grassroot activism, substantial legislation and victim assistance programs now number more than 10,000. Further, victim/witness programs in the United States became a major feature of victimological development more than three decades ago (Lynch, 1976; Bolin, 1980; Dussich, 1981; Schneider and Schneider, 1981; Mawby and Gill, 1987; Young, 1990). Furthermore, the statutory approach is typifi ed by the United States, where almost all states and the federal government have adopted statutory guidelines on how the police and other offi cials in the criminal justice system should deal with victims of crime.

Steps to Provide Assistance to Crime Victims in India

The analysis of the existing legal provisions in India for providing justice to victims of crime shows that there is a long way to go. The experiences at the international level, including the experience of the United States show that there is a lot needs to be done at the macro level. But at the micro level certain immediate and possible measures may be taken to help the victims of crime in India. Therefore, the fi rst priority in the whole scheme of things is an all round sensitization of everyone concerned. The natural sequence of rendering meaningful justice, social and legal should proceed as follows:

1. Fair, considerate and sympathetic treatment by the police, hospitals, welfare organizations, prosecution and courts;
2. Prompt restitution/compensation to the victim for the injury or loss suff ered by using the existing provisions; and
3. Security to victims and potential victims against victimization in future.

The various assistance and services to victims during crime investigation include the following:

1. The fi rst step in assisting the crime victim is
   a. to facilitate their access to services that already exists ; and
   b. to get redressed from the impact of crime

   This is partly a question of getting information from the victims, partly encouraging the victims to apply for services and partly sensitizing the service to the victim's needs.

2. The police could improve their support for crime victims by ensuring the responding offi cer to provide the victim with a card that identifi es key telephone numbers of organizations available in the community. The card should also contain:
   a. the fi le number (crime number) of the case;
   b. the name of the offi cer investigating the case; and
   c. the phone number to contact regarding enquires about the progress of the case.
3. A victims support unit should be located in the police department, preferably at the sub-divisional level to co-ordinate matters relating to crime victims.

If the above stated steps are implemented by the law enforcement agencies in India, the position of victims in the criminal justice system will be improved substantially.

Conclusion

In the current decade of victimological research, there is a substantial interest in the study of impact of crime on victims and ways to assist them. Assistance to victims of crime is of great signifi cance because victims have suff ered irreparable damages and harm as a result of crime. The problems of crime victims and the impact of crime on them is varied and complex. Therefore, the agencies of the criminal justice system should be receptive to the needs of the victims of crime and address their issues sincerely and empathetically. Like in the United States, Europe and the other developed countries, both the Government of India and the State Governments should enact exclusive legislations for victims of crime, as the existing provisions in the criminal laws are not suffi cient. A ray of hope is the recommendations of the Committee on Reforms of Criminal Justice System headed by Justice V. S. Malimath. The Committee has emphasized the need for a paradigm shift in the justice system. Hence, the Government of India may have to take eff orts to implement the recommendations of the Committee on Reforms of Criminal Justice System. There should also be a change in the focus from criminal justice to victim justice, but victim justice should be perceived as complementary and not contradictory to criminal justice.

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2. *Bipin Bihari* v. *State of Madhya Pradesh* (2005 Cr LJ 2048 MP)
3. *Chairman, Railway Board* v. *Chandrima Das* (2000 Cr LJ 1473 SC)
4. *Guruswamy* v. *State of Tamil Nadu* (1979 Cr LJ 704)
5. *Hari Krishnan and the State of Haryana* v. *Sukbhir Singh and others* (AIR 1988 SC 2127)

6. *Manjappa* v. *State of Karnataka* (2007 SCCL COM 599)

7. *Mangilal* v. *State of Madhya Pradesh* (AIR 2004 SC 1280)

8. *Nilabati Behera* v. *State of Orissa* (1993 2 SCC 746)

9. *Palaniappa Gounder* v. *State of Tamil Nadu* (AIR 1977 SC 1323)

10. *Rachhpal Singh* v. *State of Punjab* (2002 Cr LJ 3540 SC)

11. *Sarwan Singh* v. *State of Punjab* (AIR 1978 SC 1525)

12. *Sarup Singh* v. *State of Haryana* (AIR 1995 SC 2452)

Victim Compensation scheme

Introduction:

The present criminal justice system is based on the assumption that the claims of a victim of crime are sufficiently satisfied by the conviction of the perpetrator.[1] The Committee on Reforms of Criminal Justice System, chaired by Justice Dr. V.S. Malimath, by the Ministry of Home Affairs, in its Report submitted to the Government of India in March 2003, perceived that "justice to victims" is one of the fundamental imperatives of criminal law in India. It suggests a holistic justice system for the victims by allowing, among other things, participation in criminal proceedings as also compensation for any loss or injury.[2]

Analysis of Section 357A[3]

Under the amended Indian law, sub-section (1) of Section 357A of the CrPC discusses the preparation of a scheme to provide funds for the compensation of victims or his dependents who have suffered loss or injury as a result of a crime and who require rehabilitation.

Sub-section (2) states that whenever the Court makes a recommendation for compensation the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the above-mentioned scheme. It is significant that the Legal Services Authority, comprising of technical experts, has been entrusted the task of deciding

the quantum of compensation, since they are better equipped to calculate/quantify the loss suffered by a victim. However, the provision loses its teeth because the discretion remains with the judge to refer the case to the Legal Services Authority- a situation that has previously been the vanishing point of Indian victim compensation law. The problem is compounded by the fact that traditionally Indian

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[1] Rattan Singh v. State of Punjab, (1979) 4 S.C.C.

[2] N.R. Madhava Menon, Victim's Rights and Criminal Justice Reforms, THE HINDU, Mar. 27, 2006, at 7, available at http://www.hindu.com/2006/03/ 27/stories/2006032703131000.htm.

[3] Jhalak Kakkar And Shruti Ojha , "An Analysis Of The Vanishing Point Of Indian Victim Compensation Law", Journal Of Indian Law And Society [Vol. 2 : Monsoon], Pg 324.

judges have been hesitant to invoke this provision. A more effective solution could be to make compensation a statutory right, with a provision mandating that the judges have to record reasons for not awarding compensation.

It is a positive development that in sub-section (3) the trial court has been empowered to make recommendations for compensation in cases where-

- Either the quantum of compensation fixed by the Legal Services Authority is found to be inadequate; or,
- Where the case ends in acquittal or discharge of the accused and the victim has to be rehabilitated. However, there is scope to further extend compensation to victims in these cases that end in acquittal or discharge beyond rehabilitation to compensation for loss. Sub-section (4) of Section 357A states that even where no trial takes place and the offender is not traced or identified; but the victim is known, the victim or his dependents can apply to the State or the District Legal Services Authority for award of compensation.

We see a shift towards state funded victim

Compensation as has been established in the United Kingdom and the United States. This is an extremely progressive development that takes into account practical reality of an overburdened criminal justice system, which is unable to identify all offenders and prosecute them. Sub-section (5) says that on receipt of the application

under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

It is pertinent that a time frame has been provided within which the Legal Services Authority should conduct its enquiry and award compensation. A period of two months, as specified in the proposed amendment, would ensure speedy delivery of justice to the victim and specification of a time period would create accountability and prevent dilatory measures. Moreover, it should be noted that the section speaks of ‘adequate compensation’; thus ensuring the quantum of compensation awarded should be just and fair. Further, sub-section (6), states that, in order to alleviate the suffering of the victim, the State or District Legal Services Authority may order immediate first-aid facility or medical benefits to be made available free of cost or any other interim relief as the appropriate authority deems fit. It is a positive that the section speaks of “alleviating the suffering” of the victim and seeks to help the victim recover in the after-math of the

crime and ensure that the victim does not have to wait till the end of the trial to recover these costs. The statutory recognition of the right to interim relief is an important step and an urgent need of the hour.

Hari Krishna & State of Haryana v. Sukhbir Singh, [4]

Hon'ble Judge: K.J. Shetty

Held:

In this Case Hon'ble supreme Court directed al the courts to exercise Section 357 liberally and award adequate compensation, particularly in cases where the accused is released on admonition, probation or when the parties enter into a compromise. At the same time, the court cautioned that the compensation must be reasonable, fair and just; taking into account the facts and circumstances of each case—nature of the crime, veracity of the claim and ability of the accused to pay.

The following paragraph from the court's judgment sums up the importance of Section 357(3) succinctly:

"Section 357 of the CrPC is an important provision but Courts have seldom invoked it. This section of law empowers the Court to award compensation while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. This power to award compensation is not ancillary to other sentences but is in addition thereto. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system.

We therefore recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way." The court further observed that the payment by way of compensation must, however, be reasonable. What is reasonable may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of the crime and the ability of the accused to pay. If perhaps, there are more than one accused they may be asked to pay in equal terms, unless their capacity to pay varies considerably.54 A reasonable period for payment of

[4] (1988) 4 S.C.C. 551

compensation, if necessary by instalment, may also be given. The court may enforce the order by imposing sentence in default.

Thus, the court must be satisfied that the victim has suffered loss or injury due to the act, neglect or default of the accused to be entitled to recover compensation. This loss or injury may be physical, mental or pecuniary.

In Hari Krishna, the Supreme Court interpreted the scope of Section 357(3) to mean that a reasonable amount has to be awarded as compensation taking into consideration not merely the gravity of the injury or misconduct of the accused but also the capacity of the accused to pay. This practice of taking into account the accused's capacity to pay is problematic as in most cases this either deters the judges from exercising their discretion of awarding compensation or it prompts them to award compensation which is nominal in nature. However, since the State will be establishing a compensation fund for the purpose of compensating victims, this aspect will not play such a vital role in deterring the exercise of this discretion as it has in the past. The court stated that the High Courts must orient the Judicial Officers in this new aspect of compensatory criminal jurisprudence.

Smt. Nilabati Behera v. State of Orissa[5]

Hon'ble Judges: J.S Verma, Jagdish Saran

"Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not."

The abovementioned is an extract from the judgment of *Smt. Nilabati Behera* v. *State of Orissa*[6] whereby the Hon'ble Supreme Court quotes Lord Denning and gives an insight into how abuse of power by the State can impinge into the personal freedom of an individual. The instant case deals with the public and private law remedies for infringement of the fundamental rights of a citizen. While on the one hand the case deals with dereliction of duty by a public servant which contemplates action against the State

[5] (1993) 2 SCC 746
[6] Ibid, at para 32.

under Articles 32 and 226 of the Constitution of India, on the other hand, it works around the idea of government liability (if any) under the law of tort. The case draws a distinction between the liability of the State to pay compensation in cases such as these where grave violation of fundamental rights is involved and the liability of the State arising in an action for tort. The liability in the former instance falls under the realm of public law and is based on the principle of strict liability for contravention of fundamental rights by the State. The defence of sovereign immunity does not apply to the same.

This case seems to be a reflection of numerous pronouncements of the Supreme Court which dealt with a similar issue. The cases of ***Rudul Shah* v. *State of Bihar*,**[7] ***Sebastian M. Hongray* v. *Union of India***[8] and ***Bhim Singh* v. *State of Jammu and Kashmir***[9] deserve mention in this context. By referring to these cases, the Hon'ble Court makes a stark departure from the ratio in ***Kasturilal Ralia Ram Jain* v. *State of Uttar Pradesh***[10] by making a compelling observation that the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort and not for contravention of fundamental rights to which the doctrine of sovereign immunity is not applicable[11]. Such violations of rights which find mention in the Constitution and which may be referred to as "constitutional torts" have generally been thought of in terms of monetary remedies. The aim of awarding compensation to an individual aggrieved by a tort action by a State official's violation of the Constitution is to compensate for some of the individual's past injury and deter future rights' deprivations[12]. The law with respect to constitutional torts has heavily denuded the defence of sovereign immunity and the State is being held vicariously liable for the acts of its officials.

The doctrine of sovereign immunity notwithstanding, the Constitution of India contemplates holding the State liable with respect to the tortious acts of its servants by means of Article 300. Article 300, inter alia, provides that the Government of a State may

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[7] (1983) 4 SCC 141.
[8] (1984) 1 SCC 339.
[9] 1984 Supp SCC 504.
[10] (1965) 1 SCR 375.
[11] (1993) 2 SCC 746 at para 14.
[12] James J. Park, 'The Constitutional Tort Action as Individual Remedy', *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 38, 2003, pp. 393-453 at p. 393.

sue or be sued by the name of the State subject to any law made by Parliament in this regard. In various pre-constitutional as well as post-constitutional decisions, the Courts have held the State vicariously liable for the acts of its servants. While doing so, the Courts have made a distinction between the sovereign and non-sovereign functions of the State. In one of the earliest post-constitutional matters dealing with the liability of the State for tortious acts of its servants, the Supreme Court in ***State of Rajasthan* v. *Vidyawati*[13]** categorically held that "*when the rule of immunity in favour of the Crown, based on Common Law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution.*"[14] The courts have adopted the view that the State will always be liable for the torts committed by its servants in the course of employment except when the act complained of amounted to an act of State[15].

An important qualification to the doctrine of sovereign immunity as it has come to be accepted is that this defence is not available when the State or its officers acting in the course of employment infringe a person's fundamental right of life and personal liberty as guaranteed by Article 21 of the Constitution. Also, while the violation of fundamental rights gives rise to a public law remedy in favour of the victim, courts in India have begun to pave way for the State to file cases against the actual offenders in private law. For instance, the Rajasthan High Court in ***Mst. Madina* v. *State of Rajasthan***[16] ordered the State to recover an amount of Rupees 3,00,000/- from the offending policemen. A similar judgment was given by the Delhi High Court in ***Smt. Kamla Devi* v. *Government of NCT of Delhi & Anr.***[17] whereby the court left it open for the State to recover the amount awarded as compensation from the persons ultimately held responsible for the death of the victim. Thus, while upholding the claims of the victims and their dependents in public law, the courts have not closed the doors of private law remedies even if (as in these cases) they have been exercised through the medium of the State.

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[13] AIR 1962 SC 933.
[14] AIR 1962 SC 933 at para 21.
[15] Justice Guru Prasanna Singh, *Ratanlal & Dhirajlal, Law of Torts*, Wadhwa and Company, Nagpur, 2008 (25th edn.), p. 49.
[16] 2000 Cri.L.J. 4484 (Raj.).
[17] 114 (2004) DLT 57.

FACTS OF THE CASE:

The instant case is quoted in the context of the sensitive issue of custodial violence and torture. The case arose out of a letter sent to the Supreme Court by Smt. Nilabati Behera (hereinafter "the petitioner") which was treated as a writ petition under Article 32 of the Constitution. She claimed compensation by means of the petition consequent upon the death of her son Suman Behera (hereinafter "the victim") in police custody. The victim was taken into custody by the police in the district of Sundergarh in Odisha (Orissa as it then was) in connection with the offence of theft. A day thereafter, the petitioner came to know that the victim's dead body was found on a railway track nearby. The victim's body bore multiple injuries indicating that his death was unnatural. The petitioner alleged that this was a case of custodial death and the victim died due to injuries inflicted on him whilst in police custody after which his body was thrown on the railway track. Thus, the petitioner prayed for award of compensation to herself, the victim's mother, for contravention of the fundamental right to life of the victim guaranteed under Article 21 of the Constitution. The Court upheld the claim of the petitioner and ordered the State of Odisha to pay a sum of Rs. 1,50,000/- as compensation by way of exemplary damages. While doing so, the Court took into account not only the interest of the petitioner also ensured that public bodies and officials do not act unlawfully or arbitrarily.

CRITICAL ANALYSIS ON COMPENSATION SCHEME

It is widely accepted that the award of damages in cases such as the one discussed hereinabove, compensation is a manifestation of exemplary damages against those public officers or State officials who are guilty of dereliction of duty in some manner or the other. However, the justification of such compensation on deterrence grounds has been challenged by various authors for reasons more than one. It has been argued that since governments do not respond to monetary liability in the same ways as private actors, the deterrence effects of constitutional tort actions are limited[18].

[18] Daryl J. Levinson, 'Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs', *University of Chicago Law Review*, Vol. 67, No. 2 (Spring), 2000, pp. 345-420 at p. 352.

The compensatory mechanism of undoing such wrongs also fails to adequately ensure that the rights of the aggrieved individuals have been protected. Judging in terms of the loss (not just monetary) incurred by a victim due to infringement of fundamental rights, the amount awarded as compensation seems meagre. While compensation as a public law remedy in response to custodial violence is now firmly rooted, the determination of the quantum of such compensation is still in uncertain terms[19]. A common fixture of cases of custodial violence is that the victims are taken into custody on allegations of petty offences which, if at all proven to be true, point towards the compelling circumstances characterizing such victims and their families. In such an event, it seems that the compensation awarded falls short of the expectations as well as the needs of the victims and their dependents. It becomes unclear as to what the court wishes to achieve by award of such compensation as this is not restitution of the victim or his/her dependent in the true sense of the term.

Another aspect that seems relatively untouched in this judgment is that of proceeding against an erring official. Though there is no bar for an aggrieved person to proceed against a person acting in his official capacity under private law, there seems to be a serious doubt as to the efficacy of such proceedings. The official, in all fairness is open to providing the rationale that in view of performing his/her duty to the utmost, he/she went to the extent of doing the acts which form the subject of prosecution. The question of where to draw the line between acts that genuinely fall within what the State contemplates as sovereign acts and what amounts to dereliction of duty can be tough to answer. In cases where motive cannot be attributed to the arbitrary acts of an official, it would not be fair to mulct the official into paying compensation where he/she performed the acts in question with a view to discharging the duties in good faith[20].

The Supreme Court in the instant case instead of relegating the petitioner to recourse to an action in tort upheld her claim under Article 32 of the Constitution for damages for violation of fundamental rights. This is now becoming a readily accepted position even internationally where litigants are being encouraged to move a significant

[19] Dr. Usha Ramanathan, 'Tort Law in India', *Annual Survey of India Law*, 2002, pp. 615-628 at p. 619.
[20] Dr. Kamla Jain, 'State Liability in Tort: Need for Legislation', *Central India Law Quarterly*, Vol. 10, No. 1, 1990, pp. 100-110 at p. 108.

class of cases away from the tort law route and through the constitutional route[21]. For instance, in ***Smith* v. *Chief Constable of Sussex Police***[22], the Court of Appeal conceptualized a duty as being owed to the public at large instead of an individual thereby not giving a rise to liability in tort but bringing it under the sphere of the United Kingdom Human Rights Act, 1998. The Court gave rise to a tortious duty to care instead of a liability in tort. Notwithstanding the availability of private law remedies by means of an action under the law of torts, the petitioner herein found support by means a public law remedy under the Constitution. Though this does spell good news for victims of alleged human rights violations, it does open the doors for misuse of Articles 32 and 226 so as to dodge protracted litigation for civil action in private law[23].

By means of this case, the Supreme Court has essentially blurred the distinction housed in the oft-repeated proposition that tort law is "private" and concerned with compensation while criminal law is "public" and concerned with punishment. The aspect of payment of compensation herein was viewed not from the prism of civil action for damages under private law but for providing relief by an order of making "monetary amends" under public law for a breach of public duty of not protecting the fundamental rights of the citizen. The case also is an insight into the narrowing scope of State immunity and how persons acting in official capacity cannot use this defence for alleged breach of their duty to care. The case serves as a good read for studying the distinction between the public and private law remedies available in cases of contravention of fundamental rights.

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[21]Francois du Bois, 'Human Rights and the Tort Liability of Public Authorities', *Law Quarterly Review*, Vol. 127, 2011 (October), pp. 589-609 at p. 591.

[22][2009] 1 A.C. 225 – The case involved the failure of the police to protect a member of the public from a violent attack, the risk of which and the identity and whereabouts of the likely attacker he had reported to them.

[23] It is worth mentioning that the Supreme Court made a similar observation in para 35 of the judgment in *Nilabati Behera*.

Baldev Singh v. State of Punjab[24]

Hon'ble Judge: K Ramaswamy

This is another important case in the victimological approach of judicial law making. The Supreme Court ordered a grant of compensation by invoking Section 357(3) of the CrPC.

Held:

The Supreme Court held that in the circumstances of the case an order of compensation would be more appropriate instead of sentence of imprisonment. Here, the Court used its judicial discretion to the benefit of the victims and opted for the compensation theory instead of extending the sentences of imprisonment. While looking at Indian compensation laws it is imperative to note that under sub-section (1), the compensation to the victim of crime has to be paid out of the fine and the court should determine the necessity and the consequent amount of the fine.

Adamji Umar v. State of Bombay[25],

Hon'ble judges: M C Mahajan, S M Ali, V Bose

Held:

In this case Hon'ble Supreme Court observed that while passing a sentence the court has always to bear in mind the proportionality between an offence and the penalty. In imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused person and to the character and magnitude of the sentence, where a substantial term of imprisonment is imposed, an excessive fine could not accompany it

[24] (1995) 6 S.C.C. 593

[25] Adamji Umar v. State of Bombay, A.I.R. 1952 S.C. 14.This was also held in Palaniappa Gounder v. State of Tamil Nadu, A.I.R. 1978 S.C. 1525. The court reduced the fine of Rs. 20,000 imposed by the High Court on the accused, who has been sentenced to life imprisonment for committing murder, to a meagre sum of Rs. 3,000. This was once again reiterated by the Supreme Court in Swaran Singh & Anr. v. State of Punjab, (2000) 5 S.C.C. 668.

except in exceptional cases.[26] The criminal court's power to award compensation is limited by the considerations which govern the imposition of fine as compensation.

Vijayan vs Sadanandan K. & Anr[27]

Hon'ble Judges: Altamas Kabir, Cyriac Joseph

Facts:

In this case Special Leave Petition was filed to consider whether a default sentence can be imposed when compensation is awarded under Sub- Section (3) of Section 357 of the Code of Criminal Procedure.

Held:

In this case after carefully considering the submissions made on behalf of the respective parties the Court held that:

Since a decision on the question raised in this petition is still in a nebulous state, there appear to be two views as to whether a default sentence on imprisonment can be imposed in cases where compensation is awarded to the complainant under Section 357(3) Cr.P.C., the distinction between a fine and compensation as understood under Section 357(1)(b) and Section 357(3) Cr.P.C. had been explained, but the question as to whether a default sentence clause could be made in respect of compensation payable under Section 357(3) Cr.P.C, which is central to the decision in this case, had not been considered.

The provision for grant of compensation under Section 357(3) Cr.P.C. and the recovery thereof makes it necessary for the imposition of a default sentence as was held by this Court. The power to impose a default sentence in case of non-payment of compensation under Section 357(3) Cr.P.C. has been duly recognized by this Court and the arguments advanced to the contrary on behalf of the Petitioner must, therefore, be rejected.

Section 357 Cr.P.C. bears the heading "Order To Pay Compensation". It includes in sub-Section

(1) the power of the Court to utilize a portion of the fine imposed for the purpose of compensating any person for any loss or injury caused by the offence. In addition, Sub-

[26] Ibid.

[27] SPECIAL LEAVE PETITION (Crl.)No.3220 of 2008

Section (3) provides that when a sentence is imposed by the Court, of which fine does not form a part, the Court may, while passing judgment, order the accused person to pay by way of compensation such amount as may be specified in the order to the person who suffers any loss or injury by reason of the act for which the accused person has been so sentenced. It is true that the said provision does not include the power to impose a default sentence, but read with Section 431 Cr.P.C. the said difficulty can be overcome by the Magistrate imposing the sentence.

The provisions of Sections 357(3) and 431 Cr.P.C., when read with Section 64 IPC, empower the Court, while making an order for payment of compensation, to also include a default sentence in case of non-payment of the same.

Ankush Vhivaji Gaikwad Vs. State of Maharashtra[28]

Hon'ble Judges: T.S. Thakur, Gyan Sudha Misra

Held:

The long line of judicial pronouncements of this Court recognised in no uncertain terms a paradigm shift in the approach towards victims of crimes who were held entitled to reparation, restitution or compensation for loss or injury suffered by them. This shift from retribution to restitution began in the mid 1960s and gained momentum in the decades that followed.

Interestingly the clock appears to have come full circle by the law makers and courts going back in a great measure to what was in ancient times common place. Harvard Law Review (1984) in an article on "Victim Restitution in Criminal Law Process: A Procedural Analysis" sums up the historical perspective of the concept of restitution in the following words:

"Far from being a novel approach to sentencing, restitution has been employed as a punitive sanction throughout history. In ancient societies, before the conceptual separation of civil and criminal law, it was standard practice to require an offender to reimburse the victim or his family for any loss caused by the offense. The primary purpose of such restitution was not to compensate the victim, but to protect the offender

[28] (2013) 6 SCC 770

from violent retaliation by the victim or the community. It was a means by which the offender could buy back the peace he had broken. As the state gradually established a monopoly over the institution of punishment, and a division between civil and criminal law emerged, the victim's right to compensation was incorporated into civil law."

Suresh & Anr vs State Of Haryana[29]

Hon'ble Judges: V. Gopala Gowda, Adarsh Kumar Goel

In this case the question for consideration is whether the responsibility of the State ends merely by registering a case, conducting investigation and initiating prosecution and whether apart from taking these steps, the State has further responsibility to the victim. Further question is whether the Court has legal duty to award compensation irrespective of conviction or acquittal. When the State fails to identify the accused or fails to collect and present acceptable evidence to punish the guilty, the duty to give compensation remains. Victim of a crime or his kith and kin have legitimate expectation that the State will punish the guilty and compensate the victim. There are systemic or other failures responsible for crime remaining unpunished which need to be addressed by improvement in quality and integrity of those who deal with investigation and prosecution, apart from improvement of infrastructure but punishment of guilty is not the only step in providing justice to victim. Victim expects a mechanism for rehabilitative measures, including monetary compensation. Such compensation has been directed to be paid in public law remedy with reference to Article.

Held:

Expanding scope of Article 21 is not limited to providing compensation when the State or its functionaries are guilty of an act of commission but also to rehabilitate the victim or his family where crime is committed by an individual without any role of the State or its functionary. Apart from the concept of compensating the victim by way of public law remedy in writ jurisdiction, need was felt for incorporation of a specific provision for compensation by courts irrespective of the result of criminal prosecution. Accordingly, Section 357A has been introduced in the Cr.P.C. and a Scheme has been

[29] Criminal Appeal No. 420 OF 2012, Decided on 28 November, 2014

framed by the State of Odisha called 'The Odisha Victim Compensation Scheme, 2012'. Compensation under the said Section is payable to victim of a crime in all cases irrespective of conviction or acquittal. The amount of compensation may be worked out at an appropriate forum in accordance with the said Scheme, but pending such steps being taken, interim compensation ought to be given at the earliest in any proceedings.

With modern concepts creating a distinction between civil and criminal law in which civil law provides for remedies to award compensation for private wrongs and the criminal law takes care of punishing the wrong doer, the legal position that emerged till recent times was that criminal law need not concern itself with compensation to the victims since compensation was a civil remedy that fell within the domain of the civil Courts. This conventional position has in recent times undergone a notable sea change, as societies world over have increasingly felt that victims of the crimes were being neglected by the legislatures and the Courts alike. Legislations have, therefore, been introduced in many countries including Canada, Australia, England, New Zealand, Northern Ireland and in certain States in the USA providing for restitution, reparation by Courts administering criminal justice.

HUMAN RIGHTS OF ACCUSED

Human Rights of accused as incorporated in Criminal Law in India

Dr. Kiran Gardner*

Introduction:

Human rights are the fundamental rights that humans have by the fact of being human being and that are neither created nor can be abrogated by any Government.[1] These rights inherently reside in an individual human being independent to his participation in the society. These rights are recognised by the State but are independent of the legal system for their existence. Their origin can be sought in the Natural Law. They are based on their intrinsic justification and not on external enactments or recognition by individuals.

These rights are supported by several International Conventions and treaties such as the United Nation's Universal Declaration of Human Rights in 1948, these includes Cultural, Economic and Political rights, such as Right to life , Liberty, Education and Equality before law, Right to Association, Belief, Free speech, Information, Religion, Movement, and Nationality. Promulgation of these rights is not binding on any country, but they serve as a standard of the concern for people and form the basis of many modern Constitution. Thus, a legal system that does not recognize Human Rights is not a Law.[2]

John Locke (1932-1704), the Scottish philosopher was the first to define Human Rights as absolute moral claims entitlements to Life and Liberty, and Property. The best known expression of Human Rights is in the Virginia Declaration of Rights in 1776 which proclaims that, "All men are by nature equally free and independent and

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[1] www.businessdictionary.com/definition/human-rights.html retrieved on 24th September 2013

[2] Carlos SantigoNiuo,*The Ethics of Human Rights,* Clarindon Press, Oxford, 1991P. 10, 24

have certain inherent rights, of which, when they enter a state of society, they cannot by any compact, deprive or divest their posterity."[3]

Human Rights implementations through Criminal procedure Code in India

Human Rights under Criminal Laws may be classified under following three categories:

1. Human Rights of accused persons,
2. Human Rights of Convicts, and
3. Human Rights of Prisoners.

   This paper delimits the study only in relation to the Human rights of the accused person as guaranteed by Criminal Procedure Code, 1973.

Human Rights of Accused person under Criminal Procedure Code

Human Rights are generally violated by arbitrarily accusing and arresting innocent persons for an offence which one has not committed or is implicated due to enmity or victimisation. Indian Criminal law begins with the presumption that accused person is supposed to be innocent till he is proved guilty of some offence. **The International Covenant on Civil and Political Rights** has similar provision under Article 14 (2) which states, 'Everyone charged with criminal offence shall have the right to be presumed innocent until proved guilty according to law'.

Criminal procedure Code entitles following protection of Human Rights to accused in relation to his arrest, production before the Court and Judicial trial.

Human rights of arrested person safeguarded through Criminal Procedure Code: Article 9 of the Universal Declaration of Human Rights, 1948 states that, "No one shall be subjected to arbitrary arrest, detention or exile." And Article 11 declares,

[3] www.businessdictionary.com/definition/human-rights.html retrieved on 24th September 2013

"(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."[4]

A police officer under S 41 of Cr. P.C. has the power to arrest an accused person without warrant under certain circumstances. In *D. K. Basu v State of West Bengal*,[5] the Apex Court has given elaborate directions to be followed while arresting the accused. These guidelines have been incorporated in Cr. P. C. through 2009 amendment.

Amended S 41A of Cr. P. C. has incorporated the provision of issuing a notice, by the police officer, to an accused that has been alleged to have committed a cognizable offence to appear before him. If the person complies and continues to comply with the notice, he shall not be arrested. S 41B makes it mandatory for the arresting officer to bear an accurate, visible clear identification of his name which will facilitate easy identification. The section requires attestation of one witness who is the member of the family or respected person of locality where the arrest is made. The section cast duty on the arresting officer to inform the arrested person of his right to have a relative or a friend informed, if his family member was not a witness to his memorandum of arrest. According to S 41D the arrested person is entitled to meet an advocate of his choice during interrogation. These sections safeguard accused for arbitrary arrest and detention and strengthens the presumption of being innocent till proved guilty. S 50 of Cr. P. C. mandates that person arrested to be informed of grounds of his arrest. This is in consonance with the Article 9 of the Universal Declaration of Human Rights mentioned above.

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[4] http://www.un.org/en/documents/udhr/index.shtml Retrieved on 24th September 2013

[5] 1997 Cri. L. J. 743 (S.C.)

Producing the arrested person before the Magistrate

Article 9(3) of the International Covenant on Civil and Political Rights provides that, "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."[6]

Sections 56 & 57 of the Code requires that the arrested person to be produce before the Magistrate having Jurisdiction within 24 hours of his arrest.

Right to Fair Trial

Article10 of the Universal Declaration of Human Rights declares that, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Section 327 requires Court to be open. It provides that , 'The place in which the Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access.'

Accused Entitled to Compensation

Article 9.5 of the International Covenant on Civil and Political Rights provides that anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation. In consonance with this provision section 358 of the Code of

[6] http://www.hrweb.org/legal/cpr.html retrieved on 24th September 2013

Criminal Procedure, 1973 provides for compensation to persons groundless arrested. Section 250 provides for compensation for accusation without reasonable cause.

Conclusion

Human Rights of a person is violated by arbitrarily making an innocent person accused and at times arrested without following the procedure laid down by the law. If detail study of Human Rights and existing Criminal laws are made it would reveal that there are enough provisions that safeguards the rights of the accused. The adversarial justice system that is followed in India begins with the presumption that a person is innocent till he is proved guilty. Therefore, the burden is cast on the prosecutor to prove beyond doubt that the accused has committed an offence. In short, Laws are in place, what is needed is implementation of the existing laws in their letter and spirit.

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HUMAN RIGHTS OF ACCUSED IN INDIA

Case Laws:

Provisions of Indian Constitution and Criminal Procedure Code

Following are some important provisions creating rights in favour of the accused/ arrested persons:-

(i) Protection against *ex post facto law*

Clause (1) of Article 20 of the Indian Constitution says that "no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Article 11, para 2 of the Universal Declaration of Human Rights, 1948 provides freedom from ex-post facto laws[1].

An *ex post facto* law is a law which imposes penalties retrospectively, i.e., on acts already done and increases the penalty for such acts. The American Constitution also contains a similar provision prohibiting ex post facto laws both by the Central and the State Legislatures. If an act is not an offence at the date of its commission it cannot be an offence at the date subsequent to its commission. The protection afforded by clause(1) of Article 20 of the Indian Constitution is available only against conviction or sentence for a criminal offence under ex post facto law and not against the trial. The protection of clause (1) of Article 20 cannot be claimed in case of preventive detention, or demanding security from a person. The prohibition is just for conviction and sentence only and not for prosecution and trial under a retrospective law. So, a trial under a procedure different from what it was at the time of the commission of the offence or by a special court constituted after the commission of the offence cannot *ipso facto* be held unconstitutional. The second part of clause (1) protects a person from 'a penalty greater than that which he might have been subjected to at the time of the commission of the offence.'

Ín Kedar Nath v. State of West Bengal, AIR 1953 SC 404. the accused committed an offence in 1947, which under the Act then in force was punishable by imprisonment or fine or both. The Act was amended in 1949 which enhanced the punishment for the same offence by an additional fine equivalent to the amount of money procured by the accused through the offence. The

[1] Article 15 of International Covenant on Civil and Political Rights, 1966.

Supreme Court held that the enhanced punishment could not be applicable to the act committed by the accused in 1947 and hence, set aside the additional fine imposed by the amended Act. In the criminal trial, the accused can take advantage of the beneficial provisions of the ex-post facto law. The rule of beneficial construction requires that ex post facto law should be applied to mitigate the rigorous (reducing the sentence) of the previous law on the same subject. Such a law is not affected by Article 20(1) of the Constitution.

(ii) Doctrine of *"autrefois acquit"* and *"autrefois convict"*

According to this doctrine, if a person is tried and acquitted or convicted of an offence, he cannot be tried again for the same offence or on the same facts for any other offence. This doctrine has been substantially incorporated in the Article 20(2) of the Constitution and is also embodied in Section 300 of the Criminal Procedure Code, 1973. When once a person has been convicted or acquitted of any offence by a competent court, any subsequent trial for the same offence would certainly put him in jeopardy and in any case would cause him unjust harassment. Such a trial can be considered anything but fair, and therefore has been prohibited by the Code of Criminal Procedural as well as by the Constitution. The doctrine of "autrefois acquit" and "autrefois convict" has been embodied in Section 300 of Criminal Procedure Code as follows:

Person once convicted or acquitted not to be tried for same offence - *(1) a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted for such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of section 221, or for which he might have been convicted under sub-section (2) thereof.*

The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section. Constitutional provision to the same effect is incorporated in Article 20 (2) which provides that no person shall be prosecuted and punished for the same offence more than once.

These pleas are taken as a bar to criminal trial on the ground that the accused person had been once already charged and tried for the same alleged offence and was either acquitted or convicted. These rules or pleas are based on the principle that "a man may not be put twice in jeopardy for the same offence".

Article 20(2) of the Constitution recognizes the principle as a fundamental right. It says," no person shall be prosecuted and punished for the same offence more than once". While, Article 20(2) does not in terms maintain a previous acquittal, Section 300 of the Code fully incorporates the principle and explains in detail the implications of the expression "same offence**" (**See **Natrajan v. State**, 1991 Cri LJ 2329 (Mad)).

In order to get benefit of the basic rule contained in Sec 300(1) of Criminal Procedure Code is necessary for an accused person to establish that he had been tried by a "court of competent jurisdiction" for an offence. An order of acquittal passed by a court which believes that it has no jurisdiction to take cognizance of the offence or to try the case, is a nullity and the subsequent trial for the same offence is not barred by the principle of autrefois acquit. To operate as a bar the second prosecution and consequential punishment there under, must be for the "same offence". The crucial requirement for attracting the basic rule is that the offences are the same, i.e. they should be identical. It is therefore necessary to analyze and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out. Section 300 of Criminal Procedure Code bars the trial for the same offence and not for different offences which may result from the commission or omission of the same set of the act. Moreover, the principle of issue-estoppel, as enunciated and approved in several decisions of the Supreme Court, is simply is, that where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or *res judicata* against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law**. (Masud Khan v. State of U.P.** (1974) 3 SCC 469: 1973 SCC (Cri) 1084, 1086)

(iii) Prohibition against self-incrimination

Clause (3) of Article 20 provides that no person accused of any offence shall be compelled to be a witness against himself. Thus Article 20(3) embodies the general principles of English and American jurisprudence that no one shall be compelled to give testimony which may expose him to prosecution for crime. The cardinal principle of criminal law which is really the bed rock of English jurisprudence is that an accused must be presumed to be innocent till the contrary is

proved[2]. It is the duty of the prosecution to prove the offence. The accused need not make any admission or statement against his own free will. The fundamental rule of criminal jurisprudence against self-incrimination has been raised to a rule of constitutional law in Article 20(3).The guarantee extends to any person accused of an offence and prohibits all kinds of compulsions to make him a witness against himself. Explaining the scope of this clause in **M.P. Sharma v. Satish Chandra** AIR 1954 SC 300, the Supreme Court observed that this right embodies the following essentials:

(a) It is a right pertaining to a person who is "accused of an offence."

(b) It is a protection against "compulsion to be a witness".

(c) It is a protection against such compulsion relating to his giving evidence "against himself."

In **Nandini Satpathy v. P.L. Dani** AIR 1954 SC 300, the Supreme Court has considerably widened the scope of clause (3) of Article 20. The Court has held that the prohibitive scope of Article 20(3) goes back to the stage of police interrogation not commencing in court only. It extends to, and protects the accused in regard to other offences-pending or imminent, which may deter him from voluntary disclosure. The phrase compelled testimony' 'must be read as evidence procured not merely by physical threats or violence but by psychic (mental) torture, atmospheric pressure, environmental coercion, tiring interrogatives, proximity, overbearing and intimidatory methods and the like. Thus, compelled testimony is not limited to physical torture or coercion, but extend also to techniques of psychological interrogation which cause mental torture in a person subject to such interrogation[3].

Right to silence is also available to accused of a criminal offence. Right to silence is a principle of common law and it means that normally courts tribunal of fact should not be invited or encouraged to conclude, by parties or prosecutors that a suspect or an accused is guilty merely because he has refused to respond to question put to him by the police or by the Courts. The prohibition of medical or scientific experimentation without free consent is one of the human rights of the accused[4].

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[2] Article 11, Clause 1 of Universal Declaration of Human Rights, 1948 which lays down: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

[3] Article 5 of Universal Declaration of Human Rights, 1948.

[4] Article 7 of the International Covenant on Civil and Political Rights, 1966.

In case of **Smt. Selvi & Ors. v. State of Karnataka & Ors.** 2010 (2) R.C.R. (Criminal) 896**,** wherein the question was- Whether involuntary administration of scientific techniques namely Narco-analysis, Polygraph (lie Detector) test and Brain Electrical Activation Profile (BEAP) test violates the ' right against self-incrimination' enumerated in Article 20(3) of the Constitution. In answer, it was held that it is also a reasonable restriction on 'personal liberty' as understood in the context of Article 21 of the Constitution. Following observations were made in this landmark case:

(i) No individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty.

(ii) Section 53, 53-A and 54 of Criminal Procedure Code permits the examination include examination of blood, blood-stains, semen swabs in case of sexual offences, sputum and sweat, hair samples and finger nail dipping by the use of modern and scientific techniques including DNA profiling. But the scientific tests such as Polygraph test, Narcoanalysis and BEAF do not come within the purview of said provisions.

(iii) It would be unjustified intrusion into mental privacy of individual and also amount to cruel, inhuman or degrading treatment.

(iv) Voluntary administration of impugned techniques are, however, permissible subject following safeguards, but test results by themselves cannot be admitted in evidence.

(a) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.

(b) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.

(c) The consent should be recorded before a Judicial Magistrate.

(d) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.

(e) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a 'confessional' statement to the Magistrate but will have the status of a statement made to the police.

(f) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.

(g) The actual recording of the Lie Detector Test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.

(h) A full medical and factual narration of the manner of the information received must be taken on record.

The underlying rational of right against self-incrimination is as under

(i) The purpose of the 'rule against involuntary confessions' is to ensure that the testimony considered during trial is reliable. The premise is that involuntary statements are more likely to mislead the judge and the prosecutor, thereby resulting in a miscarriage of justice.

(ii) The right against self-incrimination' is a vital safeguard against torture and other 'third-degree methods' that could be used to elicit information.

(iii) The exclusion of compelled testimony is important, otherwise the investigators will be more inclined to extract information through such compulsion as a matter of course. The frequent reliance on such 'shortcuts' will compromise the diligence required for conducting meaningful investigations.

(iv) During trial stage the onus is on the prosecution to prove the charges leveled against the defendant and the 'right against self-incrimination' is a vital protection to ensure that the prosecution discharges the said onus.

(iv) Person arrested to be informed of grounds of Arrest

Article 22 (1) of the Constitution provides that a person arrested for an offence under ordinary law be informed as soon as may be the grounds of arrest. In addition to the constitutional provision, Section 50 of Criminal Procedure Code also provides for the same.

(i) According to Section 50(1) of Criminal Procedure Code, every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.

(ii) When a subordinate officer is deputed by a senior police officer to arrest a person under Section 55 of Criminal Procedure Code, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is made and the officer so required shall, before making the arrest, notify to the person to be arrested the substance of the order and, if so required by such person, shall show him the order. Non-compliance with this provision will render the arrest illegal**. (Ajit Kumar v. State of Assam**, 1976 Cri LJ 1303 (Gau)

(iii) In case of arrest to be made under a warrant, Section 75 provides that the police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and if so required, shall show him the warrant. If the substance of the warrant is not notified, the arrest would be unlawful**, (Satish Chandra Rai v. Jodu Nandan Singh,** ILR 26 Cal 748)

The right to be informed of the grounds of arrest is recognized by Sections 50, 55 and 75 in cases where the arrest is made in execution of a warrant of arrest or where the arrest is made by a police officer without warrant. If the arrest is made by a magistrate without a warrant under Section 44, the case is covered neither by any of the Sections 50, 55 and 75 nor by any other provision in the Code requiring the Magistrate to communicate the grounds of arrest to the arrested person. This lacuna in the Code, however, will not create any difficulty in practice as the Magistrate would still be bound to state the grounds under Article 22(1) of the constitution. The word "forthwith" in section 50 (1) of the Code of Criminal Procedure creates a stricter duty on the part of police officer making the arrest and would mean immediately. The right to be informed of the grounds of arrest is a precious right of the arrested person **(Udaybhan Shuki vs. State of U.P**. 1999 CRI LJ 274 (All)). The grounds of arrest should be communicated to the arrested person in the language understood by him; otherwise it would not amount to sufficient compliance with constitutional requirements.

(v) Right to be defended by a Lawyer

It is one of the fundamental rights enshrined in our Constitution. Article 22 (1) of the Constitution provides, *inter alia,* that no person who is arrested shall be denied the right to consult and to be defended by a legal practitioner of his choice. The right of the accused to have a counsel of his choice is fundamental and essential to fair trial. The right is recognized because of the obvious fact that ordinarily an accused person does not have the knowledge of law and the

professional skill to defend himself before a court of law wherein the prosecution is conducted by a competent and experienced prosecutor. This has been eloquently expressed by the Supreme Court of America in **Powell v. Alabama**.[15] The Court observed that "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and the knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step of the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect**."**

The Criminal Procedure Code has specifically recognized the right of a person against whom proceedings are instituted to be defended by a counsel. According to Section 303 of Criminal Procedure Code, any person accused of an offence before a criminal court, or against whom proceedings are instituted, may of right be defended by a pleader of his choice.

In **Huassainara Khatoon (IV) v. Home Secretary, State of Bihar** (1980) 1 SCC 98**,** the Supreme Court after adverting to Article 39-A of the Constitution and after approvingly referring to the creative interpretation of Article 21 of the constitution as propounded in its earlier epoch-making decision in **Maneka Gandhi v. Union of India** AIR 1978 SC 597**,** has explicitly observed as follows:

> *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 the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer.*

It has been categorically laid down by the Supreme Court in **Suk Das v. Union Territory of Arunachal Pradesh**, (1986) 2 SCC, that the constitutional right of legal aid cannot be denied even if the accused failed to apply for it. It is now therefore clear that unless refused, failure to provide legal aid to an indigent accused would vitiate the trial, entailing setting aside of conviction and sentence.

The provisions of Section 304 of the Code never comes in the way of right of accused to be defended by an advocate of this choice. The person who has been granted legal aid as per the provision of Section 304 of the Code can always on the later stage of the trial engage a counsel of his own choice. Thus, The Constitution as well as Section 303 of Code of Criminal Procedure recognized the right of every arrested person to consult a legal practitioner of his choice. Article 22 (1) provides, " No person who is arrested shall be detained in custody without being inform, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice".

Section 303 of Criminal Procedure Code deals with the provisions relating to right of person against whom proceedings are instituted to be defended, it provides that any person accused of an offence before a criminal court, or against whom proceedings are instituted under this court, may of right be defended by a pleader of his choice. The right begins from the moment of arrest i.e. pre-trial stage (**Llewelyn, Evans Re.** ILR 50 Bom 741).

The arrestee could also have consultation with his friends or relatives. The consultation with the lawyer may be in the presence of police officer but not within his hearing **(Sundar Singh v. Emperor,** 32 Cri LJ 339**).**

(vi) Person arrested to be taken before the Magistrate

Article 22 (2) of the Constitution provides that an arrested person must be taken to the Magistrate within 24 hours of arrest. Similar provision has been incorporated under Section 56 of Criminal Procedure Code. A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.

(vii) Person Arrested not to be detained more than twenty-four hours

Section 57 of Criminal Procedure Code provides that no police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate Court. It may also be noted that the right has been further strengthened by its incorporation in the Constitution as a fundamental right.

Article 22(2) of the Constitution provides:

> "*Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate*."

In case of arrest under a warrant the proviso to Section 76 of the Criminal Procedure Code provides a similar rule in substance which reads as below:

> *The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 71 as to security) without unnecessary delay brings the person arrested before the Court before which he is required by law to produce such person; Provided that such delay shall not, in any case, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.*

The right to be brought before a Magistrate within a period of not more than 24 hours of arrest has been created with aims:

(i) to prevent arrest and detention for the purpose of extracting confessions, or as a means of compelling people to give information;

(ii) to prevent police stations being used as though they were prisons - a purpose for which they are unsuitable;

(iii) to afford an early recourse to a judicial officer independent of the police on all questions of bail or discharge. The precautions laid down in Section 57 seem to be designed to secure that within not more than 24 hours some magistrate shall have watch of what is going on and

some knowledge of the nature of the charge against the accused, however incomplete the information may be**.** (See Dwarkadas Haridas v. Ambalal Ganpatram, 28 CWN 850, 853, Manoj v. State of M.P., (1999) 3 SCC 715: 1999 SCC (Cri) 478: 1999 Cri LJ 2095, Hari Om Prasad v. State of Bihar, 1999 Cri LJ 4400 (Pat**)).**

This healthy provision contained in section 57 of Criminal Procedure Code enables the Magistrates to keep a check over the police investigation and it is necessary that the Magistrate should try to enforce this requirement and where it found disobeyed, come down heavily upon the police. (**Khatri (II) v. state of Bihar**, 1981 SCC (Cri) 228)

If a police officer fails to produce an arrested person before a magistrate within 24 hours of the arrest, he shall be held guilty of wrongful detention **(Sharifbai v. Abdul Razak** AIR 1961 Bom 42)

(viii) No Right to Police officer to cause death of the accused

Sub-section (3) of Section 46 Criminal Procedure Code enjoins in clear terms that though police officer/any other person making arrest can use all necessary means for the purpose but they have not been given any right to cause the death of a person who is not accused of an offence punishable with death or imprisonment for life (**Karam Singh v. Hardayal Singh**, 1979 Cri LJ 1211).

Again Section 49 Criminal Procedure Code provides that 'the person arrested shall not be subjected to more restraint than is necessary to prevent his escape'. (See **Citizens for Demoracy v. State of Assam**. (1995) 3 SCC 743:1995 SCC(Cri) 600, **G.L.Gupta v. R.K. Sharma**, 1999 SCC (Cri) 1150).

(ix) Information of arrest to a nominated person

The rules emerging from decisions such as **Joginder Singh v. State of** U.P. (1994) 4 SCC 260 and **D.K. Basu v. State of West Bengal** (1997) 1 SCC 416 have been enacted in Section 50-A . Sub Section (1) of Section 50-A of Criminal Procedure Code provides every police officer or other person making any arrest under this code shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons as may be disclosed or nominated by the arrested person for the purpose of giving such information. Sub Section (2) of Section 50-A of Criminal Procedure Code provides the Police Officer shall inform the arrested person for the purpose of giving such information of his

right under Sub Section (1) as soon as he is brought to police station. Sub Section (3) of Section 50-A of Criminal Procedure Code provides an entry of the fact as to who has been informed of the arrest of such person shall be in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government. Sub Section (4) of Section 50-A of Criminal Procedure Code provides that it shall be the duty of Magistrate before whom such arrested person is proceed, to satisfy himself that the requirement of sub-section (2) and Sub-Section (3) have been complied with in respect of such arrested person.

These rights are inherent in Article 21 and 22 of the Constitution and required to be recognized and scrupulously protected.

(x) Right to be released on bail in bailable offences

Section 50(2) of Criminal Procedure Code provides that where a police officer arrests without warrant any person other than a person accused of a nonbailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf. This will certainly be of help to persons who may not know about their rights to be released on bail in case of bailable offences.

(xi) Right to receive the copy of the receipt after search

Power to search under Section 51 of Criminal Procedure Code is available only if the arrested person is not released on bail. After search all the articles other than necessary wearing apparel found upon the arrested person are to be seized, and it has been made obligatory to give to the arrested person a receipt showing the articles taken in possession by the police. This would ensure that the articles seized are properly accounted for. In case the arrested person is a woman the search can be made only by a female with strict regard to decency.

(xii) Right of medical examination of arrested person

Section 54 Criminal Procedure Code gives the accused the right to have himself medically examined to enable him to defend and protect himself properly. It is considered desirable and necessary "that a person who is arrested should be given the right to have his body examined by a medical officer when he is produced before a Magistrate or at any time when he is under custody, with a view to enabling him to establish that the offence with which he is charged was not committed by him or that he was subjected to physical injury**.** According to the Supreme Court,

the arrested accused person must be informed by the Magistrate about his right to be medically examined in terms of Section 54 (**Sheela Barse v. State of Maharashtra**, 1983 SCC (Cri) 353). In case of the examination taking place at the instance of the accused under subsection (1) a copy shall be given to him**.**

(xiii) Right to free legal aid

The 'right to counsel' would remain empty if the accused due to his poverty or indigent conditions has no means to engage a counsel for his defence. The state is under a constitutional mandate (implicit in Article 21 of the constitution, explicit in Article 39-A of the constitution-a directive principle) to provide free legal aid to an indigent accused person. Section 304 of the Code of Criminal Procedure also provides such a right to the accused. Section 304 of Criminal Procedure Code deals with the provisions relating to legal aid to accused at State expenses in certain cases. Section 304(1) provides that where, in a trial 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 defence at the expense of the State. A failure to inform the accused of this right and non-compliance with this requirement would vitiate the trial as held in **Sukhdas V. Union Territory of Arunachal Pradesh** 1986 SCC (Cri) 166

In **Khatri (II) V. State of Bihar**[36], the Supreme Court has held that the

State is under a constitutional mandate to provide free legal aid to an indigent accused person, and that their constitutional obligation to provide legal aid does not arise only when the trial commences but also when the accused is for the first time produced before the Magistrate as also when he is remanded from time to time. However this constitutional right of an indigent accused to get free legal aid may prove to be illusory unless he is produced before promptly and duly informed about it by the court when he is produced before it. The Supreme Court has therefore cast a duty on all Magistrate and courts to inform the indigent accused about his right to get free legal aid.

In 1987, Legal Services Authorities Act was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. This Act was finally enforced on 9th of

November, 1995 after certain amendments were introduced therein by the Amendment Act of 1994. The National Legal Services Authority (NALSA) has been constituted under the Legal Services Authorities Act, 1987 to provide free Legal Services to the weaker sections of the society and to organize Lok Adalats for amicable settlement of disputes. In every State, State Legal Services Authority has been constituted to give effect to the policies and directions of the NALSA and to give free legal services to the people and conduct Lok Adalats in the State. The State Legal Services Authority is headed by Hon'ble the Chief Justice of the respective High Court who is the Patron-in-Chief of the State Legal Services Authority. In every District, District Legal Services Authority has been constituted to implement legal services programmes in the district. The District Legal Services Authority is situated in the District Courts Complex in every District and chaired by the District Judge of the respective district.

These authorities provides legal aid to the needy persons including accused, convicts and victims of criminal cases.

(xiv) Right of accused to know of the accusation

One basic requirement of a fair trial in criminal cases is to give precise information to the accused as to the acquisition against him. In a criminal trial charge is the foundation. Section 218 of Criminal Procedure Code give the basic rule that for every distinct offence there shall be a separate charge. Fair trial requires that the accused person is given adequate opportunity to defend himself. Such opportunity will have little meaning, or such an opportunity will in substance be the very negation of it, if the accused is not informed of the accusations against him. The Code therefore provides in unambiguous terms that when an accused person is brought before the court for trial, the particulars of the offence of which he is accused shall be stated to him[5]. In case of serious offences, the court is required to frame in writing a formal charge and then to read and explain the charge to the accused person[6]. Details provisions have been made in the Code in Sections 211-224 of Criminal Procedure Code regarding the form of charge, and the joinder of charges.

(xv) Right to be tried in presence of accused

The personal presence of the accused throughout his trial would enable him to understand properly the prosecution case as it is unfolded in the court. This would facilitate in the making of

[5] Ss. 228, 240, 246, 251 of Cr.P.C
[6] Ss. 228,240,246 of Cr.P.C

the preparations for his defence. A criminal trial in the absence of the accused is unthinkable. A trial and a decision behind the neck of the accused person is not contemplated by the Code, though no specific provision to that effect is found therein. The requirement of the presence of the accused during his trial can be implied from the provisions which allow the court to dispense with the personal attendance of the accused person under certain circumstances. Section 273 of Criminal Procedure Code requires that the evidence is to be taken in the presence of the accused person; however, the section allows the same to be taken in the presence of the accused's pleader if the personal attendance of the accused person is dispensed with. Fair trial requires that the particulars of the offence have to be explained to the accused person and that the trial is to take place in his presence. Therefore, as a logical corollary, such a trial should also require the evidence in the trial to be taken in the presence of the accused person. Section 273 attempts to achieve this purpose. The section makes it imperative that all the evidence must be taken in the presence of the accused. Failure to do so would vitiate the trial, and the fact that no objection was taken by the accused is immaterial (**Ram Singh v. Crown**, (1951) 52 Cri. LJ 99, **Bigan Singh v. King-Emperor,** (1927) ILR 6 Pat 691)

This rule is of course subject to certain exceptions made by the provisions of the Code of Criminal Procedure, viz. Sections 205, 293, 299, and 317.

In **Sukhrah v. State of Rajasthan**, AIR 1967 Raj. 267 court held, evidence given by witnesses may become more reliable if given on oath and tested by cross-examination. A criminal trial which denies the accused person the right to cross-examine prosecution witnesses is based on weak foundation, and cannot be considered as a fair trial.

In **Habeeb Mohd. v. State of Hyderabad,** AIR 1954 SC 51 it was held that though the burden of proving the guilt is entirely on the prosecution and though the law does not require the accused to lead evidence to prove his innocence, yet a criminal trial in which the accused is not permitted to give evidence to disprove the prosecution case, or to prove any special defence available to him, cannot be any standard to be considered as just and fair. The refusal without any legal justification by a Magistrate to issue process to witnesses named by the accused person was held enough to vitiate the trial.

Though the imperative rule contained in the section confers a right on the accused to be present in the course of the trial, it presupposes that the accused accepts it and does not render its fulfillment and impossibility. This obligation or the right is not so absolute in character that its requirement cannot be dispensed with even in a case where the accused by his own conduct renders it impossible to comply with its requirements, held in **State v. Ananta Singh** , 1972 Cri LJ 1327. The right created by the section is further supplemented by Section 278 of Criminal Procedure Code. It, *inter-alia*, provides that wherever the law requires the evidence of a witness to be read over to him after its completion, the reading shall be done in the presence of the accused, or of his pleader if the accused appears by pleader. If any evidence is given in a language not understood by the accused person, the bare compliance with Section 273 of Criminal Procedure Code will not serve its purpose unless the evidence is interpreted to the accused in a language understood by him.

(xvi) Interpretation of evidence to accused or his pleader

Section 279 of Criminal Procedure Code provides that whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him. If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language. When documents are put for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary. However, non-compliance with Section 279(1) of Criminal Procedure Code will be considered as more irregularity not vitiating the trial if there was no prejudice or injustice cause to the accused person. (**Shivanarayan Kabra v. State of Madras**, AIR 1967 SC 986).

(xvii) Rights of the accused where accused does not understand proceedings

An accused person, though not of unsound mind, may be deaf and dumb, may be foreigner not knowing the language of the country and no interpreter is available, and if such accused is unable to understand or cannot be made to understand the proceedings, there is a real difficulty in giving effect to Section 273 of Criminal Procedure Code in its proper spirit. Section 318 of Criminal Procedure Code attempts to deal with such cases. It provides procedure where accused does not understand proceedings. Section 318 of Criminal Procedure Code provides that if the

accused, though not of unsound mind, cannot be made to understand the proceedings, the Court may proceed with the inquiry or[7] trial, and in the case of a Court other than a High Court if such proceedings result in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

(xviii) Right to get copies of police report and other documents

(a) Where the proceedings is instituted on a police report- where a police officer investigating the case finds it convenient to do so, he may furnish to the accused copies of all or any of the documents referred to in Section 173(5) of the Criminal Procedure Criminal Procedure Code (S. 173 (1), Cr.P.C).

According to Section 207 of Criminal Procedure Criminal Procedure Code (S. 173 (1), Cr.P.C) Code the magistrate is under an imperative duty to furnish to the accused, free of cost, copies of statements made to the police and of other documents to be relied upon by the prosecution. The object of furnishing the accused person with copies of the statements and documents as mentioned above is to put him on notice of what he has to meet at the time of the inquiry or trial and to prepare himself for his defence**. (See Gurbachan Singh v. State of Punjab,** AIR 1957 SC 623**; Geevarghese v. Philipose,** 1987 Cri LJ 1605 (Ker)**: Brojendra Nath Kolay v. State,** 1994 Cri LJ 1194 (Cal)). The right conferred on the accused is confined to the documents enlisted in the section and does not extend to other documents. From the language of Section 207, it appears that the right to have copies of statements recorded by the police is only in respect of statements recorded in the same case, and not in respect of statements recorded in any other case**. (Gurbachan Singh v. State of Pujab,** AIR 1957 SC 623; **Purshotam Jethanand v. State of Kutch,** AIR 1954 SC 700)

At the commencement of the trial in a warrant case it is the duty of the magistrate conducting the trial to satisfy himself that he has complied with the provisions of Section 207. In a summons case instituted on a police report no such duty has been specifically cast on the magistrate conducting the trial. However free copies have to be supplied to the accused in such cases by the magistrate in view of the imperative duty created by Section 207 (**Veerappa, Re** AIR 1959 Mad 405). Similarly in a case exclusively triable by a court of session such a duty is not imposed by

[7] S. 173 (1), Cr.P.C.

any express provision in the Code on the Court of Session. However if such a duty is implied in a summons case, a fortiori, it is very much implied in a case exclusively triable by a Court of Session.

(b) Where the proceeding is instituted otherwise than on a police report-

In cases where cognizance of the offence has been taken otherwise than on a police report, the case is not ordinarily investigated by the police and naturally there are no statements recorded by the police. Therefore the valuable right given to the accused by Section 207 Criminal Procedure Code regarding the supply of copies would not be available in such cases. In the absence of any preliminary inquiry preceding trial, and when no police record is available to the accused person before his trial, it might cause considerable hardship to the accused to prepare himself for his defence, particularly when the offence alleged is a serious one exclusively triable by the court of session. Section 208 of Criminal Procedure Code tried to remove this hardship and enables the accused to know the case made against him and to prepare for his defence. Section 207 and 208 of Criminal Procedure Code deals with supply to the accused of copy of police report and other documents and supply of copies of statements and documents to accused in other cases triable by Court of Session respectively.

According to Section 238 of Criminal Procedure Code at the time commencement of the trial in a warrant case it is the duty of the Magistrate to satisfy himself that he has complied with the provisions of Section 207 of Criminal Procedure Code However in a summons case instituted on a police report no such duty has been specifically cast on the Magistrate conducting the trial. However free copies have to be supplied to the accused in such cases by the Magistrate in view of the imperative duty created by Section 207 of Criminal Procedure Code. If the copies of the statements etc. are not supplied to the accused person as required by Section 207 of Criminal Procedure Code. It is undoubtedly a serious irregularity, however this irregularity in itself will not vitiate the trial. It will have to see whether the omission to supply copies has in fact occasioned a prejudice to the accused person in his defence. It is found in positive, the conviction of the accused person must be set aside, and a fair retrial after furnishing to the accused all the copies to which he is entitled must be ordered.

(xix) Right to cross-examine prosecution witnesses and to produce defence evidence

Evidence given by witnesses may become more reliable if given on oath and tested by cross-examination. A criminal trial which denies the accused person the right to cross-examine prosecution witnesses is based on weak foundation, and cannot be considered as a fair trial **(Sukanraj v. State of Rajasthan**, AIR 1967 Raj 267). It is mandatory that every accused must have assistance of counsel during the time of examination of prosecution witnesses. In **Mohd. Hussain @ Julfikare Ali v. The State (Govt. of NCT) Delhi** AIR 2012 SC 750**, i**t was held that right to have counsel at the cost of state where accused is unable to engage a counsel is part of fair trial. The right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial. The right to cross-examine a witness apart from being a natural right is statutory right. In **Mohd. Sukur Ali v. State of Assam** AIR 2011 SC 1222**,** it was held that a criminal case should not be decided against accused in the absence of the Counsel. An accused in criminal case should not suffer for the fault of his counsel and in such a situation appoint another counsel as amicus curiae to defend the accused. In **Man Singh & Anr v. State of M.P.** 2008 (4) RCR (Criminal) 55**,** it was held that Lawyers in criminal courts are necessities, not luxuries. For an accused lawyer's service is indispensable in all circumstances.

A lawyer is also duty bound to accept the case of all types of accused. In **A.S. Mohammed Rafi v. State of Tamil Nadu rep. by Home Dept. and others** AIR 2011 SC 308**,** it was held that Professional ethics requires that a lawyer cannot refuse a brief, provided a client is willing to pay his fee and lawyer is not otherwise engaged. Bar cannot pass a resolution that none of the lawyer shall appear for a particular person whatsoever heinous crime he has committed. Chapter II of the rules by Bar council of India states about “standards of Professional conduct and etiquette."

An advocate is bound to accept any brief in the Court or tribunal or before any of the authorities in or before which he proposed to practice at a fee consistent with his standing at the Bar and the nature of the case. Special circumstances may justify his refusal to accept a particular brief.

Though the burden of proving the guilt is entirely on the prosecution and though the law does not require the accused to lead evidence to prove his innocence, yet a criminal trial in which the accused is not permitted to give evidence to disprove the prosecution case, or to prove any special defence available to him, cannot be any standard to be considered as just and fair. The refusal without any legal justification by a Magistrate to issue process to witnesses named by the

accused person was held enough to vitiate the trial. **Habeeb Mohd v. State of Hyderabad**, AIR 1954 SC 51

(xx) Court's power and duty to examine the accused person

With a view to give an opportunity to the accused person to explain the circumstances appearing in evidence against him, Section 313 of Criminal Procedure Code provides for the examination of the accused by the court. This if of immense help to the accused person, particularly when he is undefended. Most of the accused persons are poor, uneducated and helpless. As observed by Stephen, an ignorant, uneducated man has the greatest possible difficulty in collecting his ideas, and seeing the bearing of facts alleged. He is utterly unaccustomed to sustain attention or systematic thought and the criminal trial proceedings which to an experienced person appear plain and simple, must be passing before the eyes and mind of the accused like a dream which he cannot grasp. Under these circumstances the importance of Section 313 is self-evident; it requires the courts to question the accused properly and fairly so that it is brought home to the accused in clear words the exact case that the accused will have to meet, and thereby an opportunity is given to the accused to explain any such point. (**Parichhat v. State of M.**P. (1972) 4 SCC 694)

(xxi) Accused person as a competent witness

According to provisions of Section 315 of Criminal Procedure Code, the accused can be a competent witness for defence and can give evidence in disproof of the charges made against him or against his co-accused. He may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial but he shall not be called as a witness except on his own request in writing and his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial.

(xxii) Right to speedy trial

Justice delayed is justice denied. This is all the more true in a criminal trial where the accused is not released on bail during the pendency of the trial and trial is inordinately delayed. However, the code does not in so many words confer any such right on the accused to have his case decided expeditiously. Section 437(6) of Criminal Procedure Code provides that if the accused is in detention and the trial is not completed within 60 days from the first date fixed for hearing he

shall be released on bail. But this only mitigates the hardship of the accused person but does not give him speedy trial and secondly this rule is applicable only in case of proceedings before a Magistrate. The code has given a more positive direction to courts when it says.

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 today until all the witnesses in attendance have been examined unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded[8]. A criminal trial which drags on for unreasonably long time is not a fair trial. The court may drop proceedings on account of long delay even in case where the delay was caused due to malafide moves of the accused. But in such a case the court may make the accused to suffer exemplary costs Section 309(1) of Criminal Procedure Code gives directions to the courts with a view to have speedy trials and quick disposals. The right of the accused in this context has been recognized but the real problem is how to make it a reality in actual practice. The provisions with regard to limitation help the accused to certain extent.

In **Hussainara Khatoon (IV) V. State of Bihar** AIR 1995 SC 366**,** the Supreme Court considered the problem in all its seriousness and declared that speedy trial is an essential ingredient of 'reasonable, fair and just' procedure guaranteed by Article 21 and that it is the constitutional obligation of the state of devise such a procedure as would ensure speedy trial to accused. The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this court, as the guardian of the fundamental rights of the people, as a sentinel on the qui vie, to enforce the fundamental right of the accused to speedy trial by issuing necessary directions to the State**.** The spirit underlying these observations have been consistently rekindled by the Supreme Court in several cases **A.R. Antulay v. R.S Nayak**, (1992) 1 SCC 225. This has again been expressed in **Raj Deo Sharma (II) v. State of Bihar** (1998) 7 SCC 507, wherein the court ordered to close the prosecution cases, if the trial had been delayed beyond a certain period in specified cases involving serious offences.

[8] Section 309(1) Cr.P.C.

The right to speedy trial came to receive examination in the Supreme Court in **Motilal Saraf v. State of J&K**. (2007) 1 SCC (Cri) 180. Dismissing a fresh complaint made after 26 years of an earlier complaint the Supreme Court explained the meaning and relevance of speedy trial right thus:

> The concept of speedy trial is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with actual restraint imposed by arrest and consequent incarceration, and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impressible and avoidable delay from the time of the commission of the offence will if consummates into a finality, can be averted.

(xxiii) Compensation for wrongful arrest

Section 358 Criminal Procedure Code empowers the court to order a person to pay compensation to another person for causing a police officer to arrest such other person wrongfully. Usually it is the police officer who investigates and makes the arrest and the complainant, if at all can be considered to have a nexus with the arrest, it is rather indirect or remote. For applying Section 358 some direct and proximate nexus between the complainant and the arrest is required. It has been held that there should be something to indicate that the informant caused the arrest of the accused without any sufficient grounds. The Section does not make any express provision for giving an opportunity to the complainant or other concerned person to show that there was sufficient ground for causing the arrest to be made or to show cause as to why an order to pay compensation under this section should not be passed against him. However, looking to the consequences which are likely to follow from the order of payment of compensation, the principles of natural justice would require that such an opportunity should be given to the complainant or other concerned person.

Some other Provisions for Human Rights of Accused

The above said rights are not the exhaustive rights of accused/arrested persons, other rules have also been made in the consideration of interest of them. Some of them have been created by the

judiciary and later on incorporated in the concerned laws. The idea underlying is to protect the basic human rights of accused in all circumstances. Some of these are as following.

(i) Rules for Bail

'Bail not Jail' is the celebrated dictum of Justice Krishna Iyer. The law of bails "has to dovetail two conflicting demands, namely, on one hand, the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence, viz., the presumption of innocence of an accused till he is found guilty. The quality of a nation's civilisation can be largely measured by the methods it uses in the enforcement of criminal law. The Supreme Court in **Nandini Satpathy v. P.L. Dani,** [1] (1978) 2 SCC p.433[9] quoting Lewis Mayers and stated:

> (Para 15): To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the lawenforcement machinery on the other is a perennial problem of statecraft. The pendulum over the years has swung to the right. We have earlier spoken of the conflicting claims requiring reconciliation. Speaking pragmatically, there exists a rivalry between societal interest in effecting crime detection and constitutional rights which accused individuals possess. Emphasis may shift, depending on circumstances, in balancing these interests as has been happening in America. Since Miranda there has been retreat from stress on protection of the accused and gravitation towards society's interest in convicting lawbreakers. Currently, the trend in the American jurisdiction according to legal journals, is that 'respect for (constitutional) principles is eroded when they leap their proper bounds to interfere with the legitimate interests of society in enforcement of its laws...'. (Couch v. United State). Our constitutional perspective has, therefore, to be relative and cannot afford to be absolutist, especially when torture technology, crime escalation and other social variables affect the application of principles in producing humane justice.

(ii) Right Against Solitary Confinement

Although, one of the mode of punishment is solitary confinement, but certain restrictions have imposed on the type of punishment to protect the right of convict to mingle with other

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,. 77 AIR 1997 SC 1369.

convicts. In **Sunil Batra (1) v. Delhi Administration** AIR 1978 SC 1575, it was held 'if by imposing solitary confinement there is total deprivation of camaraderie (friendship) among co prisoners commingling and talking and being talked to, it would offend Article 21 of the Constitution. The liberty to move, mix mingle, talk, share company with co-prisoners if substantially curtailed would be violative of Article 21 unless curtailment has the backing the law. The Court held that continuously keeping a prisoner in fetters day and night reduces the prisoners from a human being to an animal and that this treatment was cruel and unusual that the use of bar fetters was against the spirit of the Constitution.

(iii) Right against Inhuman Treatment

The accused and convict in criminal system of the country have the rights to live with dignity. Therefore, they should not be subjected to the inhuman treatment. In **Kishore Singh v. State of Rajasthan** AIR 1981 SC 625, the Supreme Court held that the use of third degree method by police is violative of Article 21 and directed the Government to take necessary steps to educate the police so as to inculcate a respect for the human person. The Court also held that punishment of solitary confinement for a long period from 8 to 11 months and putting bar fetters on the prisoners in jail for several days on flimsy ground like loitering in the prison, behaving insolently and in an uncivilized manner, tearing of his history ticket must be regarded as barbarous and against human dignity and hence violative of Article 21, 19 and 14 of the Constitution Krishna Iyer, J. declared, "Human dignity is a clear value of our Constitution not to be bartered away for mere apprehension entertained by jail officials.

Similarly, torture and ill treatment ow women suspects in police lockups has been held to be violative of Article 21 of the Constitution. The Court gave detailed instructions to concern authorities for providing security and safety in police lockup and particularly to women suspects. The female suspects should be kept in separate police lockups and not in the same in which male accused are detained and should be guarded by female constables. The Court directed the I.G. prisons and State Board of Legal Aid Advice committee to provide legal assistance to the poor and indigent accused male and female whether they are under trials or convicted prisoners as held in **Sheela Barse v. State of Maharashtra,** (1983) 2 SCC 96.

(v) Fair Trial

The fair trial is the foremost requirement of criminal proceedings and it is utmost right of an accused. In the recent case titled as **Dr. Rajesh Talwar and another v. C.B.I. and another (**2013 (4) R.C.R.(Criminal) 687) the Supreme Court observed that Article 12 of the universal declaration of Human Rights provides for the right to a fair trial what is enshrined in Article 21 of our Constitution. Therefore, fair trial is the heart of Criminal jurisprudence and, in a way, an important facet of democratic polity and is governed by rule of law. Denial of fair trial is crucifixion of human rights.

Fair Trial is the main object of criminal procedure and such fairness should not be hampered and threatened in any manner. Fair Trial entails the interests of the accused, the victim and of the society. Thus, fair trial must be accorded to every accused in the spirit of right to life and personal liberty and the accused must get a free and fair, just and reasonable trial on the charge imputed in a criminal case. Any breach or violation of public rights and duties adversely affects the community as a whole and it becomes harmful to the society in general. In all circumstances, the Courts have a duty to maintain public confidence in the administration of justice and such duty is to vindicate and uphold the majesty of the law and the Court cannot turn a blind eye to vexations or oppressive conduct that occurs in relation to criminal proceedings.

Denial of fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a fair trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for truth and not a bout over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seen to have been done. Therefore, free and fair trial is a sine quo non of Article 21 of the Constitution. Right to get a fair trial is not only a basic fundamental right but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of Constitution. In so many judgment the Supreme Court has expressed the importance of fair trial to accused. **(**See **Natasha Singh v. C.B.I.,** 2013 (3) R.C.R.(Criminal) 368**, Mohd. Hussain @Julfikar Ali v. State (Govt. of N.C.T. Delhi)** AIR 2012 SC 750)

(vi) Curative Petitions

The Supreme Court has ruled in **Rupa Ashok Hurra v. Ashok Hurra** (2002) 4 SCC388, that while certainly of law is important in India, it cannot be at the cost of justice. The court has

observed in this connection that 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. A curative petition can be filed by accused himself or on his behalf by any other person in the Supreme Court to review the earlier order of the Supreme Court itself.