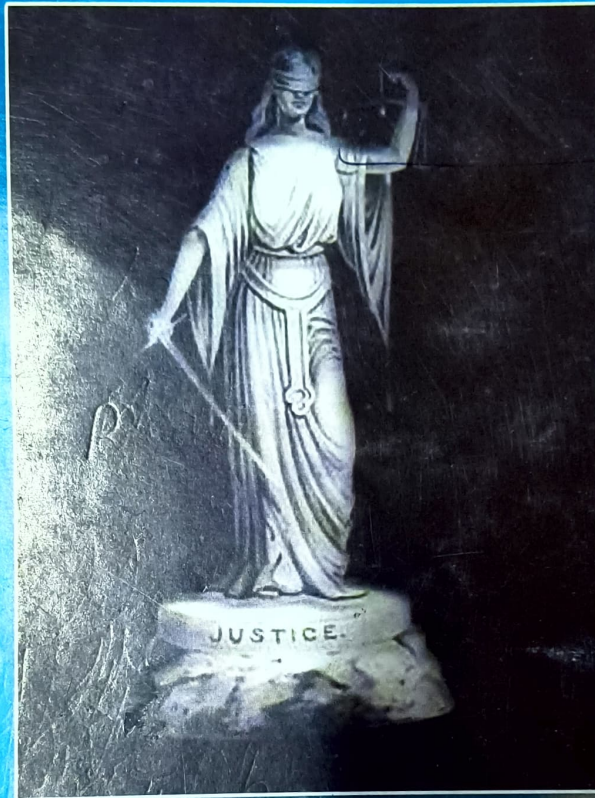




NERIMian

Magazine of NERIM Law College



NERIM

NERIM Law College

NORTH EASTERN REGIONAL INSTITUTE OF MANAGEMENT

PADMA NATH SARMAH BHAWAN, TRIPURA ROAD, JAYANAGAR,
KHANAPARA, GUWAHATI, 781022

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NERIM Law College *at a glance*

5 year integrated BALLB Course started from 2008.

The batch admitted in 2008 shall be the first law graduates of NERIM in 2011

List of Faculties of NERIM Law College

1. Professor AK Sinha, Principal (MSc, LLM, PhD, Research Guide)

Lecturers include the following

2. Mitali Sarma, MA (Political Science), LLB
3. Aparajita Dutta, BSc (H), LLB
4. Jayashri Das, BA (H), LLB
5. Sultan Haidar Alam, BSc (H), LLM
6. Bipasha Das, BA (H), LLM
7. Nirmali Bhattacharyya, MA, M Phil (Economics), LLB
8. Dulumoni Baishya, BA (H), B.Ed, LLM
9. Dhritiman Sarma, MA, (Anthropology), LLB



NERIM Law College Staff: L-R: Sitting: Mitali Sarma, Professor AK Sinha (Principal), Bipasha Das
Standing: Sultan Haidar Alam, Aparajita Dutta, Jayashri Das, Dulumoni Baishya, Jayanta Sarma,
Dhritiman Sarma

Message of the Director

Since 1992, NERIM has come a long way. The institute has attained adulthood in 18 years, and our law also considers a child to be adult, when he enters his 18th birthday. Since its first establishment and then in 1994, the institute was affiliated to Dibrugarh University and since then, NERIM has not to look back. With 3 campuses, of management wing, IT wing and Mangaldoi branch, NERIM is now a reputed successful institute in the entire Northeast India.

In Assam, NERIM is the first institute to introduce 5 year BALLB course in 2006 under Dibrugarh University. In Greater Guwahati, we are the pioneer in introducing the 5 year BALLB course. This time in 2010, we have published our first magazine in NERIM Law College, which has been named as NERIMian. We aim at making it a Law Journal in near future and trying to improve the journal with Impact Factor (IF). I hope, our wishes will be the reality soon, with sheer hard work.

I wish this magazine to be a grand success.

Sd/
Dr. Zoii Nath Sarmah
Director
NERIM

Dr. A.K. Sinha
Professor & Principal

NERIM Law College
PNS Bhawan, Jayanagar,
Khanapara, Guwahati, 781022



Messgae

I am delighted to learn that the NERIM Law College is publishing its first issue of law magazine. I hope the thought provoking articles encompassing different fields of legal study would go a long way in contributing towards academic pursuit in legal learning.

Chief Justice A.M. Ahmadi (as he then was) ventilated: "I think we have waited long enough to repair the cracks in the legal education system of the country and it is high time that we rise from our arm chair and start the repair work in right earnest." Jurists, legal luminaries and writers can contribute a lot towards such "repair work". I fervently hope that writings of the magazine will also be able to contribute towards such "repair work."

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Sd/
(A.K. Sinha)

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Sd/
(A.K. Sinha)



From the desk of the Editorial Committee.....

Since its inception in 1992, NERIM today has attained maturity. At 18, which we can consider as the teenage of the institute, we're happily publishing this magazine from the NERIM Law College. On 3rd May, 2010, when I joined NERIM as a lecturer, this was the first duty vested on me. Within the short period of 1 month, almost 30 articles were collected and we prepared the magazine.

I am thankful to all my colleagues from the institute, who helped me in this task. Our editorial committee in this issue includes the following members:

Dr. Zoiinath Sarmah (Director, NERIM), Dr. Sangeeta Tripathi (Dean), Dr. AK Sinha (Principal, NERIM Law College) and the members include all our faculties of the NERIM Law College: Mitali Sarma, Aparajita Dutta, Bipasha Das, Jayashri Das, Sultan Haidar Alam, Dulumoni Baishya & Dhritiman Sarma (editor).

In fact, based on the Law College magazine, we're trying our best to make it a journal in near future. This is the beginning and the topics selected here are all belonging to the topic of law. Law is a very essential tool to control the society and to make it safe haven for the innocents, so that criminals are perished and there can be full law and order situation under control. With this aim, law is implemented in the society. As a result of all these, NERIM is currently producing future lawyers so that they can work for the well being of the society in the future.

In fine, I am thankful to Dr. Zoiinath Sarma, Director of NERIM, whose inspiration helped me to publish this magazine. At the same time, I am also thankful to the Dean Dr. Sangeeta Tripathi and the Principal of the Law College Dr. A.K. Sinha.

On behalf of the editorial committee

Sd/

Dhritiman Sarma

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CHARACTER OF FEDERALISM AND THE CONSTITUTION OF INDIA

Aparajita Dutta

Lecturer, NERIM Law College

Introduction

Federalism is one of the most important aspects of modern constitutionalism. It is established all over the World, perhaps, as the only form of political organization suited to communities with a diversified pattern of objectives, interests and traditions, which seeks to join together different diversities in the pursuit of common objectives and interests in the cultivation of common traditions. It is an admirable device by which national unity can be harmonized with local autonomy.

Meaning and Characteristics of Federalism

The word "federal" is derived from the Latin word "foedus" which means 'a treaty' or an agreement. Professor Dicey defines Federal Government thus: "A federal government is a political contrivance intended to reconcile national unity and power with the maintenance of state rights". According to Montesquieu, a federal government is "a convention by which several similar states agree to be members of a large one". Federal principle according to Professor K.C. Wheare, is "the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent". Existence of co-ordinate authorities independent of each other is the gist of the federal principle.

In International Encyclopaedia of the Social Sciences edited by David L. Sills, it has been stated that the basic characteristics and operational principles common to all truly federal systems can be identified; and these may be divided into three essential elements i.e. written constitution, non-centralization and a real division of powers. Reference may also be made in this connection to what has been stated in Volume II of The Encyclopaedia of Democracy in which principles of federalism have been mentioned as

- a. non centralization
- b. democracy
- c. checks and balances
- d. open bargaining
- e. constitutionalism
- f. fixed units

It now transpires that federal constitution has normally five basic characteristics, i.e. Division of powers, supremacy of the constitution, written constitution, rigidity and authority of courts. A federation is a union of states and it is generally the result of two kinds of forces, viz centripetal and centrifugal. A federation comes into being as a result of centripetal forces when independent states agree to join hands and thereby create a new state. That was the case in Australia and the United States of America. Sometimes, a unitary government is transformed into a federal government as a result of centrifugal forces. The units demand a large measure of autonomous which can be provided in a federal structure. This was not provided in India by the Government of India Act, 1935 with a view to giving greater autonomy to the provinces.

Federalism in India

Federalism is a more functional than institutional concept and it is wrong to suppose that there are certain inflexible features in the absence of which a political system cannot be federal. The Indian federalism is unique in nature and is tailored according to the specific federalism as a constitutional form and as the basis of a national government in India was not a sudden development upon the transfer of power on 15th August, 1947. It was therefore many years and, in a limited

form, it was already in operation in British India. For the solution of the constitutional problem of a multi-racial, multi-lingual and multi-communal country like India with a vast area and a huge population, federalism was only a natural choice.

The Constitution of India does incorporate the concept of federalism in various provisions. Article 1 of the Constitution declares that India is a Union of States. There is a division of legislative powers between the Parliament of the Union and the Assemblies of the States and this division can only be altered with the agreement both of the Parliament of the Union and the Assemblies of not less than one-half of the Constituent States. The provisions which establish the essence of federalism i.e. the competence of Parliament to legislate in matters pertaining to the State List, only for a limited period, under Article 249 "in the national interest" and under Article 250 during "emergency", having States and the Centre, with a division of powers between them with sanction of the Constitution, vesting the President with the power under Article 258(1) to entrust a State Government, with consent of the Governor; decentralization of power by formation of independent municipalities and Panchayats through the 73rd and 74th Amendments.

Thus, though the federal principle is dominant in our Constitution and that principle is one of its basic features, but, it is also equally true that federalism under the Constitution of India leans in favor of a strong Centre, a feature that militates against the concept of strong federalism. The Centre can, in certain contingencies, encroach upon the field reserved for the States. The power of intervention given to the Centre, it is argued that it is inconsistent with the federal system, for it places the States in a subordinate position. Some of the provisions that can be referred to in this context include the power of the Union to deal with extra-ordinary situation such as during the emergency and in the event of a proclamation being issued under Article 356 that the governance of a State cannot be carried on in accordance with the provisions of the Constitution; there is only one citizenship, namely, the citizenship of India; the provisions include the power of Parliament in relation to the formation of new States and alteration of areas, boundaries or names of States (Article 3). This bias towards "unitary power" under normal circumstances is not seen either in the Constitutions of USA or Canada. Because of these reasons some constitutional jurists hesitate to characterize the Constitution of India as truly federal.

Ivor Jennings has characterized the Constitution of India as "a federation with strong centralizing tendency". According to K.C. Wheare the Constitution of India is a quasi-federal constitution. K.C. Wheare also observed that "any definition of federal government which failed to include the United States would be thereby condemned as unreal". The United States Constitution has been regarded as a truly federal Constitution.

Judicial Interpretation

The Constitution of India is the fundamental law of the land. The principle of constitutionalism advocates a check and balance model of the separation of powers; it requires a diffusion of powers, necessitating different independent centers of decision-making. The principle of constitutionalism, which requires the courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to the provision enshrining the fundamental rights. The supremacy of the Constitution constitutes the basic structure which is unamendable, thereby reflecting a novel philosophy.

The debate whether the Constitution of India is a federal constitution or quasi-federal has been grappling the Apex Court in India. In *State of Karnataka vs Union of India*, AIR 1977, where the State challenged the appointment of a Commission of Inquiry against the Chief Ministers of Karnataka on the ground that the same grossly violated the federal character of the Constitution. The Court strictly observed that the Constitution of India is not a federal Constitution where separate independent and sovereign States could be said to have joined to form a nation as in the United States of America or as may be the position in some other countries of the World.

In the *State of Rajasthan vs Union of India*, AIR 1978, the Supreme Court had observed that the extent of federalism of the Indian Union is largely watered down by the needs of progress, development and making the nation integrated politically and economically coordinated, and socially

and spiritually uplifted. In *State of West Bengal vs Union of India*, AIR 1978, the majority highlighted the various provisions in the Constitution of India which show a trend towards a stronger centre. The court also highlighted the presence and absence of certain provisions like "no separate constitution for each State", "the constitution being liable to be altered by the Parliament alone," "national policies to be decided by the centre," "no dual citizenship" and "political sovereignty is distributed between the Union and the States with greater weightage in favor of the Union", and thus concluded that the constitution is not a "traditional federal Constitution".

However, the Apex Court in *S.R. Bommai vs Union of India*, AIR 1994 expressed its view in different words regarding the character of our polity. The court observed that federalism is the essential feature of our Constitution.

Earlier in *Kesavananda Bharati vs State of Kerala*, AIR 1973, the Supreme Court held that federal character of the Constitution is the basic structure and it cannot be destroyed even by an amendment.

If at all any other argument is advanced in relation to the nature of the Indian Constitution being not federal, or not purely federal as has been pronounced sometimes by the Hon'ble Supreme Court of India itself, it is pertinent in this regard, to quote, Mr. Maily who said, "If there is such a thing as a strict, pure or unqualified federal principle, then the hard fact is that there are no federation and no federal constitution."

Conclusion

The framers of the Constitution of India had in their mind the necessity of tuning the Constitution to the changing social needs. They had objective of flexibility in mind and for this they drafted the constitution keeping scope to adjust itself to changing needs. H.M. Seervai, the Constitutional Expert observed that the principle of federalism is not watered down in our Constitution. Tension and conflict of the interests of the centre and the respective units is an integral part of federalism. Federalism with a strong centre was inevitable as the framers of the Indian Constitution were aware that there were economic disparities as several areas of India were economically as well as industrially far behind in comparison to others. The nation was committed to a socio-economic revolution not only to secure the basic needs of the common man and economic unity of the country but also to bring about a fundamental change in the structure of the Indian Society in accordance with the egalitarian principles. With these considerations in mind the constitution makers devised the Indian federation with a strong centre. The character of federalism varies from time to time depending on so many factors – historical, geographical, economical and political.

The Constitution is not merely a document, it is an "organic document" that evolves based upon the needs of the society at a given point of time. Dr. D.D. Basu suggests that a liberal attitude towards the question of federalism is inevitable particularly in view of the fact that recent experiments in the world of constitution making are departing more and more from the "pure" type of either a unitary or a federal system.

The Constitution of India is sufficiently federal. It is not less federal than United States federalism. Moreover the Constitution of India constitutes a new bold experiment in the area of federalism.

RAGGING

Mitali Sarma

Lecturer, Dept of Law

The term 'healthy ragging' which had existed for sometime, does not hold good any longer. It was once thought to be a means of mingling with juniors and newcomers, but at present it has been recognized as an offence. Theoretically ragging has been defined as a systematic and sustained

physical, mental and sexual abuse of fresh students of the College/ University any other educational institution at the hands of senior students of the same institution and sometimes by outsiders (University of Kerala Vs Council of Principals of College in Kerala and others AIR 2009 SC 2223).

Two incidents of ragging in higher educational institutions, one in the North and another in the South have exposed the nation's inability to stem the menace. The death of nineteen year old Aman Kachroo at the hands of senior students in the Rajendra Prasad Medical College in Tanda, Himachal Pradesh on March 8, 2009 raised disturbing questions about the culpability of the college authorities of ensuring compliance of the college with the anti ragging guidelines.

Another victim, a girl from the Government Engineering College at Bapatala in Guntur, Andhra Pradesh consumed a pesticide after senior students harassed her a lot.

A study by the Coalition to Uproot Ragging from Education (CURE) revealed 14 cases of suicide by victims of ragging and 12 reported cases of serious and mental torture by way of ragging between 1998 and 2007. In this decade alone, 198 incidents of ragging have been recorded across the country.

It is not as if government is unconcerned about the need to stem the menace. A report on the measures to stem ragging, by a Committee set up at the instance of the UGC in 1999, referred to the Government of India's notification banning ragging in the aftermath of the death of two freshers in a Regional Engineering College in the late 1970s.

Since then various state governments have been experimenting unsuccessfully with ordinances, laws and circulars to deal with the menace. The UGC set up a four member Committee, chaired by K.P.Unny of Jawaharlal Nehru University in 1999, in response to a Public Interest Petition filed in the Supreme Court by the Vishwa Jagriti Mission. The Committees recommendations were exhaustive. On the basis of these, the Supreme Court issued a set of directions in 2001. The Court said that the police while dealing with ragging cases should not treat students as criminals but should only resort to corrective action.

In 2006, the court being concerned with the non effectiveness of its directions while hearing the case University of Kerala Vs Council of Principals of Colleges felt the need to examine the measures afresh. A Committee headed by R.K. Raghavan, former director of the Central Bureau of Investigation, was thus set up.

The Raghavan Committee analyzed 198 incidents of ragging between 1998 and 2007, from the compilation forwarded by CURE. Tamil Nadu and Andhra Pradesh were among the first states to enact legislation, way back in 1997 prohibiting ragging.

Key recommendations of the Raghavan Committee on Ragging

Taking serious note of increasing criminalization in University campuses across the country, the apex court had appointed the Raghavan Committee to suggest measures to curb the menace. The following were its recommendations:

1. Central Regulatory bodies to take ragging situation as an important factor in accreditation of educational institution.
2. Setup anti ragging cells at central, state and college level.
3. Set up toll free helpline for ragging victims.
4. Strong law against ragging with responsibility to prove not guilty of perpetrator.
5. NCERT, SCERT books should include chapter on ragging.

The Committee urged that every incident of ragging be treated with the heaviest hand possible, however, isolated or mild or positive it might appear.

In its order on May 16, 2007 the Supreme Court endorsed many of the recommendations of the Raghavan Committee. In particular the court held that failure on the part of institutional authority or negligence or deliberate delay in lodging a First Information Report should be construed

as culpable negligence.

Most of the recommendations made by former CBI Director R.K. Raghavan were accepted by the Supreme Court. A bench comprising of Arijit Pusayat and Justice A.K. Ganguly issued the directives. The Supreme Court stepped in to curb the ragging following the death of Aman Kachroo at Dr Rajendra Prasad Medical College in Himachal Pradesh.

Key features of the Supreme Court Guidelines on Ragging

1. Immediate rustication of the senior students indulged in ragging.
2. Departmental action against all heads of institutions where ragging takes place.
3. High level security in hostel premises and a strict vigil to be maintained
4. Fresher's will be divided into small groups and will be under the charge of individual Teachers.
5. Police SHO or SP will be responsible for any ragging that takes place under their jurisdiction.

UGC passes regulations against ragging

The increasing incidents of ragging despite the Supreme Court ban, has forced the University Grant Commission (UGC) to ask all the educational institutions to spell out punishments for ragging in their prospectus and brochures. Moreover, UGC wants the institutions to seek an UNDERTAKING from parents for punishing their wards involved in ragging. The Central and State Governments have been asked by the UGC to enact a Law prohibiting ragging in educational Institutions which will content provisions "to treat ragging as a cognizable offence".

Ragging at a glance: What is ragging ?

Any disorderly conduct, whether spoken and written or by an act which causes annoyance, hardship or psychological harm or raises fear and shame in student.

When does ragging become an offence ?

Criminal conspiracy to rag, unlawful assembly and rioting while ragging, violation of decency and morals through ragging, injury to body, causing hurt or grievous hurt; wrongful restraint and criminal intimidation.

Punishment for ragging

1. Cancellation of admission
2. Suspension
3. Withholding Scholarship
4. Debarring from appearing for exams
5. Suspension or expulsion from hostel
6. Rustication from the institution for a period one to four semesters

How to stop ragging ?

1. Counseling students
2. Constituting anti ragging cells.
3. Arranging a fresher party within two weeks of the start of the academic session.
4. Informing parents in advance of the repercussions of ragging.

A new helpline to check ragging

The Supreme Court appointed Monitoring Committee on ragging has asked the Union Human Resources Development Ministry to set up a toll free helpline for students as a means to check the

menace of ragging.

Conclusion

Since law is formulated in the society, hence an evil custom like ragging would never stop only on the basis of implementation of law, but social awareness of the students is a major requirement to repeal such evil custom. However, implementation of anti ragging laws and punishment will lower the percentage of ragging in schools and colleges, as in fear of punishment, people follow rules and regulations.

NEED OF CENSUS IN THE LEGAL PERSPECTIVES

Dhritiman Sarma

Lecturer, NERIM Law College

At present, in the modern world, where we live in heterogeneous societies, census study has got a new dimension for several perspectives, including social and legal perspectives. The first census was taken in 1801, following decades of argument about whether its introduction constituted an intrusion of privacy. For some people the very idea was an infringement of human rights, a sign of an over mighty executive abusing its power? Whether genealogists ever found that these objectors were direct ancestors of today's daily mail readers is unknown. But the argument in favor of some form of census was conceded by the turn of the nineteenth century, and in England and Wales, the Channel Islands and the Isle of Man a census was carried out in 1801 and one has been conducted every ten years since, excluding 1941 because of the Second World War. That first census revealed that 9 million people lived in those isles. Unfortunately, that is all it revealed. The first three censuses of 1801 to 1831 are of no value to the family historian. All the enumerators conducted were a headcount of the population; no name, ages or addresses out of respect to the privacy campaigners. By the late 1930s the debate had become heated. The argument was now over how detailed the questions should be. Things haven't changed a great deal. Even now, after 200 years and 20 censuses, there are still those for whom the idea of the state gathering information about its citizens is an anathema.

Why do we need a Census ?

A census is needed to provide reliable statistical information about the population and households for all parts of the country. The information is used by central and local government, health authorities, businesses, schools and members of the public, often to help plan services, allocate resources and decide on the best course of action for a particular community.

What does the Census do?

The census makes a count of the number of people who live in each town, city and country area. A range of different information about these people is also recorded, such as their age, gender, what job they do and what sort of houses they live in.

The results of each question on the census form can be used independently, or the questions can be combined in order to produce much more specific information. For example, it would be possible to determine how many people live in houses which are owned outright and don't have central heating.

How is the Census carried out ?

The country is divided up into over 100,000 areas, and each area is looked after by a member of the census field force. All households and any other establishment where people live were sent

a form to complete for all the people who live there. The majority of these were posted back to census collection points, and the remainder was collected by members of the field force. Each household had a legal responsibility to complete the form, and a major publicity campaign was launched to ensure that members of the public understood how important it was that they returned their form. There was also a program of help put in place for those who may struggle to fill in the form.

Once returned to census headquarters, the forms were able to be electronically scanned so all the results could be stored and manipulated. During this process, some measures were undertaken to account for missing forms, and where forms were incomplete. More details of these processes can be obtained by contacting the Information Team at the address below.

How is data about individuals protected ?

The organizers of the census have worked very hard to ensure that data about any individual is not disclosed. Small counts will be adjusted so that individuals cannot be identified, and thresholds will be applied to the data in some tables e.g. data will be withheld for census area statistics if the area in question does not have at least 100 people and 40 households.

More information about disclosure policy can be obtained by contacting the Information & Communications Team at the address below.

What data will be available ?

Although some top line data is already available, most of the data will be released in February 2003, with the rest of the data following towards the summer.

The questions that normally asked of a household in census are:

- a. Household Accommodation
- b. Number of Rooms
- c. Sanitation
- d. Ownership of accommodation and type of landlord
- e. Household members and their relationships
- f. Sex
- g. Date of Birth
- h. Marital Status
- i. Address one year ago
- j. Country of Birth
- k. Ethnic Group
- l. Religion/ Caste
- m. Limiting Long-term Illness
- n. General Health
- o. Provision of Care
- p. Academic Qualifications
- q. Occupation

Rag Week pranks like this were not on the minds of our ancestors as the 1841 census approached. It was agreed that more detailed questions could be asked, though there were some limits. Names could be recorded for each household, but their relationship to the head of the household could not; children under 15 had their precise ages recorded, while those aged 15 and above had theirs rounded down to the nearest five; questions about the profession of trade of the head of the house followed. Finally, citizens were asked whether they were born in the same country they lived in, or Scotland, Ireland or 'foreign parts'. The 1841 census of England, Wales, Scotland and Ireland was the first to be taken by the General Register Office, and can be seen as a trial run. Ten years later the kinks had been ironed out and, thankfully for our purposes, more information was recorded. The census now gave everyone's place of birth, precise age and

relationship to the head of the household, making it prime source material for us (in 1891 and 1901 a further category was added: people had to admit whether they were deaf and dumb, blind or lunatic, imbecile or idiot.)

A day or two before census night held in June 1841, either March or April ever since forms was distributed to the head of the household, usually the father or senior male. A few days' later enumerators returned to collect the forms or give assistance to those unable to read or write.

A census is a snapshot in time. It reveals where your family was living and with whom on the night it was taken, just pray that your great-great-grandfather did not decide to go on a three day drinking jag the night he got the form, and fail to return or come round until all the forms had been collected. By using and interpreting census returns we can pick up clues about how our ancestors lived, the conditions they lived in, exactly where they lived, track them every ten years to see if they moved or died or simply vanished, and use the information to trace our roots further back in time.

What can be learnt from census ?

- a. The address at which your relatives lived.
- b. The number of people who lived in the house and their relationship to the head of the house.
- c. Their ages
- d. Their occupations
- e. Their birthplaces

Census Mistakes

Sometimes, it is not possible to find out the ancestor in the census. Here are some reasons why.

- a. 5% of the population doesn't appear in a census for one reason or another. For example, people who sleep rough.
- b. People moved around more than we think in the Victorian era, but if someone should have been at a certain address on census night and wasn't, check the rest of the neighborhood. Who knows, they might have gone round to friends for a drink that night and not made it home.
- c. Between 5 and 10% of the 1861 census is simply missing.
- d. The enumerator might have misheard or misunderstood that they were told, so individual entries can be wrong: ages can be year or two out, occupations can be inaccurate and birthplaces miss pelt.

Census Lies

The census is not infallible. People don't always tell the truth. Here are some of the most common problems to watch out for.

For some women, time can be an elastic concept. We may find that a female who gives her age as 23 in the 1861 census might miraculously still be only 28 when the 1871 one was taken. Birthplaces can be inaccurate. People often gave the place where they were brought up, or where they had spent most of their life. Sometimes they just didn't know where they were born, so simply made it up. Children may be listed as scholars. This doesn't necessarily mean they were at school; they may have been working and their parents didn't want anyone to know this. Tens of thousands of women earned their living by prostitution. Unsurprisingly, few admitted this to the census. As a result, sometimes, people who conduct the census work need to be analytical in nature.

Census in legal perspectives

Census in India was conducted during the British colonial period.

population with several ethnic groups, castes and linguistic groups. As a result, in order to perform the administration smoothly, the government needs a thorough census of the people, through which, the government can implement their policies properly. Till date, 1931 was the last census which was based on caste. After that, this time, in 2010, Dr. Manmohan Singh administration is doing this caste based census one again. Since Indian society has reservation policy based on caste, hence, this caste based census is required sometimes to implement reservation policy, which has been legalized by the Supreme Court. When a community is not adequately represented in government sector or in the parliament, then seats can be reserved for those under represented castes. As a result, based on the 15% and 8% SC and ST population respectively in India, caste reservation was implemented and hence, we can see the proportional form of reservation for SC/ST to be 15% and 8% respectively.

In fine, it can be concluded that, census study is a true mirror of the society, through which, we can know about the exact population of the society, whether the society is homogeneous or heterogeneous.

LAWYERS AND SOCIETY

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In a democratic state there are three organs namely the Legislative, the Executive and the Judiciary. The society has high expectation from judiciary. High prestige and respect has been earned by the judiciary. Its role is to do justice between rich and the poor, the mighty and the weak, the state and the citizen without fear and favor.

As the society is changing, laws are enacted to influence and regulate the behavioral pattern of members. The primary function of law is to provide a check on arbitrary and unrestrained action of the members of a given society. In the absence of regulatory behavioral norm which is provided by the law, the society will have to face anarchy because in the absence of law every member actuated of by his interest would act to determined of every one else. Law is therefore required to restrain or limit the power of individual to act in an arbitrary manner, so that the regulated development of the society done for the benefit of all members may be developed. Ultimately, it avoids anarchy, Law therefore; ordinary is a response to the minimum or Cotemporary needs of the society.

However, it is universally accepted that the society is always in a state of flux and is always changing, sometimes forward and sometime, backward. Law has therefore to keep pace with the changing modes of the society. Once the society is on the march, law will have to before reformed, modified and amended with a view to bring it in conformity with the needs of the society. Law touches people at every point, effects almost in all their activities with the presence of numerous laws enacted by parliament and state legislature. After the enactment of laws the duty of the legislature is over. It is not their function and can not determine whether the acts of the executives are within or without the law. It is the function of the judiciary to determine that the judicial scrutiny of the issues is very important because on its decision rests the security, rights and liberty of the citizens. Because of the enforcement of laws at times in illegal and arbitrary manner, the people approach judiciary as their last resort seeking justice. People from all walks of life be it politicians, bureaucrats or other approach judiciary where there is either no laid down law or they are victim of arbitrary exercise of power by the Executive.

It is often said that the Bar and the Bench are the two sides of a coin and such inseparable

from each other and lawyers are intricately interwoven with the justice delivery system. Lawyers are closely identified by the public with the law itself although drafting of legislation and judgment delivery by the courts are not within the control of the lawyers. However public assumes lawyers to be above the average in knowledge and competence and since it identifies lawyers with the law, it considers faults of lawyers more important and less excusable than those of others.

Society expects changes through lawyers when there is need. Perhaps lawyers are the only class whose members are addressed as "learned counsel" in judicial system. No other professional in the world are addressed as 'learned' the judge and the society expect much more from the lawyers. It is again a matter of pride for the lawyers that expectation from them in the society is too high and it is not for any other reasons but because of sole reason of their contribution, role and competence. The role of lawyers in the world in general and in India in particular over the years being instrumental to justice delivery system and social change is tremendous and well recognized. Society witnessed the contribution of lawyers in court and outside towards gradual transformation of peace and social discipline.

The ever increasing faith in judiciary and confidence reposed upon role of the lawyers to securing social justice there is no tremendous rush in recent years to pursue legal studies the order to make successful career in legal field. A lawyer by virtue of his profession is always research scholar. Before doing a case he has to do good amount of research work in the subject and law in order to present his case properly keeping in mind the fact that law is fast changing, besides remaining high alert with high degree of presence of mind while presenting his case unless he keeps himself abreast with the latest amendments and rulings. Perhaps he may like sailing a boat without an oar and may lose the tract. On the contrary to perform a most difficult, risky and time consuming open hearted surgery and then risky surgeries although alertness and presence of mind is essential the length or preparation and amount of research work prior to surgery is certainly less. It is perhaps only profession where one is to devote much time in study. With the continuous hard work and studies lawyers interpret laws and aid in change in legislation from time to time for bringing about Social and economic change.

It is in this background, lawyers being in the public eye should maintain high professional standard and should act in such a manner that their role is manifestly seen in the eye of public.

The Bar Council of India has been empowered to make rules so as to prescribed its standards of professional conduct and etiquette to be observed by the advocates. During the presentation of the case and while asking otherwise before the court an advocate is required to conduct himself with dignity and self respect. An advocate shall not enter appearance, act, plead or practice in any way before a court, tribunal or authority mentioned in sec 30 of the Advocate Act, if sole or any member thereof is related to the advocate as father, grand father, son, grand son, uncle, brother nephew, first cousin, husband, wife, mother, daughter, sister, aunt, niece.

An advocate shall not act or plead in any matter in which he is himself pecuniary entrusted. The relation between an advocate shall in the practice of the professional of law bear in mind that any one genuinely in need of a lawyer is entitled to general assistance even though he can not pay for it fully or adequately and that within the limits of advocate's economic condition, free legal assistance to the indigent and oppressed is one of the highest obligation, as an advocate owes to society.

THE UGLY FACE OF BLACK MONEY

adverse sociological effect on society like social inequalities. It is perceived as a parallel economy, an underground economy or an unofficial economy that is the consequence of the economic policies of the government and has damaging effects on country's economy and nation's socialist planning development. When problem like poverty affects those who are poor unemployment affects those who consume than, black money is a problem which does not affect those who have black money but it affects the common man in society.

Black money is tax evaded income. It can be earned both through legal and illegal means. Its legitimate source is that the income earners do not reveal their whole income for tax purpose, e.g. government doctors earning money by private practice even when they get non-practicing allowances, teachers earning money through tuitions, examination and book royalty and not including it in income tax returns, advocates charging much higher fee than shown in their accounts books, and so forth / on. Its illegitimate source is bribe, smuggling and black marketing, selling commodities at price higher than the controlled price taking purge for house or shop. Selling house at a high premium price but showing it at a much lower price in the account books and so on.

It is possible to convey block money into white money and vice-versa manages to get the receipt form the shopkeeper by paying the sales tax for a commodity but does not purchase it actually be generates block money as reimbursement is made to him against the receipt. The money not actually paid is to the black money in such a case. In such case, the shopkeeper sells the same commodity to another person without giving him any receipt for of on the other hand of a person. Purchasing something and pay Rs. 15,000 for it out of while money but gets a receipt of only Rs. 10,000, The balance of Rs. 5,000 becomes black money for the seller.

It is not easy to calculate the magnitude of black money in any society. The economists of the USA and the EU have adopted different measures but could not estimate. The amount involved in black money Norway and Sweden and questionnaire method for eliciting answers form persons whether they had participated in illegal activities as buyers or sellers. Italy attempted to estimate the underground economy by finding out the difference between the sizes of the labour force officially reported and actually employed. This enabled to determine the productivity in the underground sector. The UK tried to assess parallel economy by comparing the official estimates of the Gross National product (GDP) made form the consumption side with those made form the income side. In the US, Guttam assumed that only cash is used in illegal transaction. He tried to find out the difference between currency required for economic transactions in a fixed period and actual currency held outside tanks in the same period. So in spite of the various methods used, it is not possible to estimate the magnitude of the black money in a society, even though it is described as a world wide countries but also in the developed countries like the US, UK, EU, Japan, Canada, France, Germany etc. A study conducted by the IME about a decade and a half back showed that in regard to the size of the underground money, India holds the first rank followed by the US and Canada having the second and third rank. In India the black money or the unaccounted for wealth estimated by Prof. Kaldor in 1953-54 as Rs. 600 crore was estimated by Wamchoo committee as Rs. 1400 crore in 1969 - 70. In 1981 black money was estimated as 7,500 crore (6.8% of the National income at current prices). Further it is generated at the rate of Rs. 50,000 crore per year (the Hindustan Times, 2 August, 1991: 11). In 1996, the estimated black money way believed to be more then Rs. 400,000 crore (the Hindustan times, Jan 20, 1997).

If after a through study the scholars have pointed out that of the black money in our society, about one fourth (26%) from the tax evaded income. In the united state the black is expected to be about 8 percent of its GDP. There are various courses for which such black money generates.

1. Due to unrealistic tax, laws and tax frauds, i.e. due to increase in taxes and duties compel some people to evade than. A doctor with a private practices of more the Rs. 500 a day. A surgeon changing a fee of Rs. 5000 per operation and ding at least tan operations a month, an advocate changing Rs. 2,000 per hearing, a shop keeper ding a business of more than Rs. 5000 per day and an individual industrialist with a profit of millions of rupees per year all are bound to bide their real income to escape paying income tax of 30 per cent of the total income. In addition to

that Indirect taxes, like excess duty, custom duty, sales tax also encourage evasion of taxes and increase in black money. The FERA violation of around Rs. 300 crore by a top company (ITC) came to light in the last quarter of 1996. A few ministers in Narashimha Rao's government being involved in corruption cases of more than Rs. 25 crore. If income taxes are reduced, there is more likelihood of hiding less and thereby increasing the revenue.

2. Due to different rate of excise duty within similar products manufacturers feel excess burden on them. For instance, in textiles and cigarette, this leads to tax evasion through misclassification of output. In textiles, separate rates, of excise. This alone generates Rs. 1,000 crore a year in black money. For the entire manufacturing sector, including steel, evasion in excise, custom and sales taxes accounts for over Rs. 50,000 crore in black money every year.

3. The price-control policy of the government in selecting commodities for control and in determining their prices, the government fails to take into account the facilities involved in demand and supply. For example as a result of control on sugar, about Rs. 400 crore of black money were generated in the year 1991-92. Regulation of foreign exchange also leads to over-invoicing of imports and under invoicing of exports and black-marketing of currency. Thus the more stringent the measures of control and the more regulated an economy, the greater will be the effort to violate it, which will increase hoarding, fraud, artificial scarcity and the resultant black money.

4. Yet another source of black money is the quota system. The import quota, the export quota and the foreign exchange quota are generally misused by selling them at a premium. Unrealistic controls spawn a culture which encourages corporate to break the tax laws, particularly FERA (Foreign Exchange Regulation Act) Laws. When the government came out with a scheme a few years ago to allow exports to import goods without paying any customs duty, ingenious ways were devised to make money even out of this scheme, i.e. the way of over invoicing exports to get more import benefit as well as avail of the tax setoffs given to exports. During 1992-96, Directorate of Revenue Intelligence (DRI) and the customs authorities detected 605 such cases. One export house (Ganapati Export) benefited as much as Rs. 85 crore (India Today, November 30, 1996).

5. Black money is also caused by scarcity and defective public distribution system. When essential goods become scarce, people have to pay higher than the controlled prices, which generate black money. The scarcity of cooking gas, cement, kerosene, sugar, refined oil, etc. have always resulted in illegitimate transactions and black money.

6. The increase in prices of commodity like petrol, etc. in international market, increase in prices of commodities due to high increase in duties and taxes imposed by the government, the conspicuous consumption created by people with unaccountable money diverting resources from production to speculation all these cause inflation which in turn creates black money.

7. Elections in a democratic system and political funding are also one of the causes that contribute to black money. Each election in the country involves thousands of crore of rupees. For contesting Lok Sabha election, a candidate normally spends more than one million rupees and for contesting Vidhan Sabha election, one spends more than 5 lakhs. Politicians also need to draw on business resources to nurse their constituencies. Given the mind-blowing numbers, black money naturally is built into the system. For funding politicians, even honest corporate houses have no option but to find ways to generate unaccounted for money. Since the expenditure allowed by law for a candidate is limited and the companies are allowed to give up to 5 per cent of their half profits as donations to political parties for election, the elections are generally financed by the black money holder. These people expect political patronage and economic concessions which are obtained with the consent and the connivance of political elite in power in the form of artificial controls on commodities, laxity in the means of distribution, etc. All these methods create black money.

8. Estate transaction is an important source of generating black money. These days, purchasing a house or land is found to be very profitable. There is a growing tendency of transforming the rural

agricultural land to urban residential unapproved colonies on agricultural land is it legal. The transaction value shown by the colonizers in registration deeds is much less than the actual amount or the market value. This enables the seller of the land to evade capital gain tax. A/c to an estimated, illegal transaction of property alone generates about Rs. 20,000 crore of black money in a year, assuming that there are about 50 lakh transactions in urban property every year. The high rate of stamp duty ranging between 14.5 per cent and 28 per cent in different states is a major cause for under valuation of property and unreported deals, or both. The suggestion is that if duties are reduced to 2 per cent, it will prevent evasion. Another hurdle is the urban land ceiling act which reduces the supply of land and creates a black market? Roughly over Rs. 13,000 crore a year are generated through the real estate route.

9. Privatization has opened up a new area to the private sector as well as to ministers and bureaucrats for making black money. One good example is the Minister intervention on construction of road, departmental colleagues to give contracts to favored companies. While the case is still pending against the former minister in the court, the Income Tax Department alone is said to be thinking of realizing from him a fine of Rs. 20 crore for violating the income tax rules. The former Union steel Minister (under Rao administration, 1991-96) is another powerful person who had been accused of having made huge black money of Rs. 16 crore by clearing the privatization of a mine at a very low price to one concern in September 1995. A public outcry finally saw the deal getting shelved, though the minister managed to get away. The petroleum Ministry also was involved in a scam related to privatization. The ministry threw open select oil fields in 1992. In one deal, a particular concern was a contract for an oil field and the former Petroleum Minister is alleged to have received Rs. 7 crore for helping the group in getting the contract. The case is under the CBI investigation (India Today). It is expected that many scams will come to light for making black money through privatization.

Last but not the least, the unwillingness to bring agricultural income in the ambit of income tax has also contributed to generation of black money. Big industrial houses, over the past few decades have entered the agriculture sector in a big way by acquiring large farms, growing and producing nothing. The black money accrued from other sources is sought to be converted into white by showing it on the agricultural income account. Taxing agricultural income may help contain this phenomenon.

Besides the economic effects, there are many social consequences of black money also. In economic terms, black money robs the exchequer of its due share, increases economic inequality and hampers programs of economic development. Socially, it increases social inequality, creates frustrations among honest people, increases crimes like smuggling, bribery, etc. and adversely affects social service programs for the uplift of the poor and the weaker sections of society. It also distorts the measurement of true rates like growth rate, inflationary rate, unemployment rate and poverty, which in turn affects the government policies for containing these problems.

Over the past 50 years, the government has at various times announced several schemes offering opportunities to bring black money over board. Some of these schemes are : introducing the scheme of special Bearer Bonds, demonetizing high denomination currency notes, stringent raids, and scheme of voluntary disclosures.

In July 1991, the Union Finance Minister proposed a new scheme National Housing Bank scheme to woo black money back into the legitimate operations of the national economy. The scheme offered possessor of unaccounted for money an opportunity to deposit any amount of money with MHB without disclosing the sources of funds. The offer remained open for seven months. It permitted the account holders facility to withdraw 60 per cent of their deposit from the account while the remaining 40 per cent were impounded to be used for projects such as slum clearance and housing for poor. The withdrawals were to be made after stating the purpose for which the money was proposed to be used. These people were taxed at the rate of 40 per cent while the balance amount was channelled back into the open economy. Voluntary disclosure scheme of 1951, 1995 and 1975 yielded Rs. 249 crore of disclosed account. The disclosure scheme launched

in 1986 brought in just Rs. 67 crore. Some scholars have maintained that all these measures have touched only the tip of the iceberg. All the schemes have hardly fetched Rs. 5,000 crore over a period of five years. The main drawback in these schemes is that they touch the problem of black money already created but they do not go into the root cause of generation of black money and that is why a person is prepared to take the risk of keeping black money despite so many problems. Unless this problem is tackled, the menace of black money will continue to increase.

It has been suggested that the problem of black money and parallel economy can be contained by reducing taxes in some areas, giving incentives for voluntary disclosure of income overhauling the economic intelligence unit curbing administrative corruption at various levels, exempting tax on money spent on house construction doing away with control policies and so forth. Isolated attempts may not yield much but a package of mutually reinforcing incisures along with a strong political will and the commitment of political elite may prove to be successful to a large extent.

JUDICIAL ACTIVISM AND THE SUPREME COURT

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Judicial activism speaks about the judiciary's activist approach over the legislative and executive actions. Judicial activism is a popular phrase to describe the tendency of the courts to supervise administrative matters of the government. In a strictly legal sense, the courts are expected to merely settle disputes between parties (an adversary system of law). It is the result of inactiveness on the part of the executive and legislature. When both the organs of the government are not able to discharge their duties systematically, it is the duty of the court to uphold the Constitution and compel the other organs of the government to discharge their functions properly. The Supreme Court being the guardian of the Constitution can't remain as a silent spectator. It can direct the legislature and executive to discharge the functions assigned to them by the Constitution. No doubt, the doctrine of separation of powers says that each organ of the government should perform its own functions and should not interfere with the functioning of the other organs or should not usurp the function of the other organs but at the same time the judiciary in addition to its judicial functions, have been assigned the function to see that the Constitution is not violated by any person, body or authority including the legislature and the executive. In the 1980's and 90's the Supreme Court and the High Courts entertained many petitions which sought to improve the quality of life of the general public (popularly known as public interest litigation). In such cases, the courts directed the government to improve the quality of roads, the condition of our environment and on several occasions the Court has directed the executive or the legislature to discharge their duties or functions. In brief, this is judicial activism.

Though India follows the British legal system, it has adopted the US concept of judicial activism, which has charged the Supreme Court of India with an activist approach. It has emerged only due to the reluctance of the legislatures and the executive to take hard and unpleasant decisions. So, its activist role has encroached upon the jurisdiction of the executive and the legislature. John Marshall and Earl Warren, two great Chief Justices of the US, were monumental activists who wore radical robes much to the displeasure of some Presidents. Lord Atkin and Denning of the United Kingdom were the protagonists par excellence of judicial activism. Justices M. Patanjali Sastri and K. Subba Rao of India acted with daring and discipline to defend human rights and uphold hallowed values whenever these were invaded even to a small degree by the administration or violated by the legislatures. These great judges are avatars of judicial activism.

Articles 13, 32, 141 and 142 of the Constitution of the India are of considerable importance in judicial activism. Article 32 makes the Supreme Court as the protector and guarantor of the fundamental rights. The Supreme Court has been conferred wide power of judicial review. In the exercise of the judicial power it can examine the constitutionality of the executive or legislative acts. The High Court has also been conferred the power of judicial review. Article 227 confers on the High Court the power of superintendence over all courts and tribunals throughout territories in relation to which it exercises jurisdiction. Article 141 makes it clear that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The Article indicates that the power of the Supreme Court is to declare the law and to enact it, but in the course of its functions to interpret the law, it alters the law. Article 142(1) provides that the Supreme Court, in the exercise of its jurisdiction, may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. Article 142(2) provides that subject to the provision of any law made in this behalf by Parliament, the Supreme Court shall as respect the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents or the investigation or punishment of any contempt itself. Thus, by exercising the powers conferred by the Constitution, the Supreme Court has laid down various judgements to protect human rights of each and every member of the society, the outcome is, which is known as judicial activism.

Development of public interest litigation has also provided significant assistance in making the judicial activism meaningful. Now the Court entertains public interest litigation at the instance of any public spirited citizen or organization acting bonafide for the enforcement of fundamental rights of a person in custody or of a class or group of persons who by reason of poverty or disability or socially or economically disadvantaged position find it difficult to approach the Court for redress. The Court has given several important directions to the executive and legislature at the instance of the Public Interest litigation. During the last two decades, judicial activism has played a major role in protecting the rights and freedom of individuals, as guaranteed under the Constitution. After the landmark decision in the Maneka Gandhi case, the courts have assumed an activist posture and come forward to the rescue of aggrieved citizens. During this period, our judiciary developed the concept of social action litigation and public interest litigation by discarding the traditional and self-imposed limitations on its own jurisdiction. In 1975, Justice VR Krishna Iyer for the first time in the Bar Council of India case advocated the liberal interpretation of locus standi in public interest litigation.

Public interest litigation and judicial activism has touched almost every aspect of life. The hue and cry of judicial activism changed with the Supreme Court's landmark judgement in the S.P. Gupta case (1982). It was pronounced that any person can file public interest litigation for another affected person, who is poor, deprived or under privileged. Till then it was considered that only affected person could file a case. Hence P.N Bhagawati, J., and Krishna Iyer, J., initiated a stream of judicial activism. Be it the case of bonded labor, rehabilitation of freed labor, payment of minimum wages, protection of pavement dwellers, illegal detention, payment of minimum wages, juvenile offenders, child labor, the torture and maltreatment of woman in police lock-up, the implementation of various provisions of the Constitution, environmental problems, the courts took cognizance of each case and laid down various judgements to protect the basic human rights of each and every member of society.

While providing an expanded horizon to Article 21 of the Constitution of India the Supreme Court has done a great deal. It was in the Francis Carolie Vs Union Territory of Delhi where the Supreme Court agreed that Article 21 expresses not only the right to life but right to life means 'a right to live with human dignity'. A new dimension was given to Article 21 in the Maneka Gandhi's case where the Supreme Court held that the right to 'live' is not merely confined to physical existence but it includes within its ambit the right to live with human dignity. Following these cases the Supreme Court in Peoples Union for Democratic Rights vs. Union of India, AIR 1982 SC 1473 held that non-payment of minimum wages to the workers employed in various Asiad Projects in Delhi was a denial to them of their right to live with basic human dignity and violation of Article 21

of the Constitution. In *Olga Tellis vs Bombay Municipal Corporation*, AIR (1983)3 SCC 387 popularly known as the 'pavement dwellers case', a five judge bench of the Court has finally ruled that the word 'life' in Article 21 includes the right of livelihood also. Similarly 'the right to privacy' was read to life later by the Supreme Court in *Auto Shanker Case* in 1994. 'Right to shelter' has also been added in the scope of right to life. In the landmark judgement in *Mohini Jain Vs. State of Karnataka* (1992), popularly known as 'capitation fee case' the Supreme Court has held that the right to education is a fundamental right under Article 21 which cannot be denied to a citizen by charging higher fee known as the capitation fee. Thus, the Supreme Court in its activist avatar has widened the scope of Article 21 of the Constitution. In this context, the Ex-Chief Justice of India, K.G. Balakrishnan, in his address in Trinity College Dublin, Ireland on October 14, 2009 has said, "The expansion of the conception of 'personal liberty' under Article 21 of the Constitution which was traditionally invoked in the civil-political context to check governmental abuses. The judicially expanded understanding of the same now includes several socio-economic entitlements for citizens which place positive obligations on the state. The interesting fact is that the reading in of these socio-economic entitlements by judges has often directly referred to the language of provisions contained in the part dealing with directive principles. In this sense, judicial creativity has transformed the substantive character of the protection of life and liberty."

The public interest litigation cases have revealed the plight of the labor classes along with inactiveness on the part of the government in implementing the labor laws and provided opportunity to the Court to provide appropriate relief. The Supreme Court in *Bandhua Mukti Morcha* case has held that the State is bound to ensure the observance of the labor legislation enacted for serving the workmen, a life of human dignity and inaction on part of the State in implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21. In *Neerja Choudhury vs State of M.P.* AIR 1982 SC 1099, the Supreme Court has made it clear that the bonded labors should not only be identified and released but also rehabilitated after the release.

The Supreme Court has also delivered several judgements concerning child welfare. In *M.C Mehta vs State of Tamil Nadu*, AIR 1999 SC 41, the Court has held that the employment of children in match factories directly connected with the manufacturing process up to final production of match sticks should not at all be permitted. The Court held further that children can be employed in the process of packing but packing should be done in area away from the place of manufacture. It is necessary that special facilities like education, scope for recreation, medical facilities should be provided. The Court has observed that under the Factories Act there is a statutory requirement for providing facilities for recreation and medical attention. The State was directed to enforce these provisions. Again in *Sheela Barse vs Union of India*, AIR (1986)3 SCC 596, the Supreme Court directed the State to enforce the provisions of the Children's Act effectively. In another case of *M.C Mehta vs State of Tamil Nadu*, the Court has held that children below the age of 14 years cannot be employed in any hazardous industry or mines or other work. Thus the Supreme Court appears to be very active for child welfare.

The Supreme Court's role in sensitizing the Central Investigating authorities to discharge their legal obligations in the various scam cases has been praiseworthy. Its various judgements ranging from the need for Uniform Civil Code, pollution control, preservation of historical monuments, cleaning and keeping the big cities more hygienic, directing removal of encroachments, interim compensation to rape victims, protecting working women from sexual harassment have attracted praise. The Supreme Court has been very active in enforcing public duties. Many political corruption and crime instances have been brought to the Court through Public Interest litigations and compel the law enforcing agencies to perform their duties. The Court also expressed its displeasure over the magnitude of corruption in higher authorities particularly in the Housing Scandal, Fodder scam, Lakhubhai Pathak cheating case and St. Forgery case.

The Supreme Court has also passed orders for the enforcement of the professional duties on the medical practitioners. In *Parmanand Katara vs Union of India*, the Supreme Court has held that it is the duty of the members of the medical profession to provide medical aid to the injured.

person without waiting for the procedural formalities to be completed.

From the foregoing discussion, judicial activism has indeed proved to be boon to the victims of arbitrary, illegal and unconstitutional actions of state as well as of public servants. But judicial activism has also been subject to criticism. It has been discovered recently that the judiciary has emerged as a dominant wing in the body politic. Critics feel that it has upset the constitutional scheme of the division of powers, as designed by the Founding Fathers of the Constitution. The Indian Supreme Court according to the framers was not meant to be participant in policy making for the governance of the country. It was not intended that this institution would not intended that this institution would ever be in the centre of the national activity, or concerned with functions of government. Therefore, the activist role of judiciary in enacting legislation by issuing directions to regulate inter-country adoption or by laying down guidelines as to how sexual harassment in working places could be combated, are cited by opponents of judicial activism as examples of outright legislation as is enacted by legislature.

It is also possible for one to think that 'judicial activism' has become 'judicial tyranny' when he sees that the Court in its new activist role has transgressed its legitimate role assigned to it under the Constitution. If one looks at the Constituent Assembly debates it can be discerned that although the Assembly on one side wanted the Supreme Court to have wide jurisdiction in dealing with issues regarding fundamental rights, on the other side it was skeptical about giving to it much jurisdiction to deal with social and economic policies.

Jawaharlal Nehru, first Prime Minister of India, who was present at the inauguration of the Supreme Court of India on 28th January, 1950 had cautioned thus: "No Supreme Court and no judiciary can stand in judgement over the sovereign will of the Parliament representing the will of the entire community."

Alladi Krishnaswami Ayyar and T.T Krishnamachari had said that the provisions of the Constitution do not make the judiciary an imperium in imperio. Judicial activism in recent times has become a controversial subject and it has drawn many critics and opponents particularly from the side of the political executive and the legislative bodies. It cannot be said that, undeniably one can see the misuse and abuse of the process of law, invoking the power of judicial review of the constitutional Courts under the grab of PIL. The Supreme Court in *Janata Dal vs H.S Chowdhury*, AIR 1993 SC, 892 expressed its total displeasure and disgust in wasting the Court's time on account of trumped up proceedings initiated under the grab of PILs. Thus, judicial activism is criticized being sometimes turned into judicial tyranny and also the abuse of PILs. Moreover the critics have alleged that the Supreme Court has become the 'third chamber' of the Parliament.

Whatever it may be, the great contribution of judicial activism in India has been to provide a safety valve in a democracy and a hope that justice is not beyond reach. Judicial activism has come to stay in India and will prosper as long as the judiciary is respected and is not undermined by negative perceptions, which have overtaken the executive and the legislature. Whatever the Supreme Court has done is for the betterment of the society, for the good of the whole of the public and its contribution is beyond my reach to mention all in an article. When the legislators and administrators take the path of corruption, it is the prima facie duty of the Supreme Court to change itself to the activist mode and intervene in the matters. But the Supreme Court must put a check on the misuse of judicial activism. The phenomenon of judicial activism has resulted because of inaction or over action of the other two organs of the government, the legislature and the executive as Justice Bhagwati observed: "Today, we find that in third world countries, there is large number of groups which are being subjected to exploitation, injustice and even violence. In this climate of conflict and injustice, judges have to play a positive role and they cannot content themselves by invoking the doctrine of self-restraint and passive interpretation. The judges in India have fortunately a most potent judicial power in their hands, namely the power of judicial review.....The judiciary has to play a vital role and important role, not only in preventing the remedying abuse and misuse of power but also in eliminating exploitation and injustice."

JUVENILE DELINQUENCY : A SOCIAL HAVOC AND ITS PREVENTION UNDER LAW

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With the development of science and technology and rapid growth in urbanization and industrialization, the society has to face some serious problems. These are social problems becoming a threat to the civilized society. The growth in urbanization and industrialization has changed our social structure, causing some serious problems to our society. Juvenile delinquency is one of the serious social problems of the society, because it is related with the upcoming generation of the society.

In modern times law has taken various steps to prevent Juvenile delinquency. Juvenile delinquency is one of the serious problems of the society. It is an outcome of rapid urbanization and industrialization of modern times. Social conditions associated with these two processes have affected the family pattern; resulting in an atmosphere which is favorable for growth of juvenile delinquency. This has almost become a Universal problem in most of the countries including India. Basically the children moving from rural areas of cities are living in slums in cities are found to be highly vulnerable to this process.

Delinquency is a kind of abnormality. When an individual deviates from normal social life, his behavior is called 'Delinquency'. When a Juvenile, below an age specified under a statute, exhibits behavior which may prove to be dangerous to society and to himself may be called a 'Juvenile Delinquent'.

Juvenile Delinquents are those offenders including boys and girls who are normally under 16 years of age. They are mostly involved in anti social works such as stealing or even dangerous crimes.

There is no single cause of development of delinquent behavior. The causes of Juvenile delinquency may be classified under two major factors:

- a. Social factors and
- b. Personal or individual factors.
- a. Social Factors:

The various social factors of modern time are responsible for the growth of Juvenile delinquency. They are:

Broken Homes

British and American investigations reveal that nearly 50% of the delinquents are from broken homes. It can be said that broken homes, lack of parental affection, and security, absence of loving mother in childhood, parental irresponsibility and a steep rate in divorce, desertion and separation are all contributory factors to delinquency.

Poverty

A very large proportion of delinquents come from poor homes. It is generally accepted that the vast majority of delinquents come from lower class. They commit their crimes generally as members of gangs.

Poverty compels sometimes both of the parents to be outside the home for a very long period to earn their daily bread. These children are deprived of parental care and they may consciously or unconsciously join hands with gangsters and become delinquents. This mostly happens in slums.

Delinquent Areas

Some areas are highly vulnerable to delinquent trends. It is proved in various studies conducted by various agencies and social activists. The delinquents mostly come from surrounding slum areas containing cinema halls, hotels or liquor shops. It is true that the families living in heart of a town have greater chance to produce children with delinquent behavior. As the child grows older he goes to the neighborhood and becomes a member of playgroup. If by chance he joins the group or the gang that involves in delinquency.

b. Personal factors, such as mental deficiency and emotion problems of an individual may also contribute to juvenile delinquency.

It has been observed that a good number of delinquents are mentally deficient. Various research works have proved that there is large proportion of mentally defectives in juvenile delinquent groups among the normal children. It is also observed that there is a relationship between intelligence and delinquent behavior. In a study it is seen that the average I.Q. of delinquent groups is less than the normal children. The average intelligence is lower of the delinquent groups than the normal group of children.

Mental problems and emotional problems are strong factors in delinquency. Emotional problems such as inferiority, jealousy are very commonly found among the delinquent children. In a study it is found that almost 92% of delinquent children are suffering from emotional problems.

According to psychoanalytic view, the delinquent individuals are motivated by "pleasure principle". They want to get immediate pleasure and immediate satisfaction for their needs. So they become a victim of their own impulses. They are neither able to control their impulses nor able to escape from emotional conditions. So, it can be said that juvenile delinquency is a result of both social and personal factors.

The measures to prevent juvenile delinquency under legal provisions

The problem of juvenile delinquency has become a serious problem of the society and it draws the attention of the society. It is true that a delinquent child of today may turn out to be a criminal tomorrow.

To prevent the problem of juvenile delinquency and to take the children from the delinquent's activities to a normal life and rehabilitate them, there are some acts passed by the legislature and some means taken by the judiciary.

There are various legislative measures and acts to prevent and rehabilitate the delinquent children. The first step was taken to prevent this problem in India almost 100 years prior of the independence. An act was passed namely Apprentices Act of 1850. This was binding of children, both boys and girls, between the ages of 10 to 18 as apprentices. The act aimed at training about some trade, craft or employment for their livelihood.

Reformatory Schools Act of 1897 is considered as landmark in the history of treatment of delinquency. The act empowers the courts to send the youth offenders to Reformatory School for a period of three years; it could be extended to seven years also. The act also provides for establishment of Reformatory Schools by the Government and helps the delinquents in speedy recovery. The various states of India have enacted Children Acts around 1920. The Children Act enacted by Madras in 1920 is an important one. This act of 1920 provides same precisions to deal with delinquent children.

Under section 399 Criminal Procedure Code, convicted young offenders below the age of 15 could be sent to Reformatory Schools established by State Governments. Section 562 of Civil Procedure Code also permitted discharge of certain juvenile offenders. Under Section 82 of Indian Penal Code, children under 7 years of age can not be held liable for their criminal acts.

There are some other acts dealing juvenile delinquency. Notable among these are Juvenile Smoking Acts and Suppression of Immoral Traffic Acts. All these acts deal with juvenile and prevent them from involving in criminal acts. Besides these acts, there are some other institutions for

treatment and rehabilitate these juvenile delinquents. There is separate court in the judicial system to deal with juvenile delinquents.

Juvenile Courts

Juvenile Courts are established to treat the juvenile delinquents. It is a completely separate court system. No advocates are needed here for pleading. The main aim of this special court is to create positive feeling in the minds of the juvenile offenders.

Remand Houses

When a child is arrested as juvenile delinquent, after producing in the court, he or she is kept in Remands Homes till the final disposal of the case. Not only these but there are some other institutions also for rehabilitation and prevent the children to become a juvenile delinquent. Such types of institutions take care of the juvenile delinquents and try to create a good and positive mentality among them. These institutes include:

1. Auxiliary Homes
2. Foster Homes
3. Reformatory Schools
4. Borstal Institutions

These are established to reform the juvenile delinquents and prevent other to become a delinquent. One thing is very clear that the problems of juvenile delinquency is now become a serious problem in most of the countries of the world. It is also seen that the Legislatures and Judiciary has taken various steps to prevent this problem. But it is true that only law can't save this problem and can't prevent it. Because the root causes of this problem are the social causes. Due to these social causes some of the children become juvenile delinquents and commit crimes. Therefore, at first we have to solve these social problems to prevent this problem. We have to uplift the social status of the families of these children; their living conditions abolishing poverty and give them the means to earn at least their daily bread. Without solving these problems, law alone can't prevent the problems of juvenile delinquency.

JUDICIAL INTERPRETATION OF ARTICLE 21 OF THE CONSTITUTION OF INDIA

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"Right to life under Article 21 is an inalienable and inherent right of every human being."
Thomas Jefferson.

Right to life and personal liberty under Article 21 is the most cherished and pivotal fundamental human rights around which other rights of the individual resolve and, therefore the study assume great significance. The study of rights to life is indeed a study of the Supreme Court as a guardian of fundamental human rights. Article 21 is the celebrity provision of the Constitution of India and occupies a unique place as fundamental right. It guarantees right to life and personal liberty to citizens and aliens and is enforceable against the state. The new interpretation of Article 21 in Maneka Gandhi's case has ushered a new era of expansion of the Horizons of right to life and personal liberty. The wide dimension given to this right now covers various aspects which the Founding Fathers of the Constitution might not have visualized.

'Right to life' and 'personal liberty' is the modern name for what have been traditionally known as "Natural Rights". It is the primordial rights necessary for the development of human personality. It is the moral right which every human being everywhere at all times ought to have simply because of the fact that he is rational and moral. Right to life and personal liberty is one of the rights of the people of India preserved by the Constitution of India, 1950 and enforce by the High Courts and Supreme Court under Article 226 and 32 respectively.

Article 21 of the Constitution of India, 1950 provides that "No person shall be deprived of his life or personal liberty except according to procedure established by law". "Life" in Article 21 of the constitution is not merely the physical act of breathing. It does not connote mere animal existence. It has a much wider meaning which includes right to life with human dignity, right to livelihood, right to health, right to pollution free air to live human being. Right to life is fundamental to our very existence without which we cannot live as human being and includes all those aspects of life which go to make a man's life meaningful, complete and worth living.

Liberty of the persons is one of the oldest concepts to be protected by national courts. As long as 1215, the English Magna Carta provided that, "No freeman shall be taken or imprisoned.....but.....by the law of the land."

In India the concept of "Liberty" has received a far more expensive interpretation. The Supreme Court has rejected the view that liberty denotes merely freedom bodily restraint, and has held that it encompasses those rights and privileges which have long been recognized as essential to the orderly pursuit of happiness by free men. The meaning of the term "Personal Liberty" was considered by the Supreme Court in *Khafak Singh's* case, who arose out of the challenge to constitutional validity of the U.P. Police Regulations which provided for surveillance by way of domiciliary visit and secret picketing. It was held "Personal Liberty" was not only limited to bodily restraint or confinement to prisons only, but was used as a compendious term including within itself all the varieties of rights which go to make up the personal liberty of a man other than those dealt within Article 19 (1).

To understand broadly the composition Article 21 we should have the knowledge of the expression 'procedure established by law'. The expression "procedure established by law" has been subject matter of the interpretation is a number of cases. A survey of these cases reveals that courts in the process of judicial interpretation have enlarged the scope of the expression. The Supreme Court took the view that "procedure established by law" in Article 21 means procedure prescribed by law as enacted by the state and rejected to equate it with the American "due process of law". But in *Maneka Gandhi vs Constitution of India*, the Supreme Court observed that the procedure prescribing by law for depriving a person of his life and personal liberty must be "right, just and fair" and not "arbitrary, fanciful and oppressive", otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied. Thus, the "procedure established by law" has acquired the same significance in India as the "due process of law" in America. Justice V.R. Krishna Iyer, speaking in *Sunil Batra vs Delhi Administration* has said that though our constitution has no due process clause but after *Maneka Gandhi's* case the consequence is the same.

The Supreme Court of India in one of the landmark decision in the case of *Murli S. Deora Vs Union of India* observed that the fundamental right guaranteed under Article 21 of the Constitution of India provides that none shall be deprived of his life without due process of law. The court observed that smoking in public places is an indirect deprivation of life of non-smokers without any process of law. The court also directed prohibition of smoking in public places. It issued directions to the Union of India, State Governments and the Union Territories to take effective steps to ensure prohibition of smoking in public places such as auditoriums. In this manner the Supreme Court gave a liberal interpretation of Article 21 of the constitution and expanded its horizon to include the rights of non-smokers.

So, the Supreme Court has widen the scope of "procedure established by law" and held that merely a procedure has been established by law a person cannot be deprived of his life and liberty unless the procedure is just, fair and reasonable. It is thus now well established that the procedure

established by the law to deprive a person of his life and personal liberty must be just, fair and reasonable and that it must not be arbitrary, fanciful or oppressive. The procedure to become a valid one must comply with the principles of natural justice.

In a number of cases the Supreme Court has established the relation between the fundamental rights and the DPSP. In *Confederation and Ex-servicemen Association and others Vs Union of India*, the Apex Court observed that apart from fundamental rights guarantee by Part III of the constitution, it is the duty of the Government of India to implement DPSP under Part IV of the constitution. Again, in *Bandhua Mukti Morcha Vs Union of India*, Justice Bhagwati stated that it is the fundamental right of everyone in this country to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the DPSP. In 1993, relying on the DPSP, the Court ruled that the right to education until the age of 14 is a fundamental right and therefore falls under the protection of Article 21 in conjunction with Article 41. Article 41 states "The state shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education....." Thus, the court has interpreted the DPSP in conjunction with Article 21 and gave a wider meaning to Article 21.

The Supreme Court has also interpreted Article 21 in the manner so as to include within its ambit basic human rights recognized by various international human rights instruments. Justice A.S. Anand argues that any interpretation of a national law or constitution which advances the causes of human rights and seeks to fulfill the purposes of international instruments must be preferred to a sterile alternative. He further argues that it is a proper part of the judicial process and a well established judicial function for national courts to have regard to the international obligation undertaken by the country in question whether or not these have been incorporated into domestic law for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

In *Nilabati Behera Vs State of Orissa* while justifying its award of compensation for infringement of the right to life, the Court referred to the ICCPR, which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right.

In *Prem Shankar Shukla Vs Delhi administration* while dealing with the handcuffing of the prisoners and other humiliations inflicted on them in custody, the Supreme Court of India observed: "After all, even while discussing the relevant statutory provisions and constitutional requirements, courts and counsel must never forget the core principle found in Article 5 of the UDHR, 1948."

In *Hussainara Khatoon case*, the Supreme Court not only advanced the prison reform in favor of under-trials but also declared the right to speedy trial as an essential element of Article 21. Reaffirming as well as paving way for the implementation of Article 14, clause (3)(c) of the International Covenant on Civil and Political Rights which lays down that everyone is entitled "to be tried without delay" and Article 16 of the Draft Principles on Equality in the Administration of Justice which provides that everyone shall, be guaranteed the right to prompt and speedy hearing the court directed the release of all those under trials against whom the police had not filed charge sheets within the prescribed period of limitation. Such persons were directed to be released forthwith as any further detention of such under trials would be according to the court, a clear violation of Article 21.

Thus, the Court has interpreted Article 21 with the widest possible amplitude so as to include within its ambit basic human rights guarantee by international human rights instruments though that has not been incorporated in national legislation.

The most important feature of the Indian Constitution is Article 32. It is a fundamental rights guaranteed to citizens of India under Part III of the constitution. The provision of the Article states that-

1. The right to move the Supreme Court by appropriate proceeding for the enforcement of the rights conferred by this Part (Part III) is guaranteed.
2. The Supreme Court shall have the power to issue directions or orders or writs, including

writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by Part III.

In the Constituent Assembly Debates, Dr. Babasaheb Ambedkar once said, "If I am asked which is the most important provision of the Indian constitution, without which the constitution would not survive I would point to none other than Article 32 which is the soul of the Indian Constitution." In addition, the Constitution includes Article 226 which the courts have interpreted as giving any claimant the opportunity to file suit on behalf of the public in a High Court, when there is a violation of fundamental right or a right guaranteed by statute. Thus, Article 32 is the soul of the Indian Constitution. When there is infringement of Article 21 the aggrieved person can approach the Supreme Court of India for enforcement of his fundamental rights.

In the Delhi Pollution case the Supreme Court held in 1989 that Article 21 of the Constitution guaranteeing the right to life must be interpreted to include the "right to live in a healthy environment with minimum disturbance of ecological balance" and "without avoidable hazard to the people and to their cattle, house and agricultural land, and undue affection of air, water, and environment."

In Francis Coralie Mullin Vs Administrator, Union Territory of Delhi, the honorable Supreme Court stated that, "The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."

Thus, the Supreme Court interpreted Article 21 in a widest possible manner and included within its ambit the right to live with human dignity. The scope of article 21 of the Constitution has been considerably expanded by the Indian Supreme Court, which has interpreted the right to life to mean the right to live a civilized life.

DIVORCE : A CURSE

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BALLB 8th Semester

The Indian Republic is unique in character. We have Hindus, Jains, Buddhists, Muslims, Christians, Parsis and more people belonging to different cults and faiths. The unity in diversity therefore is the hallmark of our nation. Keeping in view the spirit of the Constitution of India, people belonging to different faiths are completely free to marry according to the traditions, customs, conventions and their faith in a particular cult or religion. The laws of divorce are also regulated and dealt with in accordance with the provisions made under the following statutes.

- a. The Hindu Marriage Act 1955
- b. The Divorce Act 1869
- c. The Dissolution of Muslim Marriage Act 1939
- d. The Parsi Marriage Act 1936
- e. The Special Marriage Act 1954
- f. The Foreign Marriage Act 1969

Strouds 'Judicial Dictionary' defines marriage in the following words: "I conceive that marriage may be defined as the voluntary union for life of one man and one woman, the exclusion of all others, the man and woman not being legally prohibited from marrying one another."

The Hindu law describes as a holy union for the performance of religious duties. Divorce is the

breakdown of marriage when the marriage between the spouses becomes an empty shell and there is no possibility whatsoever of any repair, we should take it that the parties have reached the stage of irreparable breakdown. And when there are all thorns in marital relations and not a single rose left, there is no other alternative than to leave the company of each other with maximum care and without bitterness, distress and humiliation.

Divorce by Mutual Consent

The Hindu Marriage Act came into existence in the year 1955. In the beginning, the law relating to divorce was not very liberal and there was no provision to seek divorce by mutual consent. Rather while seeking divorce, the parties were bound to mention that there was no collusion. The courts were also conservative while granting relief to the spouses appearing before them. But gradually taking into consideration the practical situation faced by aggrieved parties, the legislature in its wisdom brought suitable legislation to make the divorce provisions more meaningful, liberal and practicable.

Who can go to the court ?

All the Hindu spouses who have been married under the provisions of the Hindu Marriage Act 1955 are entitled to the advantage of the amendment brought in the Act in the year 1976. Therefore as per sec 13B of the Marriage laws (Amendment) Act 1976, a petition for divorce can be made in the court of District Judge to seek relief by way of mutual consent.

How to move a petition

Under sec 13B of the Act, the procedure for applying for dissolution of marriage by mutual consent is quite easy, simple and less cumbersome. The first and foremost requisite to be entitled to move the petition under the said provision is that both the parties must come to the court with clean hands. The mutual consent to sever marital bond should be transparently voluntary and without any pressure, coercion or fraud whatsoever.

Like any other petition for Divorce, it is filed in the same court, can pronounce its decision on the spot and the parties are saved botheration of visiting the lawyers and the courts for years spending time, money and energy. This is indeed a welcome legislation and has been widely applauded.

Grounds for Divorce and limitation

Under sec 13B the husband and wife are required to file a joint petition on the ground that they have been living separately for a period of one year or more. They have not been too able to live together due to unavoidable circumstances, and that they have voluntarily and mutually agreed to dissolve their marriage by a decree of divorce.

Judicial separation: Who can apply ?

Sec 10 of Hindu Marriage Act 1955 is a provision which entitles any of the spouses to seek a decree of judicial separation, in case the parties do not wish to break the nuptial ties.

Grounds for seeking relief

There are variety of reasons or grounds on account of which either the husband or the wife may seek judicial separation and not divorce at the first instance. By seeking a decree of judicial separation the nuptial tie between the parties remain intact. The only restraint under these circumstances is that the parties are not bound to cohabit. Under sec 10 of the Act, a decree of judicial separation granted by the competent court doesn't therefore dissolve the marital bond if only suspends marital rights and obligation during the period of subsistence of the decree of judicial separation. It will therefore be noticed that the judicial separation which provided under sec 10 of the Act is as a matter of fact, a milder relief than divorce and judicial separation are by and large common but the requirements in case of judicial separation is comparatively milder.

Restitution of conjugal rights: Who can apply ?

There is a very popular proverb that one can take the horse to a water tank, but you cannot force him to drink water. The provision restitution of conjugal right in the Hindu Marriage Act seems to be similar one. After solemnization of marriage under the Act if one of the spouses abandons the other without reasonable excuse, the aggrieved party has a legal right under sec 9 of the Hindu Marriage Act 1955 to file a petition in the matrimonial court for restitution of conjugal rights.

Relief

If after hearing the petition of aggrieved party, the court concludes that the grounds in the petition are genuine and have been proved satisfactory, it can pass a decree of restitution of conjugal right.

Execution of the decree

The execution of the decree of restitution of conjugal right is very difficult. The court though is competent to pass a decree of restitution of conjugal right, but powerless to have its specific performance by any law. Of course the non compliance of said decree amounts to constructive desertion on the part of the erring party. As per the provision of present Act, the aggrieved party can move petition for a decree of divorce after one year from the date of the passing of the decree and the competent court can pass a decree of divorce in favor of the aggrieved party. But under no circumstances the court can force the erring party to consummate marriage the aggrieved wife can have from this provision is that she claim maintenance from the husband.

Divorce under Hindu Law

Oxford English Dictionary defines "Divorce" as 'legal dissolution of marriage. To Hindus marriage are made in heaven, so there is no question of breaking them on earth. Separation, which originally was close to blasphemy is no longer so. Slowly and steadily the concept gave with the social reformers increasingly agitating for the emancipation of woman saying that a woman must not be chained with a man devoid of all virtues of a reasonable husband.

Following are the grounds for divorce under which either of the parties are entitled to seek a decree of divorce under sec 13 of the Hindu Marriage Act 1955:

- a. Adultery
- b. Cruelty
- c. Desertion
- d. Conversion or change of religion
- e. Insanity
- f. Leprosy
- g. Venereal disease
- h. Renunciation of world
- i. Presumption of death
- j. Non presumption of cohabitation after passing of a decree for restitution of conjugal right

Jurisdiction and procedure under Hindu Marriage Act

If both the spouses are entitled under the Hindu Marriage Act, to file a petition in the Family Court for any of the relief under the Act not only Hindu Marriage Act but other matrimonial statutes also prescribe some procedural and jurisdictional rules and guidelines for moving petition under the relevant laws.

Under Hindu Marriage Act Under sec 19 every petition under this Act shall be presented to the District Court within the local limits of whose ordinary civil jurisdiction:

- a. The marriage was solemnized

- b. The respondent, at the time of presentation of the petition
- c. The parties of marriage reside together.

Sec 20 (1) of the Act requires the petitioner to state the facts on the basis of which the claim of the relief is prayed for,, the petitioner should also state in the petition that there is no collusion between the parties . All the averments made in the petition have to be verified on solemn affirmation as required under the provision of the Act.

Sec 22 of the Act requires that all proceedings in the court be held in camera and may not be printed or published.

All the orders and decrees passed by the matrimonial courts under the Hindu Marriage Act are appealable as per the provisions contained in sec 28 of the Act.

Divorce under the Divorce Act 1869

The Divorce Act 1869 applied in the cases when at least one of the parties must be Christian and secondly the parties to the marriage must be domiciled in India at the time the petition is presented. A petition for the dissolution of marriage may be presented to the District Court. The proceedings under the Divorce Act are to be regulated by the code of civil procedure.

Grounds for Divorce

Sec 10 of the Act enumerates the grounds for obtaining a divorce under the Act. However it is only when a valid marriage subsists that the remedy under sec 10 can be availed.

When husband may file petition for dissolution

Any husband may present a petition to the District court or to the High Court praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof been guilty of adultery.

When wife may file petition for dissolution

Any wife may present a petition to the District Court or to the High Court praying that her marriage may be dissolved on the ground that, since the solemnization thereof her husband has exchanged his profession of Christianity for the profession of some other religion and gone through a form of marriage with another women.

Power to court to perform decree for dissolving marriage

In case the court is satisfied on the evidence that the case of the petitioner has been proved and does not find that the petitioner has been in any manner accessory to or conniving at, the going through of the said form of marriage, or the adultery complained, or that the petitioner is presented or prosecuted in collusion with either of the respondents, the court shall pronounce a decree declaring such marriage to be dissolved.

Divorce under the Parsi Marriage and Divorce Act 1936

The Parsis in India are governed by the Parsi Marriage and Divorce (amendment) Act 1988, in respect of their matrimonial matters. There are some grounds under which the Parsi spouses are seeking the dissolution of marriage :

- a. Continuous absence for seven years
- b. Non consummation of marriage
- c. Unsoundness of mind
- d. Pregnancy by a person other than plaintiff
- e. Adultery, fornication, bigamy, rape or unnatural offence
- f. Cruelty
- g. Grievous hurt, venereal disease compelling to prostitution
- h. Desertion
- i. Non resumption of cohabitation after passing of maintenance order

- j. Conversion Parsi to another religion
- k. Non resumption of cohabitation
- l. Divorce by mutual consent.

All suits instituted in the Divorce under Parsi Marriage Act shall be brought in the court within the limits of whose jurisdiction the defendant resides at the time of the institution of the suit or where the marriage was solemnized.

Divorce under Muslim Law

Muslim marriages are to a large extent governed by conventional norms rather than legislative provisions. That is why a Muslim husband, if not a minor or of unsound mind can divorce his wife at any time without assigning any reason. This kind of unilateral dissolution of marriage is called Talaq and can be oral as well as in writing. Divorce may also be affected by mutual consent of the parties to a marriage, which is known as Khula or divestiture and Mubara.

A Muslim husband right to repudiate the marriage at his will is absolute and unlimited under Muslim law. It confers a special right on the husband not only to divorce the wife orally in the manner provided under the Muslim law.

a. Irak Takaj: In oral it is called Talaq. When a Muslim husband divorces his wife by pronouncing Talaq thrice, it would be a valid mode of divorcing a wife and it would effectively dissolve the marriage.

b. Talaq in writing: A talaqnama executed in writing, in the presence of witness and in the customary form, takes effect immediately even if not brought to the wife's knowledge at the time of its execution.

c. Khula or Divestiture: A khula divorce is one where wife gives or agrees to give a consideration to the husband for her release from the wedlock.

d. Mubara'at: A Mubara'at divorce is also dissolution of marriage by agreement like Khula.

On the other hand, under some condition a Muslim wife can seek divorce.

- a. If the husband not heard of for 4 years.
- b. If the husband is failed to maintain the wife.
- c. If the husband is sentenced to imprisonment of seven years.
- d. If the husband is failed to marital obligations.
- e. If the husband was impotent at the time of marriage and continues.
- f. Insanity of husband a period of two years or his sufferance from leprosy or a virulent venereal disease is one of the grounds to seek divorce.
- g. If the Muslim girls' marriage contracted by her parents could not repudiate her marriage on attaining puberty.
- h. A Muslim wife is entitled to divorce if she is a victim of cruelty.

Divorce under Special Marriage Act 1954

The Special Marriage Act 1954 applies to all citizens irrespective of caste, creed or religion. The marriage conceived under the Act is monogamous and the dissolution is judicial. This Act is applicable breakdown of marriage both the spouses. There are some grounds which are available under this Act as follows:

- a. Adultery
- b. Desertion
- c. Sentence of imprisonment for 7 years
- d. Cruelty
- e. Insanity
- f. Venereal disease

- g. Leprosy
- h. Presumptions of death
- i. Rape, sodomy, bestiality
- j. Non resumption of cohabitation after passing a decree for maintenance
- k. Non resumption of cohabitation after passing a decree for judicial separation or restitution of conjugal rights.
- l. Divorce by mutual consent

Sec 29 of the said act mention that no petition for divorce can be presented before the expiry of one year from the date of entering the certificate of marriage in the Marriage Certificate book. A petition for divorce shall be presented to the District Court within the local limits of whose original civil jurisdiction.

Divorce under the Foreign Marriage Act 1969

This Act deals with the marriage between the parties at least one of whom is a citizen of India and such a marriage is solemnized in a foreign country but registered under the provisions of Foreign Marriage Act 1969.

All the grounds for seeking divorce as provided in the Special Marriage Act 1954 have been recognized as ground for divorce under Foreign Marriage Act 1969. Every petition for dissolution of marriage has to be presented in a District Court.

Alimony

Once the shattering ordeal of divorce passes by and the emotional dust settles down, the case resolves into one paramount question how to live on as divorce is just the end of relationship not the end of life, life passes into another gear and one has only oneself to look up to end of the day. True the Indian women have arrived and are financially independent but there is still an overwhelming majority that knows nothing about independence of any kind financial or emotional. Time can take care of the emotional part but one need food to live, which is not possible without financial independence which means that after divorce an uneducated, devoted housewife translated into a helpless, hopeless, jobless divorcee. Not that this kind of helplessness is the exclusive domain of woman, even man; though few may find themselves in more or less the same unenviable position. The law of maintenance is to provide relief to such individuals and to keep them from starving to death. Different personal laws dealt with the issue differently and though the talk of uniform civil court keeps changing every now and then, the legislature seems to be of the opinion that since religious practices passes into the way of life, it is proper to let even the secular social issues like maintenance succession, to be governed by the personal laws of the religious communities instead of having common code for them.

Hindu Law

Sec 25 of the Hindu Marriage Act 1955 takes care of the maintenance to the spouses after divorce. It is noticeable that the Act does not make a distinction between husband and wife regarding post divorce maintenance and makes it apply clear that if one of the spouses is not capable of maintaining himself or herself; the capable spouses is to maintain the other.

Muslim Law

The position that husband's liability to pay maintenance to his wife is limited to the period of Iddat after which the wife has no right to be maintained by the husband and must look up to her other relation to maintain her has been changed.

Christian Law

Under the Divorce Act 1869 which is Christian matrimonial law in India takes care of the post divorce maintenance of the wife. Again the husband's has no right to demand maintenance from

the wife under this Act.

Parsi Law

The Parsi law the maintenance is dealt with under sec 40. The claim of maintenance is available to both the husband and wife like maintenance of wives, children and parents.

Custody of Children

The law regarding the custody of child is same under the law irrespective of the caste or community he is born in. The foremost law is that the welfare of the child is supreme and cannot be compromised on any account. The underlying jurisprudence is that no individual is born with a religion but into a religion which to put it differently means one is born among the people subscribing to one religious faith or the other and is in no position to adopt a religion of his own accord. Therefore, it would not be reasonable to allow any particular personal law to govern the custody of a child when the child itself is not capable of choosing his or her religion. Thus the welfare of the child is of paramount importance in the eyes of law. Sec 26 of the Hindu Marriage Act thus gives the appropriate power to the court, to issue directions or pass orders, during the pendency of the proceeding or at any time thereafter for the custody, maintenance and education of minor children of the couple who are partners to the proceedings. The wishes of the children wherever it is possible to do so are to be kept in mind by the courts, while passing orders in this connection. The power to make such orders includes the power to revoke, suspend or vary them and includes both interim and final orders.

The orders passed by the competent court in regard to the custody of the children, pending disposal of the case are not final. These are interim orders and are subject to change depending upon the circumstances of each case. The court has very wide powers to change vary or alter its earlier order in case the need arises. The normal procedure adopted by the courts is very simple. The mother invariably gets the custody of the child, if the child is below the age of five years.

LIABILITY OF A COMPANY FOR ITS ISMANAGEMENT

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The Companies Act of 1956 is a relevant enactment of the Indian Parliament which deals with the various affairs of the companies operating in India. It checks the affairs of different kinds of companies like, Incorporated Companies and the Unincorporated Companies. There are further various divisions of these companies. They include the public, private, holding, subsidiary, foreign, defunct, limited and unlimited companies. The Act broadly discusses the rights and liabilities, legal status and also the privileges of the various companies. It aptly differentiates the rights and liabilities of one sort of company with that of another. The business that a company may carry out is also well defined under the provisions of the Act. The Company Law Board (CLB) established under the Act by the amendment of 1988 is the authority which adjudicates on every matter of the companies which leads to the violation of the provisions of the Act. The Act also allocates the powers and functions of different authorities established under the provision of this enactment. The amendments of the Act in 2002 and 2006 have brought about various changes in it and have also widened its application and jurisdiction.

The term 'Company' in common parlance is a larger business organization established by a large group of members with the purpose of carrying out a large-scale business to make huge profits through huge investments. The term has not been however defined in the enactment. It merely states that, a company means 'a company formed and registered under the Companies Act,

1956. Thus, any company so formed and registered under the Companies Act of 1956 are for all legal purpose a legal person. A company always has a legal entity separate from its members. It is therefore, a separate form and like any other legal person is socially, politically and economically responsible to the society. It is also therefore undoubtedly, responsible for its conducts and for any of its affairs which is prejudice to the interest of the public or its members. A company right from the date of its incorporation is responsible towards other persons or public who directly or indirectly deals with it. A company has three important documents which basically determine the responsibility of a company towards the general public and its own shareholders. The documents are namely, the Memorandum of Association, Articles of Association and Prospectus. These documents are prepared by a company, keeping in mind, its duties towards the public and therefore, none of the features or provisions incorporated in such documents should be against public policy and public good. The documents of a company must not try to defeat the interest of any person dealing with it. Moreover, decisions of a company must not be adversely affecting the rights of any public person or that of any shareholder of the company. As all decisions of a company are taken through the passing of resolutions, which are the result of majority voting, given by majority shareholders, there are chances of the majority shareholders making decisions at times which may be detrimental to the interest of the public or to the interest of the minority shareholders. In case of resolutions, minority and majority shareholders denotes the shareholders constituting the number of minority or majority voters. The Companies Act of 1956 therefore provides provisions for preventing any oppression by the majority shareholder or for preventing mismanagement of the company by its managerial persons. The managerial persons may include the Board of Directors, the other managers, secretaries, majority voters of a resolution and others. The three documents as aforesaid must be very carefully compiled in order to meet all the necessary requirements. The requirements of each of such documents are as discussed below:

1. The Memorandum of Association

The Memorandum of Association is the first and the most important document of company. It is on the basis of this document that a company seeks permission for its incorporation from the Registrar. The Memorandum contains the following clauses:

- a. Name Clause
- b. Registered Office Clause
- c. Object Clause
- d. Liability Clause
- e. Capital Clause
- f. Declaration by the Subscriber

The Name Clause contains the proposed name of the company. The name so given by the promoters is subject to the scrutiny of the Central Government. A specific name is important to be given for the recognition of the company as well as for vesting liability on the company. A company is always liable in its corporate name.

The Registered Office Clause contains the details and the address of the registered office of the company. All communication of the company shall be made in the address of such office of the company. A company cannot shift its registered office from one place to another according to its own wish. It needs the special resolution of the shareholders and in certain cases, the permission of the Regional Director of Company and the Company Law Board.

The Object Clause is an important clause containing the main objects, other objects and the objects extending to other states of the company. The object of the company must not be in any way illegal in the eye of law and must not violate any provision of the Act of 1956. Any provision made in contravention of the requirements shall be declared to be ultra vires by the Court.

The Capital Clause requires enumerating the total capital of the company. The total share capital of a company should fulfill the required criteria based on the nature of the company i.e. public company or a private company.

Lastly, a declaration must be signed by the subscribers, promising to abide by the rules laid down under the various provisions of the Act. The terms of such declaration becomes binding as soon as it is incorporated.

A Memorandum of Association is therefore very important. It vests a kind of responsibility on the company to abide by law and also to limit their activities at the larger interest of the public. Any act of the company therefore, in contravention to the Memorandum of Association shall be void.

2. Articles of association

The Article of Association is the second written document of the company. It lays down the rules of internal regulation of the company. This document is a must for: Unlimited Companies, Companies Limited by Guarantee and Private Companies limited by share. The Articles of Association must not conflict the Memorandum of Association. The Article must lucidly mention the modes of internal regulations and must not try to defeat the interest of its members without justification.

3. Prospectus

A Prospectus is a written document which contains the nature and other details of the shares that are intended to be issued by a company. A Prospectus is issued by a company in order to invite the public for investing money in the business of the company. A Prospectus should be lucid and the reader must not have any confusion regarding the shares to be issued thereby. It is also to be properly dated and duly registered. The Prospectus is also required to disclose some general information about the company like, total share capital of the company, terms and conditions of the presently issued shares, particulars of the issue, company's management and current projects, particulars with regards to the company and other listed companies under the same management which has made any capital issue during the last three years, information about pending litigations of the company (if any), management perception of risk factors, etc. the matters so disclosed by the company should be true and no other relevant information should be left undisclosed. For any misrepresentation or fraudulent misstatement the company may be held liable either in a civil suit or in a criminal proceeding. The fear of heavy penalty and of criminal sanctions has controlled the directors' tendency of "using extravagant terms and flattering descriptions". The following remedies are available misrepresentation in a Prospectus:

i. **Damages for deceit:** Deceit is a tort. It means fraud. Anyone who has been induced to invest money in a company by a fraudulent statement in a prospectus can sue the persons responsible for issuing it. If his action is successful, he recovers full compensation for the loss directly sustained by him as a result of such fraud. But the burden of proof lies on the aggrieved. When any claim under the tort of deceit is proved or established, the amount of damages would not be reduced on the grounds of contributory negligence, if any, on the part of the claimant. The following points are to be proved by the claimant in a suit for deceit:- false representation made knowingly or without belief in its truth or recklessly or carelessly whether it be true or false; secondly, the false representation must relate to some existing facts which are material to the contract of purchasing shares; thirdly, the plaintiff must have taken the shares directly from the company by allotment; and the company may also be sued for damages provided the fraud was committed by the directors within their official capacity.

ii. **Compensation under Section 62 of the Act:** Under this section, certain persons associated with the making and issuing of prospectus are liable to compensate the investor for any loss sustained by him by reason of any untrue statement contained in it. A statement is deemed to be untrue if it is false in the form and context in which it is included. The chief advantage of the proceeding under section is that the plaintiff does not have to prove the fraud. If the representation is false, the directors cannot escape liability even they have made it bonafide and not with any intent to defeat the interest of the investor.

iii. **Rescission for misrepresentation:** An allotment of shares can be avoided at the option of the allottee if it was caused by misrepresentation whether innocent or fraudulent. By avoiding the

contract he is able to get rid of his shares and claim the money he paid for them. Further, under Section 75 of the Indian Contract Act, a person who lawfully rescinds a contract is entitled to compensation for the damage which he has sustained because of the non-fulfillment of the contract. The action is against the company to have the subscribers name removed from the register of shareholders.

iv. Liability under Section 56: Section 56(1) states that a company's prospectus must contain certain particulars and sub-section (3) of the said section imposes penalty for its contravention.

Section 63 of the Companies Act also imposes criminal liability for misrepresentation. Where a prospectus includes any untrue statement, every person who authorized the issue of the prospectus shall be punishable with imprisonment for a term which may extend to two years or with fine up to fifty thousand rupees or with both. Under Section 68 imprisonment may extend to 5 years or with fine up to 1 lakh rupees.

Prevention of mismanagement: Section 398

When a company is mismanaged by its authority, the affected persons may approach the Company Law Board for immediate action. The Section 398 provides for relief in cases of mismanagement. According to this section, mismanagement may arise in many ways. Among them the two important criteria for determining mismanagement are that:

- The affairs of the company are being conducted in a manner prejudicial to the interest of the company or public interest; or
- By reason of any material change or change in the control of the company, it is likely that the affairs of the company will be conducted in a manner prejudicial to the interest of the company or the public. Here, 'material change' refers to changes in the Board of Directors, officers of the company, shares held by the shareholders of the company or changes in any other manner.

The remedy provided by the Company Law Board in this regard is generally preventive rather than being punitive. Relief given under this section has certain characteristics:

- a. Relief is always given to the company and not to the members personally who had made an application for prevention of mismanagement;
- b. Relief is given only when there is continuing mismanagement;
- c. Relief under this section does not lead to the winding up of the company; and
- d. While deciding the matter under this section would take into account of the interest of any outsider whose interest has been affected due to the mismanagement.

Powers have been given to the Company Law Board under Section 402 for the prevention of oppression and mismanagement. They may provide for regulation of the conduct of the company's affairs in the future; the purchase of shares or interest of any member by other members or by the company; in case of the purchase by the company of its shares consequent reduction of its share-capital; termination, setting-aside or modification of any agreement between the company and the Managing Director or any other director and the manager; termination, setting-aside or modification of any agreement with any person, provided notice has been given to him and his consent obtained; setting-aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within 3 months of the application which would amount to a fraudulent preference in case of an individual's insolvency; any other matter which in the opinion of the Company Law Board is just and equitable.

Under Section 408 the Central Government also has the power of giving remedy in case of mismanagement. It can appoint persons at the order of the Company Law Board to the Board of Directors or as an administrator to look after the affairs of the company. It can also appoint the further appoint member from among the minority shareholders as one of the Directors of the company.

Thus, from the elaborate analysis of the entire segments of liabilities imposed on the company as well as on the members lucidly highlights the social, economic and legal responsibilities of a company as a legal person. A company is an artificial person but it is noteworthy in this regard that neither the company nor the members in disguise of the corporate name can escape their liabilities. The enactment of 1956 has been therefore very strict in these regard.

FEW REALITIES OF BRITISH RULE IN INDIA

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History is a study of the past. We read about the past in order to understand the present. Rabindranath Tagore once asked: whose history is India's history? He gave the answer himself. It is the myriad people of different races, religions and languages that have moved into India over centuries and millennia and contributed to India's rich cultural mosaic that are the components of her history. And the British rule in India is a chronicling of facts jacketing the Indian modern history. Again regarding those Rabindra Nath Tagore said "The traders scale turned over night into the ruler's scripture."

It will be educative to see the way the British themselves spread of their empire in India under their law: On Dec. 31, 1600 a charter of in the name of Queen Elizabeth was granted to 218 persons under the name of the Governor and Company of Merchants of London trading into the East India's; to trade into and form the East Indies, part of Asia, Africa, and America but excluding territories under possession of any christen prince or that were friendly to England. Since 1612, when the British built first factory at Surat, the East India Company was merely a tenant of the Mughal rulers of India. They built their first fort at Madras in 1641. In 1683 charter II granted than a flesh charter empowering than to raise arm, train, military forces for defence. In 1757 the company grabbed the police power of the Nawab of Bengal but had to retain under the Institution of the Nawab even after 1765 when the company acquired the Diwani (revenue collecting power) in Bengal from Shah Alam. In 1772 disposed of the Bengal Nawab and thus, became the virtual Nawab of Bengal and a stopped payment of revenue to Shah Alam. In 1773, after the passing of regulating act by British Parliament, it guaranteed the Governor General-in-Council the power of ordering, managing and government of all territorial acquisition and revenues from the Kingdom of Bengal, Bihar and Orissa. The Regulating act did not assert sovereignty over any of the Indian territorial acquisitions to company. In 1784, for the first time through Pitt's India Act, they spoke of the British territorial possessions in India. This was the reality about the British takeover of Indian Territory through aggression and occupation. Obviously the government there meant only the British companies government. Neither only Indian ruler nor only other European power having colonies in India could be expected to obey the directors of the British company. In June 1873 the Board of Control of the company finally decided to formally assert the undoubted sovereignty in and over the companies Eastern possessions. During the 1833 renewals, the company was total to close its business activities altogether. Later, the British seem to have taken lessons from the 1858 desaster for their mismanagement. The Government of India act, 1858, transferred to Her-Majesty, Queen Victoria of England, all the territories under the possession or under the government of the company along with all rights. The Proclamation of Queen Victoria following that act promised that British government would abstain from territorial annexation though annexation of territory did not actually stopped, and proved to be assigning the crown's role of the guardian's power, what came to be known as paramountcy over the Indian states. Thus the act was called "an act for the Better Government of India and for ending the dual government of

India. The Indian Councils Act, 1861, added a fifth member to the Governor General Executive Council. The Governor General could also divide or alter the limits of any presidency, province or territory. In 1860 IPC was passed to administer over the territory. The Foreign Jurisdiction and Extradition Act 1872, was passed to enable the enforcement of the Code of Criminal Procedure beyond the limit of British India. The Government of India Act, 1935 defined India as British India together with all territories of only Indian rather under to the sovereignty of his Majesty. It also includes the tribal areas and any other territories which his majesty in council may time to time declare to be part of India. It will be seen that in the matter of the British colonial relationship with the native princes three terms were under at three different stages. In 1935 the British were trying to put the princely states in to federal dominion and finally in 1947, the British were leaving India and wanted to wash their hands of the princely states.

Although majority of the British historians were wrote in support of India as administered by British colonialism. There was critical view too In a brilliant article entitled "the future result of British rule in India" Karl Marx in 1853 summed up the way that power passed to the British in India that "The paramount power of the great Mogul was broken by the Mogul viceroys. The power of the Maharajas was broken by the Afghans and while all were struggling against all the Britton rushed in and was enabled to subdue them all". About 06 weeks earlier, another piece entitled "The British rule in India" Marx had written, "England has been broken down the entire framework of Indian society without any symptom of reconstruction yet appearing". In the same vain Jawaharlal Nehru wrote in 1944, "The establishment of British rule in India was an entirely novel phenomenon for her. Not comparable with any other invasion or political or economic change". India had been conquered before but by investors who settled within her frontiers and made themselves a part of her life. She had never lost her independence never been enslaved that is to say, She had never been drown into a political and economic system whose centre of gravity lay outside her soil. Never been subjected to a ruling class which was and which remained permanently alien in origin and character.

A classification is necessary at this point: From Alexander of Macedon to Nadir Shah of Persia a number of invasions had been made on the Indian frontiers. Alexander tried to impose a Governor and some of his successors also tried to set up satellite regimes in north western India. But most of these invaders were tempted by the wealth of Hinduism; their invasions were transient t. But a critical question will remain worth debating of only for academic purpose when was the Indian nation born? Our theoretical reference in answering the question is for the challenge and response model. As can be stated operationally, Indian nationalism is an off short of the freedom struggle that is, anti colonial struggle itself gave birth to a realization among its leaders that India was a nation-in-the making. So, the British were the first to give currency to the concept of territoriality of political power in India. British took the portion of Indian subcontinent under their rule through territorial annexations. Capitulation and sufferance were considered as lawful means of acquisition of territory in the colonial frame work. Such acquisition through direct or indirect force is called in the legal vocabulary, acts of state and regarded as ipso facto valid. The proclamation of Queen Victoria, following the act of 1935 promised that the British government would be assigning the crown the role of the guardian power. They made relationship with native princely states and tribal areas. The tribal area here does not mean just any area inhabited by tribal people. A tribal area was actually a trans-border area under what the British called foreign jurisdiction. Such area includes the area along the frontiers of India or in Baluchistan which are not part of British India or Burma or of any Indian state or of any foreign state. The tribal areas were placed under the executive authority of the Governor General of British India even though there were outside British India. The tribal chiefs and sub chiefs area granted samadas and pensions. Ownership of land was taken over by the government and granted to the tribal directly and free of rent. On the other hand, markets were established at the fort hills to enable the tribal to exchange their forest produces like wax honey and hides for cereals like wheat and barley and salt. The initial strategy of the British was pacification of the Tribal and imposition of a national control on them. British established the schedule districts in certain special areas. The purpose of the establishment of scheduled Districts

was to enable the Executive to selectively apply the loss of British India and to allow the local customs and traditions to be protected. According to the British they united a considerable portion of the sub-continent under one political authority which they held for nine decades. One third of the sub-continent remained under their indirect control. That is to say, if we ignore the French and Portuguese territories for their very small sizes. But today's India does not include the whole of India under the Government of India Act, 1935 or even British India. The Government of India Act, 1935 defined India as "British India together with all territories of any Indian ruler under the sovereignty of his Majesty, all territories under the sovereignty of such an Indian Ruler, the tribal areas and any the territories which Majesty in council may from time to time declare to be part of India". It is to be noted that today's India does not corresponds to any political region of the part. India of today comprises about 2/3 of British India plus 565 of the 566 former tribal areas plus the territories transferred from the former French and Portuguese colonies plus Sikkim.

The British colonialism was prevalent in India for nearly two hundred years either openly or under guise. Such a sustained and elaborate political system had deep and under spread roots in the culture and society of the people. Even many Indians were among the beneficiaries of the rule. They admired British rule in India. According to liberal version, India under British rule grew into a stage at which she could advance claims to the right to self government, understood the India aspiration and cautiously, moved towards their fulfillment. The conservative historians of the imperialist school are yet convinced that the British rule was the best that India could ever have that imperialism was not at all exploitative, that the British empire was in fact a system of competition and collaboration, that the Indian nation was a myth that India's freedom struggle was a mimic was in fact, efforts to conserve or improve the position of privileged groups of Indians.

We all know that Indian civilization is one of the oldest civilizations in the world, still whole Indian society especially among the Hindus, at that time, were under the grab of different social evils that were sucking the strength of Indian society. The people at that time were dominated by faiths and believe that were made by some up-ward-class individuals for their selfish benefit. The peoples were mostly illiterate. The peoples were dominated by religious ideologies only. There were nothing like scientific or innovative ideas. The major Indian approach to the historiography of British India has been, expectedly, nationalist Bipin Chanda and has been, R.G. Bradham Pattabhi Sitaramayya, Surendranath Banerjee, C.F. Andrews and Girija Mukerji among the political activist historians and B.R. Nanda, Bisherswas Prasad and Amalesh Tripathi among academic historians, the list can be enlarged. Such historians were aware of the exploitive character of colonialism but on the whole believe that Indian nationalism was the product of the enlightenment that British rule ushered in. Their major weakness, according to Chandra and his colleagues, was that they tended to ignore or at least, under play the inner contradictions of the Indian society both in terms of class and caste. Like caste system, class system, dowry, satidah untouchability, communal behaviors (through seems to be not in real) Regionalism, poverty, illiteracy bonded labor and suppression of / violence against woman's and were so common here and were curbing the way to development. They were so simple and were binded by different divisions were made spiritually both in society and life of an individual and people were just obeying them to live smoothly.

Socialists were also at the some time observed the inner contradictions of the Indian society. With the entrance of British to Indian soil, people got new directions to think in the modern way. There emerged a new educative class of people who later started social reform measures along with the freedom movement. No doubt that the East India Company was introduced primarily for business purpose. They were not interested in social activities but might be due to they were upset by the existing social order. The modern system of education was introduced in India. In the Common Henry Wilberforce during the debate on the renewal of the company's charter in 1792-93 it was proposed that teachers and missionaries be allowed in India for moral and educational upliftment of her people. There proposal was turned down due to the company's opposition later the proposal was accepted by British with the concept of cultural imperialism. Whatever it is, it embroiled in the controversy over religious policy. Again of results with the end of companies monopoly, as Indian people learned many new ideologies form than and worked upon it. The aim

of their education was to be the diffusion of art, science, philosophy and literature of Europe, this at the same time has encouraged the study of Indian language for. In 1857 three universities were set up at Calcutta, Bombay and Madras on the British model. In 1882 under Lord Ripon's guidance, education for moral, physical and mental improvement, special attention to education among Mohammedans and inspection of elementary schools were recommended. In 1904 the Universities Act was passed granting the Senates considerable autonomy. In 1919 the Sadler commission on the Calcutta University gave an elaborate scheme of universities education system which served as the model of University education till the end of the British Raj. It should be clear by now that behind the British colonialism in India there were different, even conflicting interests. Even many of them were interested in orientalism that is to say, revival and cultivation of the traditions and literature of the local people. So, as early as 1785 they translated Bhagavat Gita, several Sanskrit classics and many others including the Manusmriti and Kalidas' Shakuntala. Raja Ram Mohan Roy, a scholar in Sanskrit, Arabic and Persian language has learnt English privately, welcomed British rule and English education as agents of social reform and progress, agitated for the abolition of Satee, advocated liberal ideas of the west. He had adopted certain ritual practices of Christianity, like collective prayer.

The development of printing Press and spread of Western literature as well as the translation of several oriental texts has put the Indian society to good scopes for understanding modern trend. The Indian journalism on modern line began in 1780 at Calcutta with the publication of Bengal Gazette by J.A. Hickey an Englishman in English. This was followed by a number of periodicals in English, the most prominent of them being John Bull in East (later known as Englishman) started in 1821, interestingly, all these periodicals were run by Englishmen in English for the benefit of the English people of India. Later only, Vernacular journalism and periodicals were published in native Indian language by Indians. It was easy for journals, magazines and daily / weekly newspapers to be involved in politics. In fact later the press became a potent agent for spreading political messages.

By 1880 English educated matriculates in British India numbered about 50,000. There were about 5000 graduates. By 1907 the number of those studying English exceeded 500,000. The circulation of English language newspaper rose from 90,000 in 1885 to 276,000 in 1905. The proportion of these educated people to the total number of literate was in 1911, 1% and 6% of vernacular. Naturally, the English educated people enjoyed disproportionately high percentage and privileged. This class of the leadership of the freedom movement began in the late 19th century. In the 1st half of the century, however, they were its great supporters. At that time an overzealous modernization wave was flooding the Hindu College, some of that of course paid attention to social reform and spread of education there were reasons for this intellectual dilemma of the laterites. They were grateful to the British for opening up new opportunity before them. Other than that, they were in the liberal tradition that was where in by English education. After all, the western education helped the Indians in fostering the spirit of liberal ideas nationalism and patriotism. Patriotism was not a part of our national character; it was rather the product of the influence which flowed from British rule. The sentiment of nationalism began to sway the mind of Europeans only after the French Revolution and Napoleon was as almost all the leaders of the national movements were the product of western education as we can observe. That political awakening developed much more slowly among Muslims who lagged far behind them, Hindus on acquiring western education. The western education also provides the inspiring ideas of liberty of self government. It revealed wresting political power from despotic rulers and establishment of the democratic system of government. It was essentially a study of Europeans, particularly British History and western political thought more particularly of Whig and Radical exponents that contributed to the growth of national awakening in the country very naturally. From the works of great European thinkers like Milton Burke, Mill, Macaulay, Herbert Spencer, Rousseau, Voltaire, Thomas Paine, Mazzini and Ruskin, educated Indians imbibed the stirring and life giving ideas of patriotism, liberty, democracy, and rationalism English political thought produced in the age of liberalism, formed their intellectual diet. Indians who received western education were quick to

see that India also was a nation and like other nations had a right to be free and self governing. They also learnt the lesson that it was the duty of every young man to strive for national freedom and that no sacrifice could be too great to achieve that and besides the demand for liability and western education created in the minds of Indians the spirit of equity too. They realized they realized that certain right enjoyed by a certain group of people is denied to certain groups even that they were being mercilessly exploited by the alien rulers. They demanded equal rights to all western education was responsible for the emergence of a fast growing middle class intelligent whose chief interest lay in politics. It considered mainly of lawyers, Medical man journalists and members of what may be called learned professions. It was there class which provided leadership to the national movement. Besides contributing to the growth of the national sprit in the country by making the people familiar with the ideas, it also provided a common language i.e. through which educated people from different parts of Indian could communicate with one with one another and transact common affairs. Thus English become the official language of India. Indian who went to Great Britain for the completion of their studies? In England, were received cordial knowledge in terms of social equality and after returning, they started promoting national unity by the abolition of caste and purifying the social and religious life in general. Western education brought a great revolution in the ideas and out look of the educated elite. They began to voice common grievances and demand redress for than. It showed to them the way in which they could organize themselves for working political right and power. In contrary to these there were some evil effects of such western education are also there, such as, its result was 'to produce in India a class of persons "Indian in blood and color but English in test" in opinion of morals and in intellect', it led them to adopt the values of western civilization. Still we cannot incurred the fact that the Indian's were having a bad practice of (admitting) going to the school at very lately, after getting full maturity only this led Indian for behind in the race of their life, even in comparison to western's. Indians learned to admit into schools at the early stages is an important lesion taught by British by showing the picture of age qualification by imposing the restrictions on civil services. British also had added a coin for development of science in India by establishing a Medical College in Calcutta.

British Parliament abolished slave trade in 1807. In India Cornwallis has forbidden the sale and purchase of children in 1789. In 1811 import of slaves was declared illegal. Lord Ripon should not be forgotten for his moderate beginning of welfare activities towards the industrial working class.

In those days the place of Indian women had come to be confined to the four walls of her home. The doors of education had been shut for them. Several evil practices such as sati, purdah, child marriage, female infanticide, bride price and polygamy had made their life quite miserable. The system of widow also her status was miserable. There was no social and economic equality between a man and women. A Hindu woman was not entitled to inherit any property. Thus, by and large she was completely dependent on men. In 1823, Lord Amherst had imposed a legal ban on burning of widows on the funeral pyres of their dead husbands. Lord William Bentinck also passed the significant law against satee in 1829. Lord coming passed the Dalhousie's Widow Remarriage Act, 1856 on 13 July, 1856. Lord Dalhousie enacted authorizing Hindu converts to Christianity to have a share in the property of their family. He put an end to the evil practices of infanticide in Punjab and human sacrifices in Orissa. In 1929 the control legislative Assembly passed the Sarda act restraining child marriage. Increasing pauperization of the peasantry, frequency of famines and urbanization put them to extreme distress and a vulnerable condition. It was only during the nationalist agitation led by Gandhi that woman in large number participated in political activities and was partly emancipated. Under the Government of India Act, 1919 voting right for women had been established. As late as 1930 the Simon commission noted high morality among Indian woman. Yet their appears to be a slight improvement in the status of women by way of social reforms, like abolition of the satee, prohibition cohabitation permission of widow remarriage and spread of literacy among the middle class. In a few well to do families women took good education, showed literary and artistic facilities and even joined in social activities. However, these practices could not be completely eradicated only through legal measures. Gradually there civil practices could be done away only through education and public opinion.

The East India Company was mainly a trading company till the Battle of Plessey in 1757. The Portuguese, the Dutch, the French came to India for their trading activities. The trading activities greatly benefited Indian manufactures. Indian goods enjoyed a wide foreign market. The textiles were the most important among the Indian industries. Besides textiles, India was also known widely for its shipping, leather and metal industries, cutting and polishing of marbles and other precious stones, carving of ivory and sandalwood, making of gold, silver and diamond. Although when the company became a territorial power in India the production of goods of rival traders declined. Indian raw materials were taken to England and the finished and advanced goods were imported into India. As a result, Indian industry was hit hard and was ruined.

In addition to these evil effects of British on Indian economy, we should not forget some other improvements which were important and key steps for Indian Economy, such as transportation and communications were improved. William Bentinck dug canals for N.W. Province, improved roads, built the grand trunk road from Calcutta to Delhi and started Grand trunk road from Bombay to Agra. To promote trade and commerce and also for the convenience of the people Dalhousie felt the necessity of introducing Railway lines. Accordingly in 1853, the first Railway line was opened from Bombay to Thana. Likewise, he also laid the railway track between Howrah and Raniganj and between Madras and Arkonam. In 1861 a new railway line was opened between Allahabad and Calcutta which worked for many relief measures when famine broke out in Agra, Oudh and parts of Punjab and Rajputana. The work of railway was given to a Railway Board and with about 600 new railway lines were laid to develop trade, he created a new department of commerce and industry. Although, the object of such railway system was to ruin the Indian resources and raw materials from its different parts and corners of India. In this context Marx added that; "you cannot maintain a net of railway over the immense country without introducing all those industrial processes necessary to meet the immediate and current wants of railways, locomotion and out of which there must grow the application of machinery to those branches of industry not immediately connected with the railways. Still we cannot ignore this favorable development done by British in India, which has been the most effective means of communication for a developing country like India in which a large section of people living below the poverty line. Today has been developed to such an extent that it is also giving a boost to India to fight against unemployment to the greatest extent. It also provides a big sector for National Income. We cannot ignore that British have put the foundation stone of railways in India. Likewise, they laid down 400 miles of electronic telegraph system connecting Calcutta with Peshawar, and Bombay with Madras. It was telegraphs that helped the trade at the beginning. Dalhousie reorganized the post system he introduced a uniform postage of half anna for a letter and quarter anna for a post card. British opened 736 post offices in the country. They were looked after by the Director - General Post offices. They organized the public works Department to keep roads and bridges in repair and to construct new roads. As a result 2000 miles of Pukka roads were laid. Grand trunk Road from Calcutta to Punjab was also laid. They dug 180.00 miles of canals. The chief among them were Grand Ganges Canal and other canals. British rule in India has also created a number of new industries in India. Among them tea industry in 1835 under Bentinck, coffee industry in 1830, Indigo industry, Rubber industry, cotton industry, jute industry, sugar, paper, cement, iron, steel, coal mining and other industries.

If we give a look on role of British rule in Indian agriculture than, before the British rule in India peasants adopted simple methods of farming with rotation of crops, and using natural manures. Due to industry in England, there was an increase in industry in England and this necessitated the import of various types of raw materials like cotton and jute. The export of agricultural commodities was encouraged by them. The development of transport helped the India peasant to exchange from cultivation for house consumption to cultivation for the market. There was commercialization. Agriculture and the subsistence economy was replaced by 'Exchange economy' commercialization had progressed well in those tracts where the crops were largely grown for export in some parts of the country, the agriculturists easily adopted the commercial crops. Instead of the conventional crops and this change brought down the supply of food grains

in the country. The expansion of railways causes increasing nexus between the peasants and money tender and traders. From 1859 the British attempted introduction of the status of occupancy riots in the permanent settlement areas in order to save the peasants from eviction or rent-enhancements. This however, led to the sub-infatuation of land to infatuation and share coopers.

Before the establishment of the British Government there were General tributary or Independent kingdoms and in each kingdom there was a king there were no codes and regular courts in existence to interpret or give effect to Hindu and Mohammedan law books. Petty crimes were dealt with by the village headman or panchagates. Caste offences were punished by caste headman. Grave crimes were brought before the amirdar. The Punishments were severe. After the power of the English became predominant, the native courts cease to exert any authority over the English and their agents. There was a multiplicity of judicial authorities at that time. In Calcutta there existed five kinds of judicial authorities: i) The Nawab for all the capital offences: ii) The Naib Dewan for the cases of quarrel, frays iii) The faujdar for all cases except capital ones: iv) The Mohtesil for all the cases of drunkenness, selling spirituous liquors and v) The Koteval responsible for maintaining peace in the night. The East India Company paid its attention toward the organization of a system of Justice as it had done in case of other branches of administration. Early in the 18th century May courts were established on three presidency towns of Madras, Bombay and Calcutta. In 1772, he established the Muffasil Diwani Adalats (civil courts) were presided over by the District Collectors where as Indian Judges, assisted by the muftis and Qazi decided cases in the Muffasil Faujdari adulate (criminal courts). Appeals from these adalats could be made to Sadar Nizamat Adalat (The supreme criminal) at Calcutta. The former had a judge, the president of the supreme council and two Indian officers while the latter had a Deputy Nazim a chief qazi a chief mufti and three maulvis. Hindu law was codified in Sanskrit and of was translated by Halhed into English. Muslim law codified by Aurangzeb was made use of in the courts. After the Regulating Act, 1773 came into effect a supreme court was established at Calcutta with a chief justice and three other judges, who were appointed by the crown. The barristers of England or Ireland with five years experience were eligible for appointment as judges of the Supreme Court. They were not responsible to the executive authority in India. Its jurisdiction extended over all resident British nationals and the cases concerning the employees of the company. The court also functioned on the basis of a jury system appeals from this court could be made to the King in Council. The Supreme Court holds its proceedings on the basis of English law. The Supreme Court continued to exist up to 1862. The Charter Act of 1833 delegated the power of framing laws to the Governor-General in council. In 1834 the member of the General Council Lord Macaulay was asked to codify the laws. The Indian High court Act was promulgated in 1861. This Act abolished the Sadar Diwani Adalat and Sadar Nizamat and established in their place High Court at Calcutta, Bombay and Madras. In 1869, the jurisdiction of the Revenue Courts was curtailed and the Civil Courts were restored. In 1860, Macaulay's Penal code was enacted. In 1860, the code of Civil procedure and in 1861, the code of criminal procedure were enacted for adoption in the High Courts and Lower courts. These codes became the basis of the modern legal system and have remained for a long time. To establish the rule of law negotiable instrument, private trusts, transfer of property and easements were adopted in 1890 were enacted by the Imperial Government. The British also introduced in India, the concept of the rule of law and also equality before law. However, separate law courts were there to try the Europeans by the European judges. The British law courts proved that justice was expensive. Although they were known for delay and uncertainty and the courts were not within the reach of the poor.

The British administration under the crown also created these representative institutions. They provided the facilities of parliamentary form of government due to the constant struggle of Indians. The British widened the gulf between Islamic and Hindu societies and they were directly responsible for inculcating the two notion theory in the minds of the people of India. But before the establishment of the British rule there were inherent forces which kept the country divided. The British rule kept alive and strengthened the unitary approach. The British Government had set up a power fit bureaucracy to establish an efficient govt. the system created an Impersonal

administration in India. They introduced a separate and regular police force in India for the time to handle the law and order. The main duty of the police was to protect goods from thieves and dacoits and to not out the thugs although they were also used in a manner to suppress Indian by Indians.

In addition to these British brought the urbanization in Indian cities. They showed the seed of modernity in India, traditional India was spiraled by different Superstition like dogmatism.

Illiterate Indians were even not having any faith over the Doctors. They were after misled by some groups of people "Tantrics" by showing different Magic and all which was also causes from social discords. But with the advent British rule in India, advocated Indian they started to fight against such superstitions and as a result today we are defiling a society free of such dogmatism.

As an Indian we always use to take the things in our own prospective. We always think of what we have lost or what the British had taken away from us. And of course they have taken many things from us. But still, what we should think is in the Modern India there are many good things which administration in here. So this Article is a brief and has only some such portions to enlighten such few realities of British role in India. So what one should observe through this Article is that one can not directly blame the British rule in India for its Property, illiteracy, social divergence and divisions. These things existed in India from before these British have entered into. We should not blame others for all our faults.

CAN A PERSON BE A JUDGE OF HIMSELF ?

Dhirjyoti Deka
BALLB 6th Semester

India is the second most populous country of the world with multi linguistic culture and different religions, with the longest written constitution of the world. Each and every topic in our constitution has been elaborately explained so that while implementing our constitution into practice the three wings of government i.e. executive, legislature, and judiciary does not fall into the hot water. India is a homeland of various linguistic and religious groups living together harmoniously and peacefully from the primitive age. So the very basic motto of our country is to protect "unity in diversity".

India achieved independence on 15th August, 1947 after a long bitter struggle for independence from the foreign rule. The East India Company, who came to our country on 16th century as the traders, soon got the chance to become the ruler of India due to the weak political situation of the country. India, our motherland has to give a lot of sacrifice of her sons and daughters during the long journey of 200 years of struggle for her independence. During these 200 years of long struggle she saw many ups and downs, the great uprising known as the revolt of 1857, the growing of Indian National Congress, Muslim league and other political parties who were the moderates, the revolt of extremist and their sacrifice, when most of them were hanged till death; the peaceful war raised by Gandhiji, the mayhem caused by communal violence in 1947 and all these were witnessed by her silently. The moment she was freed from the British reign, democratic system of government was set up to run her in a smooth progressive way. More importantly the basic principles of equality, fraternity and brotherhood can only be achieved in a democratic system of the country. The set up democratic policy in our country was itself a landmark because from the ancient times our country has been ruled by kings and monarch. The Indian constitution came into being on 26th January 1950. The forefathers who created our constitution have enshrined really some of the noble ideas in the constitution. The preamble itself states India as a Sovereign,

by the Council shall act as Chairman [Article 91].

A Deputy Chairman shall vacate his office if he ceases to be a member of the Council. He may resign his office by writing to the Chairman. He may also be removed from his office by a resolution of the Council passed by a majority of all the then members present [Article 90]. But such a resolution can only be moved by giving at least 14 days notice. While a resolution for the removal for the Chairman (Vice-President) is under consideration, the Chairman, and while a resolution for the removal of the Deputy Chairman, the Deputy Chairman shall not preside. The Chairman shall have the right to speak and take part in the proceedings but shall have no right to vote on such resolution or on any other proceedings [Article 92]. The Rajya Sabha is a permanent House. It is not subject to dissolution. Its members are elected for period of six years but one third of its members retire after every two years.

Composition of Lok Sabha

The Lok Sabha is a popular house. Its members are directly elected by the people. The maximum number of its membership is fixed at 550 out of whom (a) not more than 530 are directly elected by the votes in States, (b) not more than 20 to represent the Union territories (article 81). Under Article 331 the president may nominate not more than two members of the Anglo-Indian community if in his opinion that community is not adequately represented in the Lok Sabha. The representatives of the states are elected directly by the people of the state on the basis of adult franchise. The representatives of Union territories shall be elected in the manner prescribed by Parliament by law. Every citizen of India, male or female who is not less than 18 years of age and is not disqualified on the grounds of non-residence, unsoundness of mind, crime or corrupt or illegal practice, is entitled to vote at election of the Lok Sabha (Article 326).

The Lok Sabha elected two of its members as Speaker and Deputy Speaker. When the Office of Speaker is vacant the Deputy Speaker performs the duties the Speakers office [Article 93]. However, if the office of Deputy Speaker is also vacant, the duties of the Speaker shall be performed by such member of the House as the President may appoint for the purpose [Article 95(1)]. The Deputy Speaker also act as the Speaker when the Speaker is absent from any sitting of the House. If, however, he is also absent, such persons as may be determined by the rules of the House and if no such person is present such other person as may determined by the House shall act as Speaker [Article 95(2)].

The Speaker and Deputy Speaker remain so long as they are members of the House. As soon as they cease to be members of the House they have to vacate their offices. However, the Speaker continues in his office even if the Lok Sabha is dissolved, till newly elected Lok Sabha meets. The Speaker and Deputy Speaker may resign their offices or they may be removed from their offices by a resolution of the House of the People passed by a majority of all the then members of the House [Article 94 (a) (b) (c)]. Such a resolution cannot be removed unless at least 14 days notice has been given of the intention to move the resolution [Article 94 proviso]. When the resolution for removal of Speaker is under consideration the Speaker, and when it is against the Deputy Speaker, the Deputy Speaker shall not preside at the sittings of the House, though he may be present [Article 96(1)]. The Speaker and Deputy Speaker will get such salaries and allowances as are fixed by Parliament by law and until a provision is so made as specified in the Second Schedule [Article 97].

The office of the Speaker is one of greatest responsibility. The Speaker is the Chief Officer of the Lok Sabha. He presides over its sittings and controls its working. He upholds the dignity and privileges of the House. Once elected, he must rise above party interests. In England, there is a convention that the Speaker has to resign from his party. This is necessary to maintain impartiality on his part. The Constitution of India contains certain provisions for maintaining independence and impartiality of the speaker. His salary is charged on the Consolidated Fund and is not subject to the annual vote by Parliament. He cannot be removed from his office except by a resolution passed by a special majority.

The Lok Sabha shall continue for five years from the commencement of its first session. The

President may, however, dissolve it even earlier. But while a proclamation of emergency is in operation the life of the House of People may be extended by law of Parliament for one year at a time. The Lok Sabha, whose life has been so extended, cannot continue beyond a period of six months after the proclamation of emergency has ceased to operate [Article 83 (2)].

The Lok Sabha in India is composed of on almost similar lines as the Lower House in England, America, Canada and Australia. In England the House of Commons, like the Lok Sabha is elected directly by the people for five years on adult suffrage. It cannot be dissolved by the Crown earlier. The House of Representatives in U.S.A. like our Lok Sabha is elected directly by the people. Its tenure is fixed for two years. The House of Representative differs from our Lok Sabha in one respect that it is not subject to dissolution before the expiry of its normal period of two years. The Lok Sabha in India may be dissolved even before the expiry of its normal period of five years.

Article 106

The Indian Constitution states about the salaries and allowances of members of Parliament. The members of either House of Parliament shall be entitled to receive such salaries and allowances as may from time to time be determined by Parliament by law and, until provision in that respect is so made, allowances at such rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Constituent Assembly of the Domain of India [Article 106].

Natural Justice

Natural justice or procedural is a legal philosophy used in some jurisdictions in the determination of just, or fair, processes in legal proceedings. The concept is very closely related to the principle of natural law (Latin word: *jus naturale*) which has been applied as a philosophical and practical principle in the law in several common law jurisdictions particularly the UK and Australia.

In common law legal systems the term natural justice refers to two specific legal principles. According to Roman law certain basic legal principles are required by nature, or so obvious that they should be applied universally without needing to be enacted into law by a legislator. The assertion in the United States Declaration of Independence, "we hold these truths to be self-evident," expresses some of this sentiment. The rules or principles of natural justice are now regularly applied by the courts in both common law and civil law jurisdictions. Natural justice operates on the principles that man is basically good, that a person of good intent should not be harmed, and one should treat others as one would like to be treated.

Natural justice includes the notion of procedural fairness and may incorporate the following guidelines:

- A person accused of a crime, or at risk of some form of loss, should be given adequate notice about the proceedings (including any charges).
- A person making a decision should declare any personal interest they may have in the proceedings.
- A person who makes a decision should be unbiased and act in good faith. He therefore can not be one of the parties in the case, or have an interest in the outcome. This is expressed in the Latin maxim, *nemo iudex in causa sua*, "no man is permitted to be judge in his own cause".
- Proceedings should be conducted so they are fair to all parties- expressed in the Latin maxim *audi alteram partem*: "let the other side be heard".
- Each party to a proceeding is entitled to ask questions and contradict the evidences of the opposing party.
- A decision-maker should take into account relevant considerations and extenuating circumstances, and ignore irrelevant consideration.
- Justice should be seen to be done. If the community is satisfied that justice has been done, they will continue to place their faith in the courts.

Notably, natural justice is binding upon both public and private entities, although the U.S. state of California has developed a doctrine of fair procedure which is binding upon certain types of private entities in that state.

Violation of natural justice by Article 106

Thus we can conclude that Article 106, of Indian Constitution has made our parliamentarians supreme and judge of their own, in fixing their salary, emolument or other pecuniary benefits. So Article 106, of Indian Constitution goes against the law of Natural Justices and against the legal maxim "nemo judex in causa sua," which means that a person cannot be his own judge in his own case or in his own matter.

During the days of Nehru, the President of our country received a monthly emolument of Rs 10,000 and the ministers of our country received monthly salary which was less than 10% of President's monthly emolument. As the time went by our ministers became so much concerned about their monthly wages that they forgot the old established rule according to which the Head of the State, monthly emoluments must be more than the other ministers and other government officials of the country. In 2008 till December our Prime Minister salary was Rs 68,000, salary of Secretary of the Union Government is Rs 52,000, Cabinet Secretary and Chief of Defence service crossed the Rs 50,000 mark while the President's salary was only Rs 50,000. This was a very shameful situation that the Head of the State was paid lower wages than the other ministers. Thanks to the change caused in December 2008 which increased the President's salary to Rs 80,000 and protects our country from the shameless activities of the ministers who were enjoying more monthly wages than the Head of the State. Thus, we can say that the article 106 has given very dangerous privileges to the Ministers of our country by giving them the right to decide their own wages and salaries by themselves. This has enabled them to raise their salary haphazardly and not thinking of the common man's problem. To our dismay in our country there are at least 836 millions Indians living on less than Rs 20 a day, as the Government own report told in 2007. Over 200 million of those get by less than Rs. 12 daily. The year 2006 is on record in the media as one of our great boom years. But it is the data from that year places our country at 132 in the United Nations Human Development Index. That's a fall from the already dismal rank of 128 we held and places us below Bhutan. In terms of underweight children and malnourishment, India is a disaster zone. After 61 years of independence we find the manifestos of political parties promising rice at Rs 3 or Rs 2 or even at Re 1 per kg. What a shameful thing, it indirectly implies that our country still have people living below poverty line. So in a country where more than fifty per cent of people of the total population live on the margin of poverty line or below it, in such a country, is there any sense to pay such handsome salary as describe above to the holder of the highest post in the country? Therefore the salary of the higher officer must be reduced so that the government gets more amount of money in their hand to spend for welfare schemes of the poor people.

There should be a reformation in the system of fixing the wages of the monthly salary of the ministers. The system of fixing their wages can be done in the following ways, which would not lead to the violation of the laws of natural justices. One procedure to solve this problem is to implement a new law which would enable the judiciary to decide wages and salary for the executive and legislature, on the other hand the legislature should be given the power to decide the wages and salary of the judiciary. This type of law will create the system of check and balance because the judiciary will not increase the salary of the executive and legislature without a valid or sound reason, and in turn the legislature will not be in favour to increase the salary of the judiciary. This system sounds very excellent as no organ of the government would be enabling to decide their monthly salary by themselves at their own sweet will. Moreover this system will make the three organs of the government to be the watchdog of one another in case of fixing the salary of any organ of government. When the judiciary will not increase the salary of the legislature and executive, in turn the legislature will not increase the salary of the judiciary. This system also has a drawback. It will make the three organs of the government dependent upon each other for the increments in their salary. Thus all the organs of the government will try to do favour to each other. It will give rise to the policy of give and take that is if the judiciary increases the salary of the legislature and executive, then only legislature will increase the salary of the judiciary and if one does not increase

the salary of the other organ, equal and opposite reaction will take place.

A best solution regarding the salary of our ministers and executive can be solved in another method. The legislature will have the power under Article 106 to make rules and regulation about their salary and remuneration but under the following condition.

1. The President of India's salary must be ten times more than the basic pay received by lowest grade central government workmen. The lowest basic pay of central government workmen at present is Rs 5000. Now ten times of the lowest basic pay will be the salary of our President i.e. Rs (10 x 5000 = 50,000). It means that according to this calculation our President at the present must received Rs 30,000 less than his present salary Rs 80,000. As a rule all other ministers' salary must be less than the President monthly salary. So The Vice-president, Prime minister and his Council of Ministers must get eight times more than the basic pay received by lowest grade central government workmen. It means they will get i.e. Rs (8 x 5000 = 40,000) and other ministers should get seven times more than the basic pay received by lowest grade central government workmen. It means our minister will get i.e. Rs (7 x 5000 = 35,000).

2. There should be no increment in the salary of the members of legislature and executive unless there is a growth of about 20 per cent increase in the per capita income of the people of our country from the present one.

This method has a merit that if the ministers have to increase their salary then they have to increase the salary of the entire government employee, which means increase of per capita income of the government employee. The second proviso halts the minister's policy of increasing their salary unless they have developed the living condition of all the people of the country which means the per capita income of all the people must be developed that is to reduce the poor people from our country and provide a standard of living to all the people of the country.

It is high time that some serious steps must be taken in order to diminish the salary and emoluments of the ministers otherwise their salary will be counted in lakhs soon, which means that great portion of our revenue collection will be wasted away in giving monthly salary to these ministers and other executive officials which in turn will hamper the growth of the country. One more reason can be given to decrease the salary of the ministers is that our lots of revenue of the country has to be wasted for the security of the ministers and other high officers of the country. At last we can conclude that some serious and effective steps must be taken by the government in order to regulate the procedure for fixing of the ministers salary or amend the article 106 so that new provision of these article do not violate the natural law especially the legal maxim "nemo iudex in causa sua," which means that a person cannot be his own judge in his own case or in his own matter.

WOMEN EMPOWERMENT IN INDIA

Indrani Bortamuly
BALLB 6th Semester

Women in Indian society have been idealized to be "Devi" (Goddess). This is because she plays different roles in different time. She is a mother, a sister, a warrior, a teacher, a doctor, an astronaut, a politician and so on. Women in today's Indian society have learnt to put equal steps with men and proving themselves to be successful in all respects. One of the befitting examples is our present Indian woman President Pratibha Patel, and Badminton Champion Saina Nehwal. Today Women have started availing themselves of the employment opportunities in almost all the civilized countries including India.

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BALLB 6th Semester

Women in Indian society have been idealized to be "Devi" (Goddess). This is because she plays different roles in different time. She is a mother, a sister, a warrior, a teacher, a doctor, an astronaut, a politician and so on. Women in today's Indian society have learnt to put equal steps with men and proving themselves to be successful in all respects. One of the befitting examples is our present Indian woman President Pratibha Patel, and Badminton Champion Saina Nehwal. Today Women have started availing themselves of the employment opportunities in almost all the civilized countries including India.

But there are places in India where women are treated still brutally. Infanticide is a major problem in some of the backward villages of India like Bihar, Gujarat. Through the study of the history of human society reveals that in no society of the world have women enjoyed absolute equality and par with men. Everywhere they were subjected to inequality, discrimination and exploitation. Throughout history and in many societies including India, gender inequality was part of an accepted male dominated culture. In many cases it is assumed that the place of women is mainly concentrated to the household activities like kitchen work and upbringing of the children. Though men and women have been living together from the very inception of the human history, every society differentiates its members on the basis of sex, treating men and women in different and expecting different patterns of behavior from them. They have been considered as the sex object and inferior to the men in different spheres of knowledge. This differentiation does not necessarily imply that one sex should have status superior to the other, but in practice, sexual differentiation is always translated into sexual inequality. The 'Sati Pratha', 'Pardah System', 'Child Marriage', 'Dowry System' etc, have been some form of atrocities and discriminatory attitudes against the women.

Social consequences of women's employment in modern society

Today women are found in a large number in the work. Women have started availing themselves of the employment opportunities in almost all the civilized countries including India. The Industrial Revolution has opened the doors of employment for women. Now a day's women are no longer associated solely with the role of 'homemaker' especially in the urban areas. Provision of employment opportunities for women a wage, salary or other type of remuneration basic outside the family has been a socio-economic development of great importance.

Sexism

Human societies have various types of inequalities, such as social, economic, racial, and ethnic and so on. Sexual inequality is also one of such inequalities. 'Sexism' is thus unfair discrimination on the basis of sex. In sexism, one sex is discriminated against another [normally men discriminating against women and vice versa too], but it is not always done openly and in the presence of all. Men do not consider women as individuals worthy of a full measure of respect and equal treatment in social institutions.

The consequences of 'Sexism' have made society pay a heavy economic and psychological price for it. Because of sexism women are not able to assume many of the responsibilities and statuses even though they have the needed capacities and qualification.

Women's liberation movement

The constitution of India does not discriminate between men and women as both men and women are born equal and they should always be treated so. Treating women as inferior especially to men and considering them individuals of the "second sex", is not right. Thus a social movement was launched which was known as 'feminist movement' or 'women's movement' to provide equal rights, opportunities and statuses to women an par with men is essential and mortally mandatory.

According to Collins Dictionary of Sociology, feminism refers to "a holistic theory concerned with the nature of women's global oppression and subordination to men". Thus, through the feminist movement the social awareness has started growing awareness have started growing among women in America especially regarding the gender discrimination. It also played a very vital role in Africa, Middle Asia, Western Europe and some other nations. In a nation like India, leaders of this movement may have to fight for social freedom and equal social status for women, and the establishment of socio-economic environment free from exploitation of all kinds.

Empowerment of women in India

The status of Indian women has radically changed since independence. Women in our country are comparatively in a more respectable position. The term 'empowerment of women' has become popular especially after 1980s. It generally refers to the process of strengthening the hands of women who have been suffering from various disabilities, inequalities and gender discrimination.

The term of "empowerment of women" could also be understood as the process of providing equal rights opportunities, responsibilities, power and positions to women so that they are able to play a role on par with men in society. Women are still considered to be one of the most powerless and marginalized sections of Indian society. Due to the efforts of the UNO the issue of empowerment of women becomes an international issue. The UN declared the year 1975 as the International Women's Year. In constitution of the UN Declaration of 1975, the "Third Women's World Congress" was held at Nairobi [Kenya] in 1985.

The fourth World Conference on Women was held in Beijing [China] in 1995 in which representatives from 189 nations including India has taken part. Special Session of the United Nations General Assembly was also considered in the year 2000 in New York to assess the progress of the programmes held in the direction of establishing gender equality. The Government also declared the year 2001 as the "Year of Women's Empowerment".

The 2001 census shows that the sex ratio for India is 933, which is lowest in the world. Percentage of female literacy is 54.16 (2001 census) against male literacy of 75.85%. In India, women's representation in Parliament and in the state Assemblies has never beyond 8-10% respectively. Most of the working women remain outside the organized sector. Mere 2.3% women are administrators and managers, 20.5% professional and the technical workers all of whom collectively earn 25% of the shared income. The constitution not only grants equality to women, but also empowers the state to adopt measures of positive discrimination in favour of women. The 73rd and 74th Amendments (1993) to the constitution of India provided for reservation of seats (at least one-third) in the local bodies of Panchayats and Municipalities for women. Another constitutional Amendment (84th Constitution Amendment Act 1998) reserving 33 percent seats in parliament and State Legislature is in the pipeline.

The Amendment Act has made an efficient role to give some special powers to women in all aspects. The Government of our country has passed various legislative measures which include, The Hindu Marriage Act (1955), The Hindu Succession Act (1956), Equal Remuneration Act (1976), Immoral Trafficking (Prevention) Act (1986), Child Marriage Restraint Act (1976), Dowry Prohibition Act (1961). Besides these our country has also ratified various international convention and human rights instruments committing to secure equal rights of woman. The Government has also taken various welfare measures to support the Employment Program (1987), Indira Mahila Yojana (1995), Balika Samridhi Yojana (1997), Mahila Samridhi Yojana (1993), etc. It is through the combined and co-ordinate efforts of the government, people and the women empowerment be progressed.

Strategies for women's development

The Government of India has prepared a national document with the aspect of raising the women's development. Thus, the strategies which are taken by the Government are as stated below:

1. Increasing Female Literacy Level

With the help of Literacy, women would be able to lead a life of self-reliance. There should be a proper co-ordination between governmental and non governmental institutions to increase considerably the literacy level of women.

2. Income generating schemes for women

There should be a number of income generating schemes were to be introduced to women's as per the provisions such as JRY: Jawahar Rojgar Yojana; IRDP: Integrated Rural Development Program.

3. Obtaining Greater Political Participation of Women

The document recommends that 33% of the seats should be reserved for women in order to get the effective participation of women in politics.

Importance and reasons behind the need for empowerment

Women empowerment is very important to improve the social and economic status of women through which women can protect themselves against all type of atrocities and to preserve their purity and dignity.

In a nation like India, the need for the empowerment of women is justified on account of the reasons which are as follows:

1. Education and Literacy

India, in comparison with the other countries of the world has the highest number of illiterate people. As per the 2001 census report 75% men are literate while only 54.16% women are found to be so. In rural areas like Rajasthan it was only 12%, while it stood at still a lower level that is 10% in rural Bihar in 1991. Illiteracy is considered to be one of the biggest weaknesses of women.

2. Economic Problem of Women

The women of India are weak generally in almost two causes-

- a. The per capita income of the Indians is quite low and a large number of families are under poverty.
- b. Women do not seem to be possessing property of their own as the property laws in this country were not in favour of women for hundred of years.

3. Health problem of Women

Women mostly consume less food and work more. They are shy of complaining about their ill health. Surveys and studies have revealed that traditional importance shows towards the male children is also one of the reasons for neglecting the health of female children.

4. Atrocities against Women

Women are regarded to be the weaker sex in the society. This is due to the rise of the number of crimes and atrocities committed against them like sexual harassment, abuse of women, rape and kidnapping of girls. Thus, women in all walks of life are discriminated against by men.

The constitution of India provides equal rights and opportunities to women. The first and foremost priority should be given to the education of women. Indian women are also responding positively to this changed socio-political situation. But this does not mean that our women are completely free from problems. It has to be fought at the emotional, cognitive and actions levels. Due to the developments the Indian Women now feel that they too have their own individuality, personality, self-respect, talent, capacity and efficiency.

POLICE TORTURE, CUSTODIAL DEATH : VIOLATION OF CONSTITUTIONAL RIGHTS

Manas Pratim Sarma
BALLB 6th Semester

Introduction

Many international charters, conventions are there to safeguard human rights. Indian Parliament has also enacted the Protection of Human Rights Act 1993. But violation of Human Rights still

continues. All attempts for a comprehensive solution have not produced the desired results. And in such a situation, the police atrocities have gained momentum, mostly upon the weaker sections of people.

Custodian torture is a naked violation of human dignity and degradation which destroys to a large extent, the individual personality. It has become a common phenomenon and routine police practice of interrogation these days. It is almost an unwritten understanding that when an officer asks his subordinates to thoroughly a suspect, it would simply mean torture. Third degree is generally believed to be short cut method of investigation by police.

Constitutional Concern

The Constitution recognizes it to be fundamental in the governance of the country that the state shall direct its policy to secure conditions of freedom and dignity and insulates against all forms of tyranny against mind and body and their freedom to grow fearlessly. All custodial safeguard in the Constitutional and other laws are meant to protect human dignity and shun barbaric approaches.

Article 21 of our Constitution provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 20(3) provides that no person accused of any offence shall be compelled to be witnessed against him. Article 22 provides protection against arrest and detention in certain cases.

Article 21 of our Constitution can be said to be the mother all Rights. The rights to life with personal liberty have received the widest possible interpretation through judicial activism. The Judiciary in *Maneka Gandhi versus Union of India* [AIR 1978 SC597] has extended the meaning of life with personal liberty to a very wide area. Though the Article appears to be negative in its grammatical forms, it has in reality, imposed several positive obligations upon the state, e.g., a person who can't pay for medical expenses must be given free medical treatment and that too without delay. A person should not be handcuffed (after arrest on a criminal charge) say in certain exceptional cases.

The expression procedure established by law in Article 21 has been judicially construed as meaning a procedure which is reasonable, fair and just. The Supreme Court in *Bandhua Mukti Morcha* case held that the 4 rights to live with human dignity enshrined in Article 21 derives its life and breath from the directive principles of state policy particularly Clauses (e) and (f) of Article 39 and Articles 41 and 42.

Chapter 'V' of The Code of Criminal Procedure, 1973 deals with the arrest of persons. Section 41 makes provision when police may arrest without warrant. How arrest can be made is provided under Section 46 of Cr. P. C. Section 47 deals with search of place entered by the person sought to be arrested and Section 50 provides when person arrested should be informed of grounds of arrest and of right to bail. Section 51 makes a provision for search of arrested person. At the request of the arrested person, he should be examined by the medical practitioner under Section 54; Section 56 provides that a Police Officer making an arrest without warrant, shall without unnecessary delay and subject to the provision as to bail take the person arrested before the Magistrate or Officer In-charge of Police Station and under Section 57 Cr. P. C. the person arrested shall not be detained more than 24 hours by the Police Officer in the absence of Special Of the Magistrate under Section 167 Cr. P. C. Chapter 'XI' of Cr. P. C. deals with preventive action of police and section 151 makes a provision for arrest to prevent commission of cognizable offence.

The prominent forms of police torture are

- a. Custodial Violence (using third degree method to get confessions).
- b. Custodial death.
- c. Fake encounters and
- d. Indiscriminate police firing.

Custodial violence is an important form of torture. It is a challenge which requires to be met

squarely and decisively. There is a great responsibility on the Police and Prison authorities to ensure that the citizen in its custody is not deprived of his right to live. The latest announcement by Supreme Court of India in Shri Prakash Singh's case [(2006)8SCC1], in which National Human Rights Commission had intervened, aimed at police reforms, when implemented would perhaps go a long way to sensitize the police and present authorities.

Judicial approach towards police torture

Courts all over the world have upheld the Human Rights of the accused and observed that the torture of innocent by the police is inhuman, degrading and barbaric that death in police custody is one of the worst kind of crime in a civilized society, governed by the rule of law and poses a serious threat to an orderly civilized society. Justice A. Pasayat in *Munshi Singh Gautam and others vs state of Madhya Pradesh* [(2005)9SCC631] stated, arrested "custodial violence, torture and abused to police power are not peculiar to India". But pray in which other democracy governed by the rule of law is so widespread and unchecked?

The Court's observations that followed this could be quoted extensively "It is assuming alarming proportion, now a days all around it is merely on account of the devilish devices adopted by those of the helm of affairs who proclaimed from the rooftops to be the defenders of democracy and protectors of peoples rights and yet do not hesitate to condescend behind the screen to let loose their men in uniform to settle personal scores, feigning ignorance of what happens and pretending to be peace loving puritans and saviours of citizens' rights".

The dehumanizing torture, assault and death in custody which has assumed alarming proportions raised serious questions about the credibility of rule of law and administration of criminal justice system. A suggestion to control the custodial violence may be, as was suggested by Millimath Committee and Law Commission of India that a special investigation police must be in place to interrogate the criminal cases rather than a constable who is an SSC passed, investigating the case using third degree method to elicit the truth (or the statement they wanted to have) from the accused. The most common forms of third degree used are falanga (beating on the soles of the feet), submarino (pushing the head of the person in water tank), electric shock and flogging by hanging by the hands and the feet. All these forms of torture have been reported in more than 40 countries of the world including India, Pakistan, China, USA and even developed nations of Western Europe.

Custodial Death: Difficulties in gathering evidence against erring police

It is pertinent to discuss the difficulties being faced by the courts in bringing the erring police to justice. The first hurdle is to gather the evidence. The offence is committed in the dark rooms of the police stations in the presence of other police personnel who will never speak against their colleagues or superiors whoever had committed the torture and hence it becomes difficult to collect the evidence. To help the prosecution, a suggestion was made by the Law Commission in its 113th report which recommended amendments to the Indian Evidence Act so as to provide that in the prosecution of a police officer for an alleged offence of having caused bodily injuries to a person while in police custody, if there is evidence that the injury was caused during the period when the police person was in police custody, the court may presume that the injury was caused by the police officer having the custody of that person during that period unless, the police officer proves to the contrary. The onus to prove the contrary must be discharged by the concerned police official. The recommendation however appears to have gone unnoticed and the crime of custodial torture flourished unabated.

Another major hurdle is the Criminal jurisprudence mandate that the guilt of the accused must be proved beyond reasonable doubt which brings in lots of difficulties in conviction of the police personnel. According to the statistics given by NHRC in the year 2004-2005, 1504 cases were reported in our country. The actual figure may be far high from this official figure but the conviction rate is considerably low. The Supreme Court in *State of MP versus Shyam Sundar Trivedi* observed that the courts are also required to have a change in their outlook and attitude, particularly in

cases involving custodial crimes and they should exhibit more sensitively and adopt a more realistic rather than a narrow technical approach, while dealing with the cases of custodial crimes so far as possible within their powers advice the legislature to implement the suggestion given by the Law Commission of India in its 113th Report.

Awarding compensation to the victims of custodial death

The Supreme Court of India time and again in a plethora of cases awarded compensation to the victims of the police firing and lock up deaths under Public Law Remedy. The court awarded compensation to the victims of lock up death in *Mani Kumar Thapa versus State of Sikkim* [AIR2002SC2920]. In *Sube Singh versus State of Haryana* [AIR 2006 SC 1117] for the question whether compensation should be awarded under Articles 32 and 226, and for every violation of Article 21 of the Constitution of India, where illegal detention or custodial violence was alleged. The apex court laid down the parameters to award the compensation and said that: "In cases where custodial death or custodial torture or other violation of rights guaranteed under Article 21 of the Constitution was established, courts may award compensation in a proceeding under Article 32 or 226 of the Constitution, but before awarding compensation, the court would have to pose the following question: (a) whether the violation of Article 21 of the Constitution was patent or controvertible, (b) whether the violation was grossed and a magnitude to shock the conscience of the court, (c) whether the custodial torture alleged resulted in death or whether custodial torture was supported by medical report or visible mark or scars of disability."

There is positive trend of the judicial policy for compensating victims of torture. But compensation was awarded without any basis for principles for quantifying the amount. Judges went by intuition rather than any rational basis.

Increasing use of compensation remedy may also give an impression that the State is ready to compensate if it can purchase the right to continue to inflict Constitutional deprivation on its citizens. Whether a death is deliberate, accidental, suicide or due to neglect or however it is cause, the net result is a custodial death. Then the question is how to compensate for the life that has been lost of the fact death state agencies have committed a crime and therefore, the State must pay compensation. The question remains about the prosecution of those officials who have committed the crime.

The next form of torture is fake encounters. Section 46 (3) of the Code of Criminal Procedure, 1973 gives power to the police to go to the extent of causing death of the arrestee in case he is absconding evading the arrest and has committed the serious offence which is punishable by either imprisonment for life or death. This provision becomes crucial in the wake of fake encounters.

Inquest by judicial magistrate: A mandatory provision under new Cr.P.C. amendment

Another check on the police excesses is already in place in the Code of Criminal Procedure, a special provision is made in the Cr. P. C. under Sub-Section (1) of Section 176 of the Code, when a person dies in police custody, a Magistrate may hold an enquiry into the cause of death. The recent amendment made in 2005 extended the ambit of Section 176 to disappearance and custodial rape also.

When a person is killed in an encounter or in police custody or in exchange of fire, inquiry shall be conducted by a Judicial Magistrate and Section 176 of the Cr. P. C. must be made applicable to all the above said cases because as the law stands now it applies to custodial deaths only, but not to deaths caused in exchange of fire or in encounter.

Do laws over empowering the police ?

Sometimes our laws give more teeth than what is required to the police, which is abused by them, an example of such category is Armed Forces (Special Power) Act (1958) which is in operation in Jammu and Kashmir and Manipur and other North Eastern States. Human rights activists have long argue that this Act is unconstitutional and violates international humanitarian laws. Section 4 (b) of the Act allows such military personnel to destroy any shelter from which, in

his opinion armed attacks are likely to be made or which has been utilized as a hideout by absconders "wanted for any offence". The latitude has permitted a destruction of large number of dwelling and other buildings in the state including collateral damage adjoining the one targeted have been damaged or destroyed. Section 4(c) of the Act permits arrest without warrant, with whatever force as may be necessary vis-à-vis any person against whom a reasonable suspicion exist that he is about to commit a cognizable offence. This has provided the basis of indiscriminate arrest and use of brutal force including firing against innocent civilians.

Duty of legislature and Government of India

Torture and other cruel, inhuman or degrading treatment or punishment is particularly serious violation of Human Rights and, as such, are strictly condemned by International Law. The convention entered into force on 26/06/1987. The Government of India should ratify the convention against torture and other forms of cruel inhuman and degrading punishment or treatment, which was signed by India by 14th October 1997. Ratifying the convention is to fulfill not only its obligation under the international humanitarian law, but also to honor the promise made at the time of signing the convention by the permanent representatives of India to the United Nations, namely, that India would "uphold the greatest values of Indian civilization and our policy to work with other members of the international community to promote and protect human rights".

Conclusion

Torture violates the inherent dignity of a person. It not only humiliates the victim but reduces him to a sub-human level. The decent to sub-human level not only that of the victim, but of the perpetrator as well. The victims decent can be redeemed. But the perpetrator defies redemption. He develops a cynical contempt for the values of the democracy, the laws he is paid to enforce and for the courts to which, he as a witness, is accountable. He becomes impervious to the fact that he is a part of an institutional set up erected for ensuring greater freedom for members to progress towards a meaningful nature human society. There are numerous provisions in the Constitution of India and also in other laws, but unfortunately most of the provisions have remained paper tigers without teeth.

It is generally the poor, disadvantaged and the weaker sections of the society who are victims are custodial crimes because there is no one to care for them and to protect them. It is therefore, for the Government and the legislature to give a serious thought to the recommendation of the Law Commission and National Human Rights Commission and bring about appropriate change in the law both to curb custodial crimes and also to ensure that the guilty is punished.

Torture in custody flouts the basic rights of the citizens recognized by the Constitution of India and is affront to human dignity. Police excesses and maltreatment of detainees or under trial prisoners or suspects tarnishes the image of any civilized nation and encourages the men in "khaki" to consider them to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady, the foundation of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading towards perishing.

CAPITAL PUNISHMENT

Mayuri Saikia
BALLB 8th Semester

Everyone fears punishment, everyone fears death, everyone loves life and therefore the death penalty or capital punishment is used as a necessary deterrent and presenter method, but not as

a means of vengeance. It is imposed to permanently remove the worst criminal from the society and to prove much safer for the rest of us than long term permanent incarceration. The department is much more likely to be a deterrent where the execution is a virtual cardinality, but the anti death penalty campaigner always urge that it is not a different but a cruel or unusual punishment. This fact is quite controversial due to the high level of violent crime including murder and rape. Advocates of the death penalty argue that it deters crime and hence a good tool for police and prospectors, improve the community by making sure that convicted criminals do not offend again provide closure to surviving victim or loved ones and it is a just penalty for their crime. Opponents of capital punishment argue that it has led to the execution of wrongfully convicted that is discriminate against minorities and the poor that it doesn't deter criminal, but a violation of human rights. The execution of death penalty is a real punishment rather than same "rehabilitative" treatment the criminal are made to suffer in proportion to the offence. Although there is a place in a modern society for the old fashioned principal of *lex talens* (i.e. an eye for an eye) is a matter of personal opinion. Therefore, retribution is seen by many as an acceptable reason for the death penalty.

Capital punishment is the lawful infliction of death as a punishment and since ancient time it has been used for a wide variety of offence. Capital punishment or the death penalty is the execution for a person by judicial process as a punishment for an offence. Crimes that can result in a death penalty are known as capital crime or capital offence. The term capital originates from Latin word *capitalia* literally means 'regarding the head', as in ancient times, capital punishment was executed through beheading. Capital punishment in the past was practised in every society, although currently only 58 nation actively practice it with 95 countries abolishing it. It is matter of active controversy in various countries and state, and position can vary within a single political ideology or cultural region.

In most of the countries, capital punishment is reserved for murder, espionage, treason or as part of military justice. In some countries sexual crime, such as rape, adultery, carry death penalty, as do religious crime such as apostasy in Islamic nations. In many countries that used the death penalty, drug trafficking is also a capital offense. In China, human trafficking and serious cases of corruption are punished by death penalty. In militaries around the world court martial have imposed death sentences for offences such as cowardice, desertion, in subordination and mutiny. Most historical records and various preemptive tribal practices indicate that the death penalty was a part of their justice system. The states clergy have no absolute right to put it subject to death although almost all countries to do so in same form or other. In most countries, it is by arming their police forces and accepting the fact that people will from time to time be shot as a result and therefore at the state's command. A majority of states' subjects may wish to confer the right to put certain classes of criminals to death through referendum or voting in state elections for candidates favoring capital punishment. Majority opinions in some democratic countries, including United Kingdom, are still in favor of the death penalty. By 1500 in England, only major felonies carried the death penalty like treason, murder larceny. In many cases, we will know of this in advance and suffer great pain and emotional anguish in the process. Therefore most of the countries of the world a now a days become the abolitionist of the death penalty.

Reformation of the death penalty began in Europe by the 1750s and was championed by academics such as the Italian justice, Cesar, the French philosopher Voltaire and the English law reformers Jeremy Bentham and Samuel Homily. By the 1850s, these reform efforts began to bear fruit. Virgule and Portugal were the first nations to abolish the death penalty altogether. In the United States Michigan was the first state to abolish it for murder in 1847. Today it is virtually abolished in all of Western Europe and most of Latin America. Britain effectively abolished capital punishment in 1965. The USA, together with China, Japan and many Asian and Middle Eastern countries, plus some African states still retain the death penalty for certain crimes and impose it with varying frequency. The death penalty was over helpfully practiced in poor and authoritarian states, which often employed the death penalty as a tool of political oppression. The rapid industrialization in Asia has been increasing the number of developed retention set countries. In these countries, the death penalty enjoys strong public support and the matter receives the little

attention from the Government or the media. Most of the nations abolished for all offences except under special circumstances. India is also considered as receptionist country for the capital punishment because the federal death penalty is still in active use. In almost all countries, capital punishment is granted as a penalty for planned murder, espionage, trachery, or as a part of military justice. Recently, the case of Mohammad Afzal, a terrorist who was found guilty of instigating the attack on the Indian parliament house, has cropped up the controversy regarding the Indian law of capital punishment.

India stands poised between the global trend to end the death penalty and those nations that still apply the death penalty. Capital punishment in India is legal but rare and it is granted for different crimes, counting murder, instigating a child's suicide, instigating war against the government, acts of terrorism, or a second evidence for drug trafficking. Death penalty is officially permitted though and it is to be used in the 'rarest of rare' cases as per the judgement of the Supreme Court of India. India has the lowest execution rate with just 55 people executed since independence in 1947 amongst the all retention is countries around the world. Since the condition of the 'rarest of rare' is not exactly defined, sometimes even less horrific murders have been awarded capital punishment owing to poor justification by lawyers. Supreme Court of India ruled in 1983 that the death penalty for murder should be imposed only in 'the rarest of the rare cases,' but this instruction has been contradicted by the legislature increasing the number of offences punishable by death. In 1980, the Supreme Court upheld the constitutionality of the death penalty in the key case of *Buchan Singh V. state of Punjab*, although the bench was not unanimous. The judgement called for aggravating and mitigating circumstances with reference to both the crime and the convicted prisoner to be considered in passing sentence and emphasized that the death penalty should be used only in the 'rarest of the rare' cases. Now the most serious concern before the court was to decide the cases which are going to fall within the rarest of the rare category or which are not. More than a quarter of a century later, it is clear that through the failure of the courts and state authorities laid down by law and by that judgement, the court's strictures remain unfulfilled. In a judgement delivered in December 2006, a Supreme Court bench admitted the court's failure to evolve a sentencing policy in capital cases (*Alok Nath Dutta and others V. state of West Bengal*). The Bench examined judgements over the past two decades in which the Supreme Court adjudicated upon whether a case was one of the 'rarest of the rare' or not and concluded: 'What would constitute a 'rarest of the rare' case must be determined in the fact situation obtaining in each case. We have also noticed herein before that different criterion has been adopted by different benches of this court, although the offences are similar in nature. Because the case involved the offences under the same provision, the same by itself may not be a ground to lay down any uniform criteria for awarding a death penalty or a lesser penalty as several factors therefore is required to be taken in to consideration.' The frustration of the court was evident when it stated: "No sentencing policy in clear cut terms have been evolved by the Supreme Court. What should we do?" In that particular ruling, the court commuted the appellant's death sentence. On the Supreme Court upheld the death sentence imposed on appellants who had convicted for murdering his wife and four specific situation of the appellant, the motive for killings or the possibility of the reform in this case.

There are two broad categories of legislation providing for the death penalty in India: the Indian penal code (IPC), and special or local legislation within the IPC, nine offences are punishable by death. At least 14 other special or local laws also provide for the death penalty. Under the ordinary criminal law, all trials involving a possible death sentence are initially held before a district and session court at state level. Death sentences imposed in such trials must be reviewed by the High court of the same state, which has the power to direct further inquiry to be made or additional evidence to be taken upon any point bearing on the guilt or innocence of the defendant. In the High Court a bench comprising a minimum of two judges must, on appreciation of the facts, come to its own conclusion on guilt and awarded sentence as deemed fit in the circumstances of the case. Based on its assessment of the evidence on record, the High court may'

- a. Confirm the death sentence or impose another sentence in its place;

- b. Withdraw the conviction and convict for any other offences of which the sessions court might have convicted the defendant, or order a new trial on the basis of the amended charge;
- c. Acquit the defendant.

The High court serves as the first court of appeal for a person sentenced to death, except under some anti-terrorist legislation where the supreme court of India is the first appellate court. Where a death sentence has not been imposed by a trial court, the state can appeal to the High court to enhance to one of death.

There is no automatic right of appeal to the Supreme Court, except in cases where a High court has imposed a death sentence while quashing a trial court acquittal. "Special leave" to file an appeal with the Supreme Court has to be granted by the High court or by the Supreme Court itself.

The judicial process in capital cases comes to an end once the higher courts have confirmed the death sentence. At this stage, the defendant can file a mercy petition with state or national executive. Under Articles 72 and 161 of the constitution of India, the state governor and the president of India have the power to grant pardon or commutation of sentence. These constitutional provisions implicitly allow for two tier process of seeking commutation, first from the state governor and then from the president. The executive also have the power under the Indian penal code to commute a death sentence without the consent of the offender. The Indian penal code provides for capital punishment for the following offences, or for criminal conspiracy to commit any of the following offences—

1. Treason, for waging war against the Government of Indian (section 121).
2. Abetment of mutiny actually committed (section 132).
3. Perjury resulting in the conviction and death of an innocent person (section 194).
4. Threatening and inducing any person to give false evidence resulting in the conviction and death of an innocent person (Section 195 A).
5. Murder (section 302) and murder committed by a life convict (section 303), though the later was struck down by the Supreme Court, it still remains in the IPC.
6. Abetment of a suicide by a minor, in sane person or intoxicated person (305).
7. Attempted murder by a serving life convicts (Section 307(2)).
8. Kidnapping for ransom (section 364 A).
9. Dacoits [armed robbery or banditry] with murder (section 396).

Capital punishment in India is legal but rare. There is no other way or modes of execution like electrocution lethal injection or even firing squad like other countries of the world. For Indians capital punishment is also most synonymous with hanging. The hanging of a person by the neck, at the end of a legal process involving the executive and the judiciary at various stages, was found to be profoundly arbitrary. It is also shocking fact that most death sentences handed down in India are based on circumstantial evidence alone. In the absence of forensic facilities, the testimony of witnesses is crucial, but there is widespread acknowledgment of the use by police and prosecution of stock or professional witnesses. A number of Supreme Court judgments in present day can illustrate how the innocent persons have been sentenced to death on the basis of false and fabricated evidence, often used in manipulated investigations and prosecutions, with investigating and prosecuting agencies acting in collusion. While successive Supreme Court constitutional benches have favored judicial discretion rather than the setting out of detailed guidelines on sentencing, that judicial discretion has proved inadequate as a safeguard against arbitrariness. The judgments in numerous cases demonstrate that the courts including the Supreme Court have not always followed the existing law and jurisprudence on death penalty cases consistently. Also the prisoners sentenced to death may wait many years while their cases are under consideration. The length of time a person spends on death row presents conflicting problems. However prolonged periods on

death row as occurs in some countries leave the individual facing the constant strain of living with the fear of execution, almost always in harsh prison conditions. There is no appropriate length of time a prisoner should be held before execution. The dilemma described above provides other important reasons why the death penalty should be abolished. The Supreme Court ruled that an unduly long delay in execution of the sentence of death would entitle an approach to the court, but that only delay after the conclusion of the judicial process would be relevant, and that the period could not be fixed. The UN human Rights committee has stated that "the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life in violation of Article 6, paragraph 1, of ICCPR, in circumstances where the death penalty is imposed without any possibility of taking in to account the defendant's personal circumstances. The UN special Reporter on extra judicial, summary or arbitrary execution has stated that "the death penalty should under no circumstances be mandatory by law.

Mandatory death sentences are currently prescribed in India in three "special" laws: the Arms Act 1959; Narcotic Drugs and psychotropic substances Act 1985; and the scheduled castes and Scheduled Tribes (prevention of Atrocities) Act 1989. Previously, mandatory death sentences were also prescribed in section 303 of the Indian penal code and in section 3(2)(i) of the Terrorist and disruptive Activities (prevention) Act 1985. Article 6(5) of the ICCPR prohibits the use of the death penalty against people who were under 18 years old at the time of the crime, as does article 37 (a) of the convention on the right of the child, another international human rights treaty to which India acceded in 1992. Safeguard 3 of the UN safeguard granting protection of life those people facing the death penalty state not to impose the penalty of death on a person suffering from any mental or intellectual disabilities or to execute any such person.

The Supreme Court of India ruled in 1983 that the penalty should be imposed only in the "rarest of the rare" cases. Capital crime are murder, Gang robbery with murder, abetting the suicide or child or insure person, waging war against the government, and abetting mutiny by the member of the armed forces. In recent years the death penalty has been imposed under new anti-terrorists legislation for people convicted of terrorist activities. Recently the Indian supreme court in Swamy Sharaddanda state of Karnataka made imposing the death penalty even harder the judgment holds that the "hoarest of the rare" the prescribed in Buchan. Singh's case was deleted in the mach chi sing case. The judgement states that the "rarest of the rare" must be measured not only qualitative but also quantities terms. Thus given that the general crime level has been worsen since Marci Singh case was decided that categories of the "rarest of rare" should also change. Death penalties awarded by the lower courts are appealed in the High Courts. It appears that judge in the lower court are also getting increasingly average to use capital punishment, e.g. in 2007 several high profile cases involving premeditated cold blooded murders, rape and murder of minors during rioting, terrorist bombing have not attracted the death penalty. But activities reveal a flaw that due to the absence of sentencing guideline in what constitute the "rarest the rare" in some less gruesome murder the lower courts have awarded death penalty possibly due to poor defense presented by the lawyers of the economically back warded. The death penalty is generally carried out in India by hanging. After a 1983 challenge to this method the Supreme Court ruled that hanging did not involve torture, barbarity, humiliation or degradation.

As the most of the nation of the world move steadily away from the use of the death penalty, the time has come for the Indian authorities to abolish this outmoded form of punishment. India as being a member state to the ICCPR (International convent for Civil and Political Rights) has an opportunity to exercise regional leadership and to strong signal of its determination to fully upholds human rights by abolishing the capital punishment of the death penalty. Capital punishment is often subject to controversy. Opponents of the death penalty argue that it has led to the execution of innocent people, that the life imprisonment is an effective and less expensive substitute, that it discriminates against minorities and the poor, that it violets the criminal's right to life. Supporters believe the penalty is justified for murders by the principle of retribution, that life imprisonment is not an equally effective deterrent and that the death penalty efforts the right to life by punishment those who violet it in the striated form. Besides, wrongful execution is a miscarriage of justice

occurring when an innocent person is put to death by capital punishment for that many people have been proclaimed innocent victim of the death penalty in refusing over the years to declare the death penalty unconstitutional, the Supreme Court has relied on the fact that those framing the death penalty did not see fit to abolish capital punishment, and that the legislative has subsequently not done so. In turn, the failure of the Supreme Court to strike down capital punishment has become the rationale for the Indian state to deny any need to re-examine the relevance of death penalty provisions in Indian law or to abolish the punishment. The arguments for abolishing the death penalty remain forceful and persuasive. State killing condones violence and brutalizes the society. The ever present risk of the execution of the innocent is enhanced by an unsafe judicial system. As the nation continues to meet aspirations, it is vital that it examines its attachment to capital punishment. Judicial state killings have no place in the modern world and therefore India should abolish the death penalty as soon as practically possible.

NATIONAL INTERGRATION

Minakshi Sarmah
BALLB 6th Semester

India is a country of continental size. In terms of population it is only next to China. It has marked natural divisions. India is inhabited by people of different race, religions, language, castes, sub-caste, sects and segments. This is the social structure of India.

When the main political events of India are studied, two distinct trends are noticed in the structure of India's history. The first one is the political and territorial integration of the country. It extends from Kashmir to Kerala and from the border of Afghanistan to Arunachal. The second trend is that of political decentralization and the eruption of local and regional feeling and emotions. The second trend has led to the problems of national integration in India.

Indian society is traditional in nature. Primordial loyalties are very strong in India. As a result of that, political culture is disintegrated in our country. It is standing in the way of the process of nation building and state building. The different social segments in India are going in opposite directions. They sometime indulge in violence against each other in a large scale. This is creating disintegrating forces in our country. These are problems of national integration today is posing as a great threat to the unity and sovereignty of country.

The problem of national integration in India, as Giselher Wirsing observes: Many years after independence, India still faces attempts to disrupt the unity of the states. With the disappearance of the generation of founder, the disintegrating factors have become more conspicuous. However in contrast to most of the recently established state, there have also been strong integrating forces. Before the problem of national integration is discussed, the meaning of national integration should be made clear.

The word integration is interpreted by various scholars in their own ways. Dr. Radhakrishnan says, "National Integration is not a house which could be built by mortar and bricks. It is not discussed an industrial plan too which could be discussed and implemented by experts. Integration, on the contrary, is a thought which must go into the heads of the people. It is the consciousness which must awaken the people at large."

The National Integration conference defined national integration as "A Psychological and education process involving the development of a feeling of unity solidarity and cohesion in the hearts of people, a sense of common citizenship and feeling of loyalty to the nation. According to Weinlr, national integration implies,

- a. a process of bringing together culturally and socially discreet groups into a single territorial unit and the establishment of a national identity,
- b. The process of establishing a national, central authority over subordinate political units and regions which may or may not coincide with distinct cultural or social groups.
- c. Building government with government
- d. Evolving the minimum value order, referring either to the norms and the processes to be accepted or to the goals to be achieved."
- e. Nationality integration implies both 'Nation- building' and 'State Building.' National- building means removal of boundaries which divide society on tribal, communal, racial, casteist, linguistic or regional lines. There should not be any secessionist and separatist force within the country.

Objectives of national integration

National Integration has certain objectives. The objectives are as follows :-

- a. To keep together different groups of people in a place having social and cultural differences.
- b. To establish national authority over political units and regions.
- c. To strengthen social and cultural bonds among people.
- d. To develop emotional unity among the people
- e. To promote a sense of unity among the people.
- f. To develop certain minimum values among the people
- g. To stand against all sorts of disintegrating forces in the country.

Importance of national integration

The importance of National Integration may be pointed out as follows:

- a. Social peace can be preserved by means of national integration.
- b. People can make progress in the field of education, philosophy, science, etc. when there is national integration.
- c. National integration frees the mind of the people.
- d. National integration helps in bringing about social and economic development.
- e. Healthy public opinion can be formed when there is national integration.
- f. The territorial integrity of India can be maintained only by national integration.

National integration is essential for the success of democracy. It is said that for a vast country like India National Integration is the urgent need of the hour by which we can maintain the unity and integrity of the country. In the absence of national integration India can not prosper in any sphere of life.

Problems of national integration

There are certain forces which are trying to undermine national unity and integrity. Those are discussed below:

I. Communalism: No part of India is free from communalism. It is a threat to our national integration. During the freedom movement nationalist forces were in a position to weaken religious fundamentalism and Communal fanaticism. The nationalist forces have become weak and as such religious fundamentalism and communal fanaticism are raising their heads here and there some cities in India have become the nerve-centers of mischief. Religious places are used for political purpose and the lessons of communalism are spread among the people from these places. The constitution of India has guaranteed freedom of religion to the people. But this freedom is utilized

by many for political purposes.

ii. Linguistic: Linguistic iterance is also a threat to national integration. India is a multiannual country and linguistic to learner among the Indians is the urgent need of the hour. Language may play both integrative and disintegrative. There is no consensus about the national language in India. Linguistic differences create social tensions and they also stand in the way of nation integration. Linguistic is also encouraging regionalism. Without linguistic tolerance. India can not be sure about the future of her political structure.

iii. Headers: The Founding Fathers of free India who are living today have been made ineffective in the present political set-up. The present leaders are not in position to set examples of unity and national integration. A leader today wants to set one against the other and there by perpetuate his self-interest. Many leaders put self before service and pay only lip service to integration.

iv. Regionalism: Regionalism today has become a very important factor in India politics. People think more in terms of their regions rather than the nation. People having separate cultural identity want to preserve it at a political level also. Hence, there are demands throughout India for further reorganization of states. Even some regions which have their own political identity are also not satisfied for various reasons. They are always haunted by the fear of encroachment from outside. Regionalism leads to parochialism. So now a day parochial interest gets preference over national interests.

v. Press and Intellectuals: The role of the Intellectuals and press in weakening the process of national integration has also been very shameful. Our press is not in a position to give impartial means and views. Moreover, the contribution of modern intellectuals is very poor towards national integration. They are not in a position to set noble ideals before the people for national integration

They are problems of emotional integration in all societies and civilizations. Emotional instability of a man stands in the way of national integration. So, integration is first essential for the emotional stability of men. Economic factor are also no less responsible for disturbing the integrity of the nation.

Suggestion for national integration

An all India Seminar was held in Hyderabad on National Integration. It has put forward certain segregation for National Integration they are as follows:-

- a. The concept of national integration should be clarified for the better appreciation of the people. National integration may be achieved by making sound public policies.
- b. An earnest attempt must be made for the removal of economic inequalities.
- c. There should be uniform development of various regions industrially.
- d. The man media may be encouraged to project the development and achievement of the country in an objective manner.
- e. The regional languages should be given their rightful place in the state administration the interests of the minorities should not the ignored.
- f. Education system should be molded in such a way so that it develops scientific temperament, spirit of inquiry and reform. Education should be spread in the rural areas. Rural people should be associated with task of nation building. Education must be imparted to make the rural people politically conscious.

Constitutional Provisions for National Integration

The constitution of India has made various provisions to bring about national integration in our country. The first National conference on integration was held in 1961 which was inaugurated by Dr. Radha Krishnan, then Vice President of India. Some of the constitutional provisions are as follows:-

- a. Provision for single citizenship

- b. Unified Judiciary
- c. Common All India Service
- d. A strong central government
- e. Provision for equal rights and opportunities for all citizens.
- f. National symbols, Anthem, flag and Language.
- g. Social, Political and economic justice
- h. Uniform Laws and national festival.

These provision of the constitution of India are likely to a promote unity among the people of India.

Solution of problems of national integration

It is regretted that communal and regional force, have gone to lamentable depths. It is also very unfortunate that these forces are not only present in into the vital organs of our governmental structure. The leadership of a country must rise to the occasion and bring about minimum requirements of national integration. It may take time to remove these evils from the social level, but it should not remove them from the political structure of the country. National integration may be made strong id certain measures are adopted:-

i. Casteism should be removed by all means. If necessary strong measures shallot be adopted to bring it under control. After independence, this weakness of the people of India is exploited by the politicians to serve their own ends.

ii. The secular spirit of our society must be maintained by all manned of course, it regulars courage and determination. Religious minorities should be given all safeguards so that they do not suffer from a feeling of frustration. They should not be allowed to become the victims of religious fanaticism. Religious places should never be used for spreading the lessons of communalism and hatred.

iii. Our students should be given real education. Our educational system has failed to inculcate patriotism in students. Educational intuitions should be free from political influences, Teacher politicians should. This class of people neither teaches the students be controlled as early as possible. These classes of people neither teach the students not serve the people.

iv. Regional imbalances should be removed while formulating the plans. Special care should be taken for the up life of the backward classes and under developed areas. The benefit of freedom reaches these people.

v. Administration should be impartial towards all. It should come nearer to the people otherwise; it would cause frustration among the people. The administration should not ignore any problem faced by the people.

Nationalism must enable as to transcend localism, casteism, provincialism and Communalism. To makes nationalism strong, it must be supported by humanism. Humanism requires the psychological and moral re-making of man. Humanism will prevent the people from doing things against the unity and integrity of India. If people do not maintain unity among themselves, the integrity of the country will be destroyed which will result in untold sufferings for people.

CORRUPTION

Monalisa Khanikar
BALLB 8th Semester

Introduction

Corruption as a phenomenon is both universal and historical. It is a fact that there existed no society in the past in which corruption was totally absent. At the same time, corruption is existed in one way or another in all existing societies of the world. Its content and character, its forms and intensity, of course, may differ from society to society.

Corruption as a Social Evil

Corruption is one of the social evils found in all the societies of the world. In some societies, it is more rampant than in some others. Unfortunately, India is regarded as one of the most corrupt countries. Corruption in India has become deep-rooted and its growth is unchecked and unhindered. All those leaders who declared war against corruption have either shamelessly succumbed to corruption or miserably lost the battle.

"Power corrupts and absolute power corrupts absolutely". That is what the events at the national political scene seem to suggest, at least during the last couple of years practice of corruption at lower levels by some clerks, peons and attendees for some petty amount, is understandable and tolerable. What is more disturbing and the dangerous is corruption at higher levels. Corruption in various forms has become the main-stay of our national polity in the recent past.

Definition of the concept of Corruption

The meaning of the concept of corruption can be made clearer by some of definition-

1. In simple words, corruption refers to "an act of bribery". It is abuse of political power or public office for personal or private gain brushing aside all formal rules.
2. The Dictionary defines corruption as "an inducement to wrong by bribery or other unlawful means: a departure from what is pure and correct.
3. According to Andriski, corruption is the use of public power for private advantage in ways which transgress some formal rules of law.

Characteristics of Corruption

The above definitions pointed out some of the following characteristics of corruption which are as follows-

1. Corruption involves the abuse of power associated with a public office or public life.
2. Person's party to corruption tends to neglect their prescribed duty deliberately.
3. Corruption, as it understood today refers to an irregular, illegal and immoral practice associated with out public life.
4. An act of corruption involves dereliction of duty, moral and legal lapses.

Causes of Corruption

Corruption is like blood cancer. It has taken deep roots in the country. It has percolated through almost all fields.

The causes responsible for corruption are as follows -

1. Economic Insecurity

This is regarded as the most important causes of corruption. The poor people become corrupt in the hope of becoming rich. The rich indulge in it for fear of losing what they have. This

encourages smuggling on a massive scale.

2. High rate of Income Tax

Since tax rates are comparatively high in India even the honest people are often tempted to escape from it by making false returns of their property and income. Many of the officers in the Income Tax Department are also equally corrupt and they thrive on bribery.

3. Meager Salary being paid to the Government Servants.

Employees in some of the government departments are paid comparatively very less salary. This situation is said to be the cause of corruption in administration. It has been estimated that 60% to 70% of the officers are corrupt in one form or the other. For example, Clerks in the Court, Peons and attendees in all government departments, police constable draw poor salary. But this point is now proved to be invalid as after 6th pay commission of the Government of India, salaries of Government Employees now increase, and hence the meager salary as the cause for corruption has become invalid now.

4. Emergence of new sources of wealth and power

The modern political economic set up provides a chance for the politicians in power to make money through illegal means. This unholy understanding between the businessman and the politicians always encourage corruption.

5. The very presence of Black Money

Existence of large amounts of unaccounted Black Money is one of the main sources of corruption. "This money is obtained by various ways, namely, tax evasion, smuggling, speculation, in immovable property and shares and stocks, receiving fees and remuneration partly or wholly in cash without showings them in accounts, trading in licenses and permits....." (C.B Mamocia: 847)

All the factors mentioned above have generated a favorable atmosphere for corruption.

Corruption in public life and among public servants

Corruption has become widespread practice today. A large number of public servants are guilty of either practicing or supporting corruption. The term "corruption" has a very wide meaning and from the legal point of view, the following behavior patterns can be dubbed as corrupt practices.

1. Receiving same reward on the part of a public servant, for the work done by him in his official capacity. Ex-A doctor in a government hospital receiving monetary reward from a patient for having treated him.
2. Obtaining any object or pecuniary advantage illegally. Ex-police officer receiving 'masul' at the hands of small vendors found in footpaths of busy area of a city.
3. Misappropriation of public property. Ex-Government officers using their departmental vehicles for their personal tours, family purposes.
4. Refusal to do on some plea which may benefit the other party. Ex- police officer not registering a case to protect a criminal.

Corruption is so rampant that is found in all the ministries and departments of the central and the state Governments. In some ministries in the Union Government such as defense, petroleum, power and communication chances for 'making money' through corrupt practices are more. In the same way, certain departments such as police, income tax, sales tax, commercial tax, transport Etc, provide lot of opportunities for the public servants working in them to make money in an illegal way.

Hence, Corruption is so widespread today the people have come to accept it as a commonly approved practice. No wonder, if it becomes institutionalized in the days to come.

Reference to case matter, a recent Landmark judgment has been given by the Aurangabad

bench of the Bombay High Court relating to corruption in 2008

The Aurangabad Bench of the Bombay High Court has passed a landmark judgement in a corruption case which should sent shock waves among the corrupt officials who had amassed wealth and property disproportionate to their known sources of income and declared their wives as the owner of such property. The Aurangabad bench sentence Mangal Bai Wagh wife of Vashar Wagh, a cashier of the Minor Irrigation Department of a Zila Parishad to 3 years rigorous imprisonment and imposed a fine of Rs 2 lakh for possessing immovable property and a vehicle without any source of income. While her husband was sentenced to 7 years and a fine of Rs 3 lakhs holding that the wife was also culpable for sharing the ill-gotten wealth of her husband. Normally the corrupt officials take recourse to registering immovable property in the name of their wives or other family members to hoodwink investigation against them. The Bombay High Court judgement would prevent such illegal modus operandi by the corrupt officials.

Recently another judicial pronouncement of the Apex court has raised hopes that courts would not be lenient in dealing with corruption cases. A Bench of the Supreme Court consisting of Justice Arijit Pasavat and S.H. Kapadia ruled that no prior sanction from competent authority was required to prosecute a public servant, including present and former Minister in corruption cases for accepting a bribe or illegal gratification would not amount to discharge of official duty. The necessity of prior sanction has resulted in abnormal delay in prosecution of corruption cases. Sanction of prosecution is also used by the political parties in power to bargain support.

The Apex court's ruling would expedite prosecution of the pending cases. Politicians like Lalu Prasad, Mayavati, Prakash Singh Badal, accused in corruption cases not be brought to book so far as because of legal loopholes, but continue to occupy seats of power, M. Karunanidhi, Jayalalithaa and Chauthala also exercise immense influence in political arena though facing corruption cases. Mayavati and Jayalalithaa used gifts to amass enormous wealth, though acceptance of gifts is prohibited for Government servants under the Government Servants Conduct Rules. The former Chief Secretary of U.P Akhand Pratap Singh, a 1967 batch IAS Officer who was arrested on the charge that he had amassed wealth and huge property in the name of the family members and others was another glaring example of top bureaucrats succumbing to corrupt practices.

Thus, India will remain in the top list of most corrupt countries unless drastic measures are taken to root out corrupt politicians and bureaucrats from the administration.

Prevention of Corruption: Legislative Measures to contain Corruption

Corruption which has become widespread in the Indian society has to be contained in some way or the other. Legislative measures are very much necessary for this.

1. Prevention of corruption Act, 1947

Certain sections of the IPC could be used for punishing those who are guilty of taking bribe. The central government introduced in 1947 "The Prevention of corruption Act" for the more effective prevention of bribery and corruption. The Act, of course, has been a miserable failure in reaching its target, as we know that corruption has increased out of all proportions.

2. Prevention of Corruption Act, 1988

In order to bring all relevant legal provisions relating to the practice of corruption, the Central Government introduced the Prevention of Corruption Act, 1988. The Act consolidated the provisions of the prevention of Corruption Act, 1947, some sections of I.P.C, the criminal procedure code, and the Criminal Law, 1952.

This Act enlarged the scope of the term "public servant". The Act is now applicable to all the employees of the central and the union territories. However, M.P's, M.L.A's and M.L.C's, are kept out of the purview of this Act.

3. The Santhanam Committee and its recommendations

Corruption which has gone deep into our social life cannot be removed very easily. In fact, it can only be reduced or minimized, and can hardly be stopped altogether. No Nation has become Successful so far. Even for minimizing this problem, both preventive and punitive measures will have to be taken. Thus, the Central government appointed in 1962, a committee on "prevention of corruption" under the Chairmanship of K. Santhanam. The committee gave its report in 1964 in which it recommended various steps to be taken to contain corruption.

Thus, the committee recommended the following measures-

- a. A thorough study of the extent possible, scope and modes of corruption should be undertaken regarding each department, undertaking or ministry.
- b. Attempts should be made to educate citizens with regard to their rights, responsibilities and the procedures of the Government.
- c. Improvement must be made to increase the salary of the employees besides making necessary provisions for housing, Medical facilities for the government employees.
- d. Companies and businessmen should be obliged to keep detailed accounts of expenditure.
- e. There should be a complete ban on government servants accepting private commercial or industrial employment for two years retirement.

The central Government established another commission known as the Central vigilance Commission (CVC) in 1964 it as per the recommendations of this committee. The government also set up three other departments as anti- corruption measures:

- a. Administrative Vigilance Division (AVD) in the Department of personal and Training.
- b. Central Bureau Investigation (CBI)
- c. Domestic Vigilance Units in the Ministries/Departments/Public Undertaking/Nationalized Banks.

Other Suggestions to Eradicate Corruption

It is to be noted that legal measures alone are not sufficient for corruption. As supplementary to them, various measures are to be undertaken to control the practice of corruption.

In addition to the above recommendations made by the Santhanam Committee the following suggestions may be considered with a view to eradicate or minimize corruption, which are as follows

1. The taxation laws must be modified, licenses and permit system must be thoroughly reviewed.
2. Mass communication media must play a more positive role in encouraging honesty and discouraging and condemning dishonesty and corruption.
3. Bureaucratic corruption must be reduced by stringent enforcement of punitive measures against bribe-taking.
4. The law enforcing authorities must see that laws are rigorously enforced without any fear or favor.
5. Corruption trails should be given the widest possible publicity.

Besides the above measures, the Vohra committee and the Lok Pal Bill was also introduced to probe into corruption cases.

The Vohra Committee

The government had to set up in July 1993, the Vohra Committee to find out the links between government functionaries and political personalities and crime syndicates and mafia organizations. The committee which submitted its report in October 1993 strongly recommended the setting up of an independent agency to probe into corruption cases.

The Lok Pal Bill

The Central government previously tried to introduced the Lok Pal bill in the Lok Sabha for several times but was not able to pass the bill. The BJP-Led NDA government has shown great interest in introducing this bill in the parliament. Appointing Lok Pals to look into the charges of corruption at the level of those holding high offices, may prove to be an effective measures in containing corruption.

Thus, from the above foregoing discussion we came into conclusion that corruption today has ceased to shock people. It is a cancer which is eating the vitals of the Indian society. It seems that it may not be possible to root out corruption completely at all levels but it is certainly possible to roll it down or to contain it within the tolerable limits. People, instead of making compromises with corruption must make up their mind to fight it. Only then the evil practice of corruption could be contained.

INTERNATIONAL CRIMINAL COURT (ICC)

Monti Gogoi

B.A.L.L.B. 8th Semester

International crimes may be referred to those crimes which are recognized by the international community on account of the consideration that their prevention is essential for the protection of fundamental interests of the community. This implies that whether a crime is an international crime or not is decided by the states themselves after taking into account its nature and its relationship with the fundamental interests of the international community. The incidents of international crimes are required to be prevented as they disrupt or jeopardize the normal course of international relationship and threaten international peace and security.

During the time of the League of Nations, only a few crimes such as slavery, counterfeiting, and narcotic drugs came to be recognized as international crimes by concluding multilateral treaties. The United Nations has taken a leading role in the field of crime prevention and formulation of standards and norms of criminal justice and seeks international cooperation in solving international problems of economic, social, cultural or humanitarian nature. A series of crimes presently have been generally recognized under international law, which are genocide, piracy on high seas, aircraft hijacking and the unlawful acts against the safety of civil aviation, traffic in women children, narcotic drugs, counterfeiting currency, kidnapping of diplomatic personnel and other offences, taking of hostages, apartheid, slave trade, psychotropic substances, crimes in times of war.

Persons committing these crimes are prosecuted by the states where they are found or where the crime has been committed if extradited. In both the case prosecution is carried on according to the national laws of the states. The system of the application of national laws by the domestic courts to the offenders appears to be unsatisfactory for a number of reasons. The system may lead to different treatment to the offenders belonging to different states. Further, domestic judges may also be not impartial when the vital interest of their country is at stake especially when the offender belongs to a hostile or enemy state.

The absence of any permanent of criminal court led states to establish ad hoc tribunals from time to time to prosecute offenders. After the Second World War, two International Military Tribunals were established at Nuremberg and Tokyo for the prosecution of the major German and Japanese war crimes respectively of the Second World War. In addition to this, two International Tribunals have been set up by the Security Council one in the year 1993 for the prosecution of the

persons responsible for serious violation of international humanitarian law in the territory of former Yugoslavia, and other in 1994, for the prosecution of those persons who were responsible for the genocide and other violations of international humanitarian law in Rwanda and Rwanda citizens responsible for genocide in neighboring states. But the system for the creation of ad hoc tribunals suffers from a number of defects. It is not only time consuming, difficulties also arise to the competence, appointment of the judges and prosecutors and as to the seat. It is to be noted that International Court of Justice does not have competence to decide the cases of individuals. It is therefore desirable to establish a permanent international court to administer criminal justice which would not be limited in its mandate to specific crimes or to a particular criminal.

With the establishment of United Nations, proposal for the establishment of the court was made with great enthusiasm. At the request of the General Assembly in 1950, the International Law Commission studied the desirability and possibility of establishing an international judicial organ for the trial of genocide and certain other crimes. The Commission concluded that the establishment of International Criminal Court was both possible and desirable.

After a long interval, the General Assembly on its part, passed resolution 51/207 on 17th December, 1996 through which it decided to hold a Diplomatic Conference of Plenipotentiaries in 1998 with a view to finalizing and adopting a convention on the establishment of an International Criminal Court. In its resolution 52/160 of 15th December, 1998, the General Assembly accepted the offer of Italy to act as host to the conference and decided to hold the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court in Rome from 17th June, 1998, the Conference adopted the statute known as Rome Statute of the International Criminal Court. Besides the Preamble, there are 128 Articles in the Statute and are divided into 13 parts. Article-1 lays down that -an International Criminal Court is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern. The Constitution of the court lays down that the court shall have eighteen judges. The member may be increased on a proposal made by the presidency in this regard indicating the reasons for the increase. All the judges shall hold office for a term of nine years and shall not be eligible for re-election. The qualifications of the judges are also provided in the statute. The judges shall be chosen from among persons of high moral character, impartiality and integrity and they shall possess the qualifications required in their respective states for appointment to the highest judicial officers. The judges shall be independent in the performance of their functions.

The composition of the court is stated under Article 34 of the statute which lays down the following organs -

1. The Presidency
2. An Appeals Division, a Trial Division and a Pre- Trial Division.
3. The Office of the Prosecutor and
4. The Registry.

The aspect of jurisdiction is one of the most important parts of this court; it says that that the jurisdiction of the court shall be limited to the most serious crimes of concern of the international community as a whole. The court shall have jurisdiction with respect to the following crimes -

1. The crime of genocide
2. Crimes against humanity
3. War crimes, and
4. The crimes of aggression.

Genocide, for the purpose of the statute means any of the acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such killing members of the group, causing serious bodily or mental harm to the members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part imposing measures intended to prevent births within the group.

children of the group to another group. War crimes means grave breaches of the Geneva conventions of August 12, 1947 committed against persons or property protected by the convention. For instance, willful killing, torture or inhuman treatment, including biological experiments, serious injury to body and health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war and other prosecuted person to serve in the forces of a hostile power, willfully depriving a prisoners of war or other prosecuted persons of the right of fair and regular trial, unlawful deportation or transfer or unlawful confinement and taking of hostages.

As to the crime of aggression, the court shall exercise jurisdiction only after it has been defined by the Review Conference which shall be convened by the Secretary General of the United Nations, seven years after the entry into force of the Statute, and if amendment is made. A state which becomes party to the statute thereby accepts the jurisdiction of the court with respect to the above crimes. The court shall have jurisdiction over the crimes which are committed on the territory of the State Party or committed on board or vessel or aircraft. The court shall also have jurisdiction over a person if the accused of the crime is a national of the State Party. The above provisions imply that the states by becoming parties to the statute ipso facto, grant consent a priori to the ICC to exercise jurisdiction over the above crimes stipulated in Article 5 of the statutes. Those States which are not parties to the Statutes, the court has to obtain consent from the States concerned in order to exercise jurisdiction. The court will have jurisdiction only over crimes committed after 1st July, 2002, when the Statute entered into force.

The penalties of the court are laid down under Article 77 of the Statute. The court may impose one of the following penalties on a person convicted of crime: Imprisonment for a specified number of years which may not exceed a maximum of 13 years, or a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

In addition to imprisonment, the court may order a fine under the criteria provided for in the rules of procedure and evidence, a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bonafide third parties. It is to be noted that the court does not have any enforcement powers. It can neither enforce its own arrest warrants nor its own jurisdictions. The court depends primarily on the cooperation of the states and as a secondary resort to international and other organizations.

Thus, we can see and say that an international criminal court can play a critical role in dispensing justice to the victims of the war crimes, genocide, and terrorism especially in those areas where the perpetrators were also close to those were also close to those in governance. Establishment of such institution will surely advance the concept of international governance which is supposed to be the apex step of world democracy. Sticking to the sovereignty by the nation state itself is a stumbling block for the creation of international governance and the same has happened to the International Criminal Court. Its creation has a great relevance in the world democracy and thereafter every citizen of the counter should appeal to the Indian government to become a signatory to the process of creating an International Criminal Court. If taken positively, then certainly it will be a milestone.

OFFICE OF PROFIT AND THE CONTROVERSY THEREIN

Mosaraf Hussain
BALLB 8th Semester

The expression 'office of profit' has often created chaos and controversy among the legislators

regarding the disqualification of the members in the Parliament or even in the state legislature. It is one of the grounds of disqualification of a person for being chosen or continuing as a Member of Parliament or State Legislature under Article 102(1)(a) and Article 191(1)(a) of the Constitution of India. Clause (a) of Article 102(1) provides that a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament if he/she holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder. Article 191(1)(a) also applies the same condition in case of State Legislators. In ordinary parlance it means an office or profit or position, which brings to the person holding it some pecuniary gain or advantage or benefit. But the expression has not been defined in the Constitution or in the Representation of the People Act, 1951. It is for the courts to explain the significance and meaning of this concept. Over the years, courts have decided this issue in the context of specific factual situations.

It is however clear that before a person can be held to be disqualified under Article 102(1) (a) or Article 191(1) (a) three things must be proved:

- i. That he held an office;
- ii. That it was an office of profit; and
- iii. That it was an office under the Government of India or the State Government.

Office, in its fullest sense embraces the elements of tenure, duration, duties and emoluments but the element of emolument is not essential to the existence of an office. It means a fixed position for performance of duties (Mahadeo v. Shantibai, (1969)2 SCR 422,426).

In MacMillan v. Guest, Lord Wright observed: "The word 'office' is of indefinite content. Its various meanings cover four columns of the New English Dictionary, but I take as the most relevant for purposes of this case the following: a position or place to which certain duties are attached, specially one of a more or less public character."

Office of profit means an office capable of yielding a profit or from which a man might reasonably be expected to make profit. The actual making of profit is not necessary. Profit means pecuniary gain or any material benefit [S.S. Inamdar v. A.S. Andanappa, (1971) 3 SCC 870]. Further the office of profit must be held "under the Government of India or Government of any State". Ordinarily, there are five tests which determine that the office of profit is under the government:

- i. Whether government makes appointment to the office;
- ii. Whether government has the right to remove or dismiss the holder of office;
- iii. Whether the government pays the remuneration;
- iv. Whether the functions which the holder of the office performs are for government;
- v. Does the government exercise any control over the performance of the functions?

It is to be noted here that it is not necessary that all the above are present together and that if one of the above is absent, the test is not satisfied. In Abdul Shakur v. Rikhabchand, the facts that were held to be decisive were: (i) the power of the government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion; and (ii) payment out of government revenues.

Exceptions: If a person holds an office of profit, he/she shall not be disqualified for being chosen as member of either House of Parliament if that office of profit is declared by Parliament by law not to disqualify its holder. By virtue of Section 3 of the Parliament (Prevention of Disqualification) Act, 1959 the following offices are declared as not to disqualify their holders for membership of either House of Parliament:

- a. Any office held by a Minister, Minister of State or Deputy Minister for the Union or for any State, whether ex-officio or by name;
- b. The office of Chief Whip, Deputy Chief Whip or Whip in Parliament or of Parliamentary

Secretary;

- c. The office of a member of any force raised or maintained under the National Cadet Corps Act, 1948, the Territorial Army Act, 1948, or the Reserve and Auxiliary Air Forces Act, 1952;
- d. The office of a member of a Home Guard constituted under any law for the time being in force in any State;
- e. The Office of Sharif in the city of Bombay, Calcutta, or Maras;
- f. The Office of a chairman or member of the Syndicate, Senate, Executive Committee, Council or Court of an University or any other body connected with a University;
- g. The office of a member of any delegation or mission sent outside India by the Government for any special purpose;
- h. The office of chairman or member of a committee, set up temporarily for the purpose of advising the Government or any other authority in respect of any matter of public importance or for the purpose of making an inquiry into or collecting statistics in respect of, any such matter, if the holder of such office is not entitled to any remuneration other than compensatory allowance;
- i. The office of chairman, director or member of any statutory or non-statutory body other than any such body as is referred to in clause (h), if the holder of such office is not entitled to any remuneration other than compensatory allowance, but excluding (i) the office of chairman of any statutory or non-statutory body specified in Part I of the Schedule and (ii) the office of chairman or secretary of any statutory or non-statutory body specified in Part II of the Schedule;
- j. The office of village revenue officer, whether called a Lambardar, Malguzar, Patel, Deshmukh or by any other name, whose duty is to collect land revenue and who is remunerated by a share of, or commission on, the amount of land revenue collected by him, but who does not discharge any police functions.
- k. There are also enactments, such as, Muslim Wakf Act, 1954, Rubber (Production and Marketing) Amendment Act, 1954, Tea (Second) Amendment Act, 1954, which made specific provisions that an office created by such Acts shall not be deemed to be an office of profit for the purpose of disqualification from being Chosen as a Member of Parliament.

History

The view that certain offices or positions held by a Member of Parliament may be incompatible with his/her duty as an elected representative of the people had its origin in the Parliamentary history of the United Kingdom. The concept of 'office of profit' has a history of more than four centuries in United Kingdom and it has evolved through many phases. As we have adopted the British Parliamentary form of Government, the concept of 'office of profit' was also adopted with some modifications. The concept of 'office of profit' began to develop with the entry of non-official members in the Legislature. A clear and precise statement in this regard was made in Section 26(1)(a) of the Government of India Act, 1935 which provided that a person shall be disqualified for being chosen as, and for being, a Member of either Chamber if he held any office of profit under the Crown of India, other than an office declared by Act of the Federal Legislature not to disqualify its holder. When the Constitution of India came into force on 26th January, 1950 declaring that a person holding an office of profit would be disqualified, the explanation to Article 102 clarified that a person who is a Minister (either for the Union or for any State) shall not be deemed to hold an office of profit. However, there existed Ministers of State as also Deputy Ministers in the Union Government who were not specifically exempted from disqualification under Article 102 because the expression 'minister' was construed as referring only to a Cabinet Minister. In order to address this situation, the Parliament (Prevention of Disqualification) Act, 1950 was enacted.

This was followed by the Parliament (Prevention of Disqualification) Act, 1951 declaring that certain offices under the government shall not disqualify, and shall be deemed never to have disqualified the holders thereof for being chosen as, or for being, Members of Parliament. The said

Act was given retrospective effect from 26.1.1950. Further in 1959 the Parliament (Prevention of Disqualification) Act, 1959 was enacted, thereby declaring that certain offices of profit under the government shall not disqualify the holders thereof for being chosen as or for being, Members of Parliament.

The Court also noted the Constitutional provisions in this regard that "Article 102(1)(a) lays down that a Member of either House of Parliament shall be disqualified if he holds any 'office of profit' under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder. Section 101(3)(a) provided that if a Member of either House of Parliament becomes subject to any of the disqualifications mentioned in Article 102(1), his seat shall thereupon become vacant. Article 103 provides for reference of any question as to whether a Member of either House of Parliament has become subject to any of the disqualifications mentioned in Article 102(1) to the decision of the President, whose decision on the question is made final."

Present scenario

The question whether a person holds an office of profit has to be interpreted based on the facts and circumstances of each case and the relevant statutory provisions. In *Ashok Kumar Bhattacharya vs Ajoy Biswas* (AIR 1985 SC 211) the Supreme Court held that to determine whether a person holds an office under the Government, each case must be measured and judged in the light of the relevant provisions and sections.

A Constitution Bench of the Supreme Court in *Guru Gobind Basu vs Sankari Prasad Ghosal & others* (AIR 1964 SC 254) ruled that the decisive test for determining whether a person holds any office of profit under the Government is the test of appointment. There are several factors that enter into the determination of this question such as: appointing authority; the authority vested with the power to terminate the appointment; the authority that determines the remuneration; the source from which the remuneration is paid; the authority vested with the power to control the manner in which the duties of the office are discharged and to give protection on that behalf.

The Supreme Court has further held that it is not necessary that all these factors must co-exist. The court also held that stress on one factor or the other would depend on the facts of each case. The Election Commission of India (while recommending the disqualification of Jaya Bachchan from the Rajya Sabha) also opined that any post, even if held in an advisory capacity, was an office of profit, unless the facts of each case are carefully gone into by the Joint Committee, a comprehensive legislation may not be successful. The opinion of the Law Commission of India on this aspect may also be a guiding factor. Unlike in India, in England whenever a new office is created, the law also lays down whether it would be an office of profit or not.

Jaya Bachchan's disqualification, the Union Government's proposed Ordinance to save some MPs, the opposition's hue and cry that the ordinance was to save Mrs Sonia Gandhi, and strategic resignation of the later to disarm the opposition and remove the sting in their attack led to a very serious controversy over the offices, their profits, and the control of the government over them. A nation-wide debate is going on over the controversy of disqualification of MP's and MLA's on the Ground of holding offices of profit in Indian Political system. It began with the disqualification of "Samajwadi Party MP Jaya Bhachan from Rajya Sabha on March 17, 2006 with retrospective effect from 14th July, 2004. After this event, leaders of different political parties performed much hue and cry. Finally Sonia Gandhi resigned from the Lok Sabha pretending the issue of morality. Very soon the controversy took a constitutional crisis and different state governments rushed to save their pillars of powers.

Sonia Gandhi Issue

Congress President Sonia Gandhi was a member of Lok Sabha. She was appointed as the Chairperson of National Advisory Council by the UPA government. She also held several posts under the government. Complaints were registered against her, and she chose the safe route of resignation. So that she could continue her impression of being the statue of sacrifice and morality.

Ramakrishna Hegde Case

In *Ramakrishna Hegde vs State of Karnataka*, Hegde was a member of Karnataka Assembly. He was appointed as Deputy Chairman of the Planning Commission. He did not draw any salary but only allowances like traveling allowance, daily allowance, conveyance allowance, house rent allowance, etc., and The High Court ruled that it would not disqualify him. There is an enactment in Karnataka, Karnataka Legislature (Prevention of Disqualification) Act, 1956 which exempts this post from being considered as 'office of profit'. Parliament and Legislatures are having power, according to Article 102 and 191, to declare certain posts as not to be considered as 'office of profit'. The Parliament (Prevention of Disqualification) Act, 1959 declared the offices which are listed therein are not 'offices of profit'. The purpose of this disqualification is to avoid conflict between duty and interest. The legislators should be free from any interest when they are performing the duty as legislator and representative of people.

Tests for determining whether an office is an 'office of profit' under government are as follows: i) whether the government makes appointment ii) whether the government has the right to remove or dismiss the holder of office iii) whether the government pays remuneration iv) whether the functions performed by the holder are carried on by him for the government and v) whether the government has control over the duties and functions of the holder.

This means the money or salary is not the criteria at all to consider whether the 'office' has any 'profit' attached to it or not. The Executive power, control of the Government, power of government in appointing or dismissing the office holder will make that an office of profit. A government servant is disqualified to be a member of House. The government servant should be relieved from duties before he files nomination to avoid the disqualification.

In *Joti Prasad v Kalka Prasad*, it was held that a Vice-chancellor of a University appointed by the Governor in his capacity as the Chancellor of the University does not hold an office of profit, as the government had no power to appoint or remove him. A teacher in a government aided school does not hold an office under the government, for the school, though under government's control and supervision, still has its own separate personality, property and funds.

The emphasis should be on the nature of the post held and the possibility of conflict between duty and interest of an elected member and to appreciate the same the test is whether the government has power to appoint or dismiss the employee who is being chosen as a legislator.

AP Legislator's Case

In *Satrucharla Chandrasekhara Rajuv Vyricherla Pradeep Kumar Dev*, *Satrucharla* was a single teacher in a primary school run by Integrated Tribal Development Agency by its project officer who was the district collector. The ITDA is a registered society with Government control. He was suspended for some irregularities. Later he was elected to Legislative Assembly of AP. High Court ruled that he held an office of profit and disqualified, because the state government has total control over his post and position. Then the Supreme Court reversed the order and held that it was not an office of profit, because the society has the authority to appoint and remove. Though the government also has some power it was not a direct control over the teachers themselves under the scheme of ITDA. The right to appoint and remove the holder of office in many cases becomes an important and decisive test.

If this provision is applied in a strict and narrow construction, it will amount to preventing many prominent and other eligible persons to contest the elections which form the fundamental basis for the democracy.

There may be further disqualification under any other law, besides the Constitution. The Representation of People Act debar a person, who holds the office of a managing agent manager or secretary of a company or corporation in the capital of which the government holds not less than 25% share, from being chosen as a member of the Legislature to which the Government is responsible.

Jaya Bachchan's Office and the Control of Government

The President's decision to disqualify Samajwadi Party MP Jaya Bachchan on a petition by a Congress activist who sought her disqualification on the ground that she was Chairperson of the UP Film Development Council, an office of profit kicked off the debate. The President has issued such an order on the recommendation of the Election Commission, who is authorized to receive complaints and recommend the action as per the law. When Election Commission examines the complaint, it has to depend upon the judicial decisions to interpret the character of office, profit and control of the government. On its recommendation the President has to act upon. Prior to her election, she had resigned from the post of Uttar Pradesh Film Development Corporation. However, after the election she assumed the charge as chairperson of UPFDC on July 14, 2004. On the basis of documents and pleadings, the Commission noted that Mrs. Bachchan was entitled to a daily allowance while traveling inside and outside UP and was entitled to a chauffeur driven car, free accommodation in state government guest houses and local hospitality on tour. The daily allowance of Rs 600 inside UP was considered a source of profit to the incumbent. It did not buy the argument that Bachchan was an affluent person and the benefits granted to her by the government were immaterial. "The issue is one of law and not the financial status or standing of the person appointed to the office of profit under the government," the Commission held and came to the opinion that she became disqualified under the Constitution.

Role of Election Commission

The Election Commission, which is now flooded with several complaints against sitting legislators for holding 'office of profit' has taken notice of the petitions received against 10 CPI(M) MPs, including the Speaker, and others and in most of the cases it has sought more information from the petitioners because "details were lacking". It is reported that the Election Commission has asked the petitioners including Mukul Roy of the Trinamool Congress to give details like the date of appointment of the MPs to the office said to be held by them along with documentary evidence to substantiate their contention that they were offices of profit. The Commission's jurisdiction will come into force when an MP or MLA becomes a subject of disqualification only if he is appointed to the post after he becomes a member of the House. In case, the MP or MLA had been appointed before his election, then a complaint could only lie in the form of an election petition in the High Court, which is also bound by law of limitation. However it is the duty of the Election Commission and its officers to look into the nominations and study whether they hold any post, which would disqualify them for contesting elections. Since it is constitutionally prescribed disqualification and strikes at the root of the validity of membership, the election officials need to check whether a particular contestant holds any such office under government. It is also the duty of people in general and rivals in particular to bring such a fact to the notice of returning officers. An employee cannot contest. The resignation, acceptance and due relieving orders are insisted upon as basic requirements to contest. Why not the office of profit as 'disqualification' should not be looked into?

Jharkhand Dilemma

A big chunk of Jharkhand MLAs were facing the problem of disqualification, but heaved a sigh of relief when on March 24, 2006 the Assembly passed a Bill to protect them. At least 19 Jharkhand MLAs keeping their fingers crossed ever since their names were referred to Chief Election Commissioner BB Tandon for "holding offices of profit". Earlier the State Advocate General claimed that all the members of the Assembly were shielded by a 1950 Act of undivided Bihar. "Section 84 of the Bihar State Reorganization Act, 2000 mentions that all Acts enacted before creation of Jharkhand shall be applicable to the new State, and under Section 85 it gives the option for modification of any Act adopted by Bihar," according to the Advocate General. The 1950 Act exempted the office of the chairman or member of any committee or body appointed by the Central or a State Government. The Bihar Legislature (Removal of Disqualifications) Act of 1950 stipulated that holders of certain offices shall not be disqualified for being chosen as, or for being, members of the Bihar Legislative Assembly or the Bihar Legislative Council. But the big question is

a condition stated in the schedule in the Act. It states, "a person shall not be (and shall be deemed never to have been) disqualified...Provided that the chairman or member of any committee or body does not receive any remuneration other than compensatory allowance." The Act only allows "travelling allowance, daily allowance, or any allowance in the shape of honorarium, which may be paid to the holder of the office for the purpose of reimbursing the personal expenditure incurred by him in attending the meetings of the committee or body or performing any other functions as the holder of the said office." Senior BJP leader and vice-chairman of the State Planning Commission Saryu Roy claimed that except for the Leader of the Opposition Sudhir Mahto, who is among the 19 MLAs referred by Governor Syed Sibtey Razi to the CEC, "the remaining 18 members are protected by the act as they are either chairman or member of any committee or body". As they were not sure of this protection, the Jharkhand Government decided to move a bill.

Like Uttar Pradesh the Jharkhand legislature also passed a law to protect their legislators without losing the second 'office' amidst protests. There was another similarity in opposing the Bill as they were intended to save the members of ruling party. In the UP assembly when the Mulayam Singh Yadav government passed a bill aimed to protect SP leaders Jaya Bachchan and Amar Singh's Rajya Sabha seats, there was a similar opposition. Amidst opposition uproar and pandemonium, the Arjun Munda government also passed bill to save four NDA MLAs holding offices of profit.

Interestingly, the UP bill passed on March 9, 2006 is called the UP State Legislature (Prevention of Disqualification Amendment) Bill 2006, whereas Jharkhand's bill is called Jharkhand State Legislature (Removal of Disqualification) Bill 2006. The UP Bill exempts 79 posts The UP State Legislature (Prevention of Disqualification) Act, 1971, amendment bill introduced with retrospective effect from January 1, 2003, which the assembly passed on March 9. It exempts heads of 79 corporation, boards and councils from posts of profit. In the amendment, the government has proposed that the term 'daily allowances' be changed to 'honorarium' so that parliamentarians can financially benefit from more than one office without attracting the provisions of disqualification in the Act. Under the new bill, the posts held by legislators in boards, corporations and other such offices will be not be counted under the category of office of profit. A total of 22 posts have been included in the list, which will prevent the disqualification of any legislator. By passing this bill, the Government has not only saved the four legislators but the government itself, because it was having a wafer thin majority in the house. While the UP Governor cleared four other bills, he decided to seek the opinion of legal experts. Though the bill could not save the seat of Jaya Bachchan in Rajya Sabha, it provides a perfect legal ground for other members who are similarly charged or the complaints against whom the Election Commission is considering. Consensus to amend the law The UPA Government initiated the process to seek consensus to amend the law. The Government is considering whether to amend the definition of office of profit under the Parliament (Prevention of Disqualification) Act, 1959, or bring in a fresh Bill. Most of the parties that Parliament and not the Election Commission be given the right to determine what constitute an office of profit, according to Mr. Dasmunsi, the Union Minister who discussed with the parties. The Left parties favored a comprehensive Bill before Parliament. Abani Roy (RSP) favored an all-party meet. Even the main opposition BJP, and its allies wanted the term 'office of profit' be defined, which means giving exemptions.

Impact of these Amendments

These attempts of UPA Government at the center to achieve consensus to amend the law to facilitate some MPs to hold additional office of profit, indicates the climax of the trend of the governments to dilute the spirit of the Constitution. Already Uttar Pradesh and Jharkhand made the laws permitting legislators to hold hundreds of offices of profit under the Government. If the Parliament also passes a law carefully protecting all prominent members, every state will follow the suit and there will be spate of legislations in states totally circumventing the Articles 102 and 191, which kills the independence of legislators and permits the executive to allure the MPs. All the political parties are generally in the same situation as the Congress and Samajwadi Party are. Hence there would be unprecedented unity and consensus among all the parties to protect their political

interests of present and future. The casualty is the spirit of the constitution. The political parties, which pounced upon Jaya Bachchan and Sonia Gandhi, have no moral status to reach an agreement to dilute this constitutional ideal.

Removal of every disqualification forms basis of concentration of power. It appears that the purity and independence of legislative membership is the target of every political party so that their people enjoy more than one position without threat of 'disqualification'. Generally it is commented that politicians aim at next election while the statesmen work for next generation. Our politicians' aim is much narrowed down, as they are interested in securing couple of power centers to their members.

The people who argue for reforms and corruption-free-political-offices need to develop a comprehensive vision. While a few talk about horse-trading for hammering out a coalition out of a hung house, some others discuss the cleansing of legislatures by weeding out criminals. On one hand the sting operations hit at bribe taking MPs putting a total full stop for their political career, and on the other, cabinet positions and corporation chairmen posts become the most offered allurements to switch the sides, in spite of a stricter anti-defection law. The present controversy on office of profit is just one facet of political corruption, which is totally in contradiction to the letter, and spirit of constitutional governance. The Parliament Members (Removal of Disqualification) 1959 needs no amendment. The expression 'office of profit' needs no definition as the judiciary has already explained the criteria where an office has to be termed as an office of profit under government. If at all it is amended, the expression should be given the meaning which is deliberated and concluded by the judgments. The list, which, now exists under the 1959 law should not be expanded because it dilutes the spirit of separation of legislature from executive. Any attempt to exclude the corporation chairman positions and other public offices from the operation of disqualification would be unconstitutional and not justified.

PUBLIC INTEREST LITIGATION

Mrinali Das

BALLB 8th Semester

Public Interest Litigation is a process through which a legal action can be created or initiated in a Court of Law for the enforcement of the public interest. It is well known that the fundamental rights are the basic rights of an individual to live with a human dignity. But only by giving the rights to the people is not enough, if these rights are not enforceable on its violation. Thus we can say that a declaration of fundamental rights is meaningless unless there is effective machinery for the enforcement of the rights. It is remedy which makes the rights real. And so, our Constitution makers have incorporated a long list of fundamental rights and also provided for its enforcement provision under the Article 32 of the Indian Constitution. Article 32 is itself a fundamental right.

Dr. B. R. Ambedkar said that "If I was asked to name any particular Article in this Constitution as the most important, an Article without which this Constitution would be a nullity__ I could not refer to any other Article except this one..... It is the very soul of the Constitution and the very heart of it".

Under Article 32(1) of the Constitution, though guarantee of right is provided to move to the Supreme Court by appropriate proceedings, we also found that the Directive Principles of State Policy under Articles 38 and 39A have also been taken into account in allowing the development of the Public Interest Litigation. Article 38 provides that the State shall strive to promote the welfare of the people, and also strive to minimize the inequalities in income and endeavor to

eliminate inequalities in status, opportunities not only among the individuals but also amongst the groups of people. Article 39A of the Constitution provides that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall provide free legal aid.

Aim of Public Interest Litigation is to provide an effective remedy to the poor, weak, illiterate persons to enforce their rights and interests. It is not in the nature of adversary litigation but it is a challenge and opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the significant tune of our Constitution. When the Court entertains the Public Interest Litigation, it does not do so in a controversial mood or in a view to tilting at executive authority, but its attempt is only to endure observance of social and economic programs framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive, the Court is thus merely assisting in the realization of the constitutional objective.

Traditionally, it was found that a person whose fundamental rights are violated can only move to the Supreme Court for the enforcement of his rights. But this Locus Standi rule has been relaxed by the Supreme Court in its recent rulings. The Court nor permits public Interest Litigations or Social Interest Litigation at the instance of 'public spirited citizens' for the enforcement of the Constitutional and other legal rights of any person or group of persons who because of their poverty or socially or economically disadvantaged position are unable to approach the Court for relief. But we must be careful to see that the member of the public, who approaches the Court in case of the litigation, is acting in bonafide manner and not for its personal gain or private profit or political motivation or other public consideration. Thus any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provisions of the Constitution. This is absolutely necessary for maintaining the rule of law, furthering the cause of justice and accelerating the peace and realization of the constitutional objectives.

Importance of Public Interest Litigation in Judicial Activism and Public Welfare

The main object of the judicial activism is to maintain the rule of in the Country. The rule of law requires each organ of the Government to perform the functions assigned to it by the Constitution. If the Legislature does not make required law and the Executive does not execute the law, does not arrest the law breakers, there will be complete death of rule of law. The Court cannot be and should not be a party to it as it is the guardian of the Constitution and protector of the rule of law in the country. Development of the public interest litigation has provided a significant assistance in making the judicial activism meaningful. The Court has given several important directions to the executive and the Legislature at the instance of the Public Interest Litigation on account of the public interest litigation, the court has found an opportunity to give directions in public interest and enforce the public duties. Several directions and orders relating to environment protection, labor welfare, investigation by CBI or police, human rights, etc., has been issued in Public Interest Litigation cases.

The PIL cases have revealed the plight of the labor classes and the inactiveness on the part of the government in implementing the labor laws and provide an opportunity to the Court to provide relief. The Supreme Court has made it clear that the right to life guaranteed under Article 21 of Indian Constitution should be taken to mean right to live with human dignity, free from exploitation.

The Supreme Court of India has also delivered several judgments for the child welfare also. In a case namely, *M.C .Mehta vs State of Tamil Nadu*, the Court has held that the employment of the children in match factories directly connected with the manufacturing process up to final production of match sticks or fireworks should not be at all be permitted. They can be employed but this packing process should be done in area away from the place of the manufacture. And along with this the children's must get all the facilities like proper diet, fixed wages, education, recreational

activities, etc. thus, the PIL has provided the Court an opportunity to compel the state to enforce the laws enacted for the child welfare.

The Court also gave several directions to make the CBI and CVC more efficient and effective. According to it, the Central Vigilance Commission shall be responsible for the efficient functioning of the CBI. The CBI shall report the CVC about the cases taken up by it for investigation, progress of investigation, etc. the CVC shall review the progress of all cases moved by the CBI for sanction of the prosecution of public servants which are pending with the competent authorities.

Regarding blood-banks certain defects in the matter of collection, storage and supply of blood was brought to the Court by the PIL. The Court thus directed for establishment of a National Council of Blood Transfusion. The Court directed for separate legislation for regulating the collection, storage, distribution and transportation of blood and operation of blood banks.

By PIL the fact of contempt of Court is brought to the knowledge of the Court and thereby the Court gets an opportunity to punish the contemnor. The prevention of Contempt of Court is necessary to maintain the faith of the people in the administration of justice which is necessary for the existence of the orderly society.

Abuse of PIL

In spite of the beneficial impact of the PIL, the use of this new strategy by the Court for the enforcement of various fundamental rights and other legal rights, it is criticized by many. It is said that by entertaining the violation of fundamental rights by a letter, Court will be flooded with litigation & it results in delay in deciding many other important cases. It is also pointed out that interference by the Courts through the PIL in the sphere of Executive and Legislature is not justified as it likely to cause a conflict between the three organs of the government. Sometimes such action has been taken by the judges on the basis of the newspapers reports. But this has been criticized on the ground that thereby the judge assumes the role of petitioner as well and thus acting against the judicial precept, no body should be a judge in his own case.

It is also criticized on the ground that it can be misused for private motive or the political ends.

PIL has now a day, largely become 'publicity interest litigation' or 'politics interest litigation' or latest trend 'pauper income litigation'. Much of public interest litigation is really blackmail. PIL which was initially created as a useful judicial tool to help the poor and the weaker sections of the society who could not afford to come to the court has in course of time, largely developed into an uncontrollable and a nuisance which is threatening to choke the dockets of the superior courts obstructing the hearing of the genuine and the regular cases which have been waiting to be taken up for years together.

Thus, the Supreme Court has observed that the PIL may be entertained when an issue of great public importance is involved but not to settle private scores. In spite of its defects, one cannot deny its significance. It is one of the stronger weapons in the hands of the public for the enforcement of their rights in case of its violation. And thus, no one is deprived from fully enjoying of their rights on the ground of poverty or backwardness.

STATUTORY PROTECTION TO WOMEN

Nahid Raisa Ahmed
BALLB 4th Semester

Violation of women's right and unequal status of women have emerged today as a fundamental crisis in social development in the world. India is also a no exception to it. In spite of various social

reform movement and legal & constitutional provisions, the women folk is suffering from inequalities and violence. The violence and crime against women can be studied as under:-

1. Bride burning or the crime relating to Dowry death 2. Rape 3. Immoral Traffic in girls and women 4. Domestic violence and 5. Early child marriage.

Rape, Dowry, Murder, sexual harassment on the working place and in police custody are all crimes against women and violence of their rights. Reports of National crime record Bureau shows that every 51 minutes women is sexually harassed, in every 54 minutes she is raped and in every 102 minutes there is a Dowry death. These estimates do not include the unreported ones.

Domestic violence has been identified as major cause of injuries to women. The protection of women from Domestic violence at 2005 was enacted to provide for more effective protection of women guaranteed under the constitution on who are the victims of violence of any kind occurring within the family.

After independence, the government of India sought by legislation and other means of change wrong practices and to uplift the condition of the women-hood.

The constitution of India has guaranteed certain fundamental rights to the Indian with provision against discrimination and guarantee of equality before Law and equal protection of Law. Article 14 of the constitution based reasonable classification based on Sex, Caste, Religion and place of birth. Article 15 permits discrimination subject to certain exception. Under Article 15(3) States can make special law for women and children.

Section 66 of C.P.C prohibits arrest and detentions of women in exceptions for payments of money.

A special attention has been made to the women in the directive principle of state policy, though they are not justifiable in the Governance of the country.

Parliament of India passed equal remuneration act 1976. Equal pay for equal work is a goal attainable through Constitutional remedies. Article 42 provides that the State shall make provision for securing just and human condition of work of women and for their maternity relief.

India, being a welfare State owes a duty to provide justice to them who on account of various reasons are not able to get justice; legal aid can be provided by organizing Lok-Adalat and by approaching the High Court and the Supreme Court by way of Public interest litigation.

Family court Act was passed in 1986 with the aim to make legal process less technical.

Indian Panel Code contains some protective provisions for women.

Section 136 exempts harbor even by a wife to a deserter from Army, Navy and Air force.

Section 354 provides that an indecent assault to outrage modesty of a woman is punishable. Under Section 361 taking or enticing a girl child under 18 years out of the keeping of the lawful guardians without the consent of such guardian is the offence of kidnapping.

Section 356(A) was inserted in to I.P.C for the suppression of traffic in women and children.

Under Section 375 stringent measures are provided for the offence of rape on a women and female child. Custodial rape is punished by a minimum imprisonment of ten years under Section 376(2B).

Under Section 493 to 498 are offences relating to marriage and protect a women from mock marriage and punishes a deceitful who co-habits with her causing her to believe that she is lawfully married to him.

Under Section 125 of Cr. P.C provision for order by a 1st class magistrate for maintenance of wife is unable to maintain herself upon proof of neglect and refusal.

The prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994 has been a great help in preventing female feticide.

Thus the passing of various legislations in favor of the women and with the widespread of education, a change has been noticeable in spite of the laws are confined to statutory books because of the enforcing machinery is inadequate.

A long gap exists between law and its enforcement. The mobilization of public opinion to create environment for effective implementation is still required. Special emphasis should be given on education to make women aware of rights of women.

We now conclude with the famous saying of Swami Vivekananda, "Country and Nation who do not respect women had never become great nor will ever be in the future."

THE INDEPENDENCE OF JUDICIARY

Nayana Medhi

BALLB 6th Semester

Introduction

An independent judiciary is the sine qua non of a vibrant democratic system. Only an impartial and independent judiciary can stand as a bulwark for the protection of the rights of the individual and mete out even handed justice without fear or favor. The judiciary is the protector of the Constitution and, as such, it may have to strike down executive, administrative and legislative acts of the Centre and the States. For Rule of Law to prevail, judicial independence is of prime necessity. Being the highest Court in the land, it is very necessary that the Supreme Court is allowed to work in an atmosphere of independence of action and judgment and is insulated from all kinds of pressures, political or otherwise.

Judicial independence is not a matter of compromise. It is the soul and inner strength of the judiciary, which helps it in safeguarding the Fundamental Rights and civil liberties of people against executive actions and encroachment by other powerful groups.

Origin: India

The judiciary is relatively independent and the legal system is based on English common law. India's independent judicial system began under the British, and its concepts and procedures resemble those of Anglo-Saxon countries.

When India attained Independence on the 15 August, 1947, the best among India's statesmen and the most talented among her constitutional experts were elected to the Constituent Assembly and they provided us a near ideal Constitution that would enable the continued preservation of India's Independence and her democratic institutions. The doctrine of Independence of Judiciary is based on the doctrine of "Separation of Powers" which was borrowed from the American Constitution, though not in a direct and concrete form, due to the fact that the exercise of both judicial and administrative functions by the same officer was one of the controversies British India.

Thus, such separation calls for not merely the independence of the superior courts but also a differentiation of local function. Judicial administration even at the lower levels, has become a subject of constitutional importance. The Articles of the Constitution dealing with the judiciary are based on the theory that the subject is of great importance that it should be dealt with in detail by Constitutional law and not by ordinary law.

Independence of Judiciary as the salient feature of a Federal Constitution of India

India is a federation, though not a chaste one. Unlike many countries which have a federal

constitution, India has a single judicial system. The special advantage of a single system of judiciary is that it avoids diversity in jurisdiction arising out of separate system of federal and state courts. Under the Constitution all the courts in India are hierarchically linked together. The Supreme Court stands at the apex of this judicial hierarchy with effective power to supervise and control the working of the entire system and to ensure the realization of the high judicial standards that it might set as an integral part of the democratic system of government which the Constitution seeks to establish.

Thus, the fathers of the Constitution of India wanted that some power should be given to the federating units. Subjects for making laws are allocated between the federal units and the Central authority. Union list gives us the list of subjects on which only the Central Government can make laws, State list is for the States only but on Concurrent list both States and the Centre can make laws. There is a great tendency on the part of the federal government to assume, more and more powers. States cannot tolerate this unhealthy development because their own powers are curtailed. The Supreme Court upholds the constitutional law against all type of violations by the Central Government. Moreover, there is a possibility that the state may have governments, which have different political parties. An independent judiciary will not hinder the working of State Government in implementing their policies.

Need for the Independence of Judiciary

In a democratic State, particularly of Indian type, it is necessary that people should be inspired to have faith in the government. We have been subjected to colonial rule for a very long time and a large number of people, who lack political education, have no faith in democracy. Democracy is more a matter of outlook, thinking and actions than of carrying on administration. Thus only an independent judiciary can help us to retain the real character of democracy. A disguised dictatorship is more dangerous than an actual one.

Mere enumeration of a number of Fundamental Rights in a Constitution without any provision for their proper safeguards will not serve any useful purpose. Indeed, the very existence of a right depends upon the remedy for its enforcement. "Where there is a right, there is a remedy" is a maxim. For this purpose an independent and impartial judiciary with a power of judicial review has been established under the Constitution of India. It is the custodian of the rights of citizens. As the court has observed recent in A.C. Thalwal vs High Court of Himachal Pradesh AIR 2000 SC 2732, "The constitutional scheme aims at securing an independent judiciary which is the bulwark of democracy." Besides, in a federal Constitution it plays another significant role of determining the limits of power of the Centre and States.

Objectives of Independence of Judiciary

It is the responsibility of the judiciary to enforce the laws passed by the legislature and also to discharge the responsibilities enjoined on it by the Constitution. It is not to be influenced either by fear or favor in the discharge of its duties. It should not only retain impartial but also maintain impression among the people. It has to safeguard its reputation. Also, if our experiment in democratic living is to succeed, we will have to make our judiciary independent, hold and alive to the sense of equity.

The Independence of Judiciary maintained under the Indian Constitution

The independence of Judiciary determines the quality of justice in a Country. Thus, it is very necessary that the Court should be allowed to perform its functions in an atmosphere of independence and that it should be free from all kinds of political pressures. The Constitution of India has made several provisions to ensure independence of the judiciary and they are:

Security of tenure

The judges of the Supreme Court have security of tenure. They cannot be removed from office except by an order of the President and that also only on the ground of proved misbehavior and incapacity, supported by a resolution adopted by a majority of total membership of each

House and also by a majority of not less than 2/3 of the members of the House present and voting. Parliament cannot misuse the power, because the special procedure for their removal must be followed.

Salary of judges fixed, not subject to vote of legislature

The salaries and allowances of the judges of the Supreme Court are fixed by the Constitution and charged on the Consolidated Fund of India. Parliament can extend, but cannot curtail the jurisdiction and power of the Supreme Court (original, advisory and appellate) as stated under Article 138 of the Constitution of India. No discussion in the Legislature on the conduct of the judges as stated in Article 121. Power to punish for its contempt as stated, (Article 129 and 215) of the Indian Constitution. Judiciary is separated from the Executive in Article 50 of the Constitution of India. Judges of the Supreme Court are appointed by the executive with the consultation of legal experts [Article 124 (2)] and Prohibition on practice after retirement [Article 124 (7)].

Threats to the independence of Judiciary

The main causes for danger to the independence of the judiciary are as follows:

At first, although judges are appointed by the Executive with the consultation of legal expert, the word 'consultation', as has been held in the Judges Transfer Case, does not mean concurrence and Executive is bound by it. The Government may completely ignore the advice of legal experts as in Sankal Chand Sheth case (AIR 1977, SC 2328). Secondly, the power of the President under Article 222 to transfer a judge from one High Court to another might also be used to undermine the independence of judiciary. Thirdly, the practice of appointing retired Judges in various capacities might pose a serious danger to judicial independence.

Recommendations

In order to uphold the independence of the judiciary, a meaningful unity and mutual respect must exist within itself. There are a few recommendations, which may create the independence without any controversies. There is a need to establish an All India Judicial Service and to keep the uniformity in service conditions of members of the subordinate judiciary. The state governments' administrative control over the district and subordinate magistrates must be abolished and control of the High Court over the district judge and the subordinate judiciary is to be strengthened. There is a need to take immediate action to upgrade the infrastructure facilities for the judiciary. There is a need to set up a judicial disciplinary authority over the misconduct of judges, which must be under the control of judiciary, and so on and so forth.

Conclusion

In the conclusion we can state that 'Judicial Independence' is the foundation on which the whole concept of justice is based. There are no two opinions that the judiciary has served the country well even in difficult times. It has produced judges of outstanding integrity and ability. The people of India have confidence in judiciary because it has functioned independently and impartially. If judges are not independent and impartial, who will have faith in the administration of justice?

CYBER CRIME

Pallavi Bordoloi
BALLB 8TH semester

As the new millennium dawned, the computer has gained popularity in every aspect of our lives. This includes the use of computers by persons involved in the commission of crimes. Today,

computers play a major role in almost every crime that is committed according to Donn Parker, For the last time in human history, computers and automated process make it possible to possess not just commit a crime. Today criminals can pass a complete crime in software from one to another, each improving or adapting it to his own needs.

The first recorded cyber crime took place in the year 1820. The era of modern computers, however, began with the analytical engine of Charles Babbage. Cyber crime is an evil having its origin in the growing dependence on computers in modern life. In a day and age when everything from microwaves ovens and refrigerator to nuclear power plants is being run a computer, Cyber Crime has assumed rather threatening implications.

What is a computer crime ?

Criminals can operate anonymously over the computer Notebooks.

- a. Hackers invade privacy.
- b. Hackers destroy property in the form of computer files are records.
- c. Hackers injure other computer users by destroying information systems.
- d. Computer pirates steal intellectual property.

Cyber crimes may be defined as "act that are punishable by the information Technology Act "would be unsuitable as the Indian Penal Code also covers many Cyber Crimes, such as email sending and cyber defamation, sending threatening email etc. A simple yet study definition of cyber crime would be "unlawful acts wherein the computer is either a tool or target or both.

Classification of cyber crime

Information Technology Act deals with the following cyber crimes along with other:

1. Tampering with computer source.
2. Hacking
3. Publishing of information, which is obscene in electronic form.
4. Child pornography.
5. Accessing protected system
6. Breach of confidentiality and privacy

Cyber crime other than those mentioned under the Information technology Acts include the following:

1. Cyber Stalking
2. Data diddling
3. Trojan attack
4. Forgery
5. Financial crimes
6. Salami attack, etc

Cyber terrorism

Cyber Crime and cyber terrorism are both crimes of the cyber world. The difference between the two however is with regard to the motive and the intention of the perpetrator.

While a cyber crime can be described simply as an unlawful act within the computer is either a tool or a target or both, cyber terrorism deserves a more detailed definition. One can define cyber terrorism as a premeditated use of disruptive activities or the threat thereof, in cyber space, with the intention to further social, ideological, religious, political or similar objectives, or to intimidate any person in furtherance of such objectives.

Cyber criminals

Any person who commits an illegal act within a guilty intention or commits a crime is called an

offender or a criminal. In this context, any person who commits a Cyber Crime is known as a **Cyber Criminal**. The cyber criminal may be children and adolescents aged between 6-18 years, they may be organized hackers, may be professional hackers or crackers, discontented employee, cheaters or even psychic persons.

Cyber ethics

Ethics and morality in different circumstances connotes varied and complex meanings. Each and everything which is opposed to public policy, against public welfare and which may disturb public tranquility may be termed to be immoral and unethical. In the past terms such as imperialism, colonialism, apartheid, which were burning issues have given way to cyber crime, hacking. Today in the present era there is a need to evolve cyber jurisprudence' based on which "Cyber Ethics" can be evaluated and criticized. Further there is a dire need for evolving a code of ethics on the cyber space and the discipline.

Conclusion

The information technology Act 2000 was passed when the country was facing the problem of growing cyber crimes. Since the internet is the medium for huge information and a large base of communication around the world, it is necessary to take certain precaution while operating it. Therefore, in order to prevent cyber crime is important to educate every one and practice safe computing.

PRISONERS' RIGHTS IN INDIA: SOCIO-LEGAL ASPECTS, HUMAN RIGHTS AND JAIL RESEARCH

Parul Handique

BALLB 8th Semester

More than hundred years ago the attitude towards the prisoners and their punishment was very cruel and barbaric. But due to the recognition of Human Rights for the convicted offender the idea towards them were gradually changing. The Indian legal system is based on non – violence, mutual respect and human dignity of the individual. Therefore Indian Constitution under Article 21 a protection towards the prisoners in jail is available. If a person commit any crime it does not mean deprived of all fundamental rights which they otherwise posses. Prisoners may be deprive of fundamental freedom like the right to move freely throughout the territory of India or the right to "practise" a profession but in case of other rights which the constitution guarantee to them, other freedom like right to acquire, hold and dispose of property for existence of which detention can be of no hindrance. Thus a convicted is entitled to the precious right guaranteed by Article 21 and he shall not be deprived of his life or personal liberty except according to procedure established by law. For prisoner all fundamental rights are enforceable indirectly, though it is restricted by the fact of imprisonment.

Article 21 of the Constitution of India guarantees the right to personal liberty which includes and prohibits any inhuman, cruel or barbaric treatment to any person whether he is a national or foreigner's .Any violation of this right may also touch the provisions of Article 14 of the Constitution which enshrines right to equality and equal protection of law. In addition to these, the question of Cruelty to Prisoners is also dealt with specifically by the Prisons Act, 1894 and Narcotic Drug and Psychotropic Substances Act, 1985. Any excess committed on a prisoner by the police authorities or any other authorities then it will attract the attention of the legislature and judiciary. Indian

judiciary, basically Supreme Court in several cases have issued appropriate direction to prison and police authorities for safeguarding the rights of the prisoners and person in police lock up particularly of women and children against sexual abuse and for their early trial and also directed the Union Of India to issue appropriate guideline to the responsible authority in this regard.

Indian judiciary has played an important role in developing the concept of legal aid and expanding its scope so as to enable the people to have access to court in case of a violation of their Human Rights. The role of Supreme Court in introducing jail reforms has been commendable. Some of the landmark judgements are as follows

1. The Supreme Court in a separate writ petition filed by Sunil Batra and Charles Sobharaj Supreme Court held in this case that there is no total deprivation of a prisoner's right of life and liberty. The safe keeping in jail custody is the limited jurisdiction of the jailor. To provide safe keeping into a hidden opportunity to care the ward and to traumatize him is to betray the custodian of law, safe custody does not mean deprivation, violation, banishment of prison life and infliction of travails as if guardianship were best fulfilled by making the ward suffer near insanity.

The court held that Sunil Batra's mercy petition to the President /Governor had not been disposed off and Batra was not "under sentence of death". His solitary confinement was quashed. In the case of Charles Sobharaj it was held that there was no arbitrary power to an under-trial to put an under bar-fetters. The discretion to impose "irons" is a quasi-judicial decision and a previous hearing is essential before putting a prisoner in fetters.

The grounds for imposing fetters would be given to each victim in his language. It was further laid down that no fetters shall continue of bar -fetters shall be with the approval of the Chief Judicial Magistrate or a Session Judge.

2. Maneka Gandhi's case was a landmark in Indian Jurisprudence: The Maneka principle was to extend the prisoners condition and particularly to the under trials. A news item appeared in "The Indian Express " about the continued incarceration of under trial in Bihar Jail. Some of them were never produced before the Courts. Some of others had spent more than in jail as under-trials than the maximum penalty that could be imposed upon them if they were convicted of the offences they were charged with. The Supreme Court in the writs of Habeas Corpus for under trial stated that, "The information contained in this newspaper cutting most distressing and it is sufficient to stir the conscience and disturb the equanimity of any socially motivated lawyer or judge. Some of the under-trial prisoners whose names are given in the newspaper cutting have been in jail for as many as 5, 7, or 9 years and a few of them for even more than 10 years without their trial being begun . What faith can these lost souls have in a judicial system which denies them a bare trial for so many years and keep them behind bars, not because they are guilty, but because they are too poor to afford bail and the Courts have no time to try them. There can be little doubt after the dynamic interpretation placed by this court on Article 21 in Maneka Gandhi vs. Union Of India that a procedure which keeps such large numbers of people behind bars without trial so long cannot possibly be regarded as reasonable, just or fair so as to be in conflict with the requirement of the Article" . It was with this observation that the Supreme Court directed the Bihar Government and the Patna High Court to furnish to the Supreme Court details of criminal case pending in Bihar and their year wise breakup. The Supreme Court thereafter directed the release of such under- trial that were in detention for a unduly long period.

3. The Supreme Court has given a dimension to the writ of Habeas corpus by its judgement in Sunil Batra II vs. Delhi Administration. Here in this case an important principle lays down that, a writ of Habeas Corpus is available not only to secure the release of a prisoner illegally detained but also to regulate the condition and manner of detention of a person whose detention is lawful. Thus a speedy and simple remedy is available to prisoners to seek redress of their grievances about the manner of their detention.

4. In another case named Prem Shankar Shukla Vs Delhi Administration,"Supreme Court struck down the provision of the Punjab Police rules which discriminate between the rich and the poor prisoners in determining who was to be handcuffed. The Court also held that in the absence of

the escorting authority recording why the prisoners are being put under handcuff, the procedure of handcuffing is a violation of Article 21.

5. In another recent landmark judgement in the case of *Francies Corale Mullin Vs the Administrator, Union Territory of Delhi and others*. The Supreme Court explained the ingredient of personal liberty under Article 21. The case arose out of the rights of a detainee Under COFEPOSA to have an interview with his family members and lawyers. The meeting with family members was restricted to one a month and the lawyers could be met only in the presence of an officer of the custom department. The Supreme Court ruled that the right to life and personal liberty included his right to live with human dignity and therefore a detainee would be entitled to have interviews with his family members, friends and lawyers without these severe restrictions.

Some of the rights of the prisoners

1. Rights to expressions

In *State of Maharashtra vs Pravakar Panduranga*, the Court held that the right to personal liberty includes right to write a book and get it published and when the right was exercised by a detenu its denial without the authority of law violated Article 21.

In the case of *R. Rajagopal alias R.R. Gopal and Another Vs State of Tamil Nadu and Others*, the petitioner raises a question concerning the freedom of press vis-à-vis the right to privacy of the citizen of this country. It also raises the question as to the parameters of the right of the press to criticize and comment on the acts and conduct of public officials.

The court held that the petitioners have a right to publish, what allege to be the life story autobiography of Auto Shankar insofar as it appears from the public records, even without his consent or authorization. But if they go beyond that and published his life story, they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restrain the said publication.

2. Right to Reasonable wages in prison

During the imprisonment, the prisoners are made to work in the prison; they must be paid wages at the reasonable rate. The wages should not be below minimum wages who has been asked to provide labor or service by the State. The payment has to be equivalent to the service rendered; otherwise it would be forced labor within the meaning of Article 23 of the constitution.

In case of *People s Union for Democratic Rights Vs Union of India*, the Bench observed thus: we are therefore of the view that where a person provides labor or service to another or remuneration which is less than the minimum wages, the labor or service provided by him clearly falls within the scope and ambit of the words forced labor under Article 23. A Division Bench in case of *Gurdev Singh vs. State of Himachal Pradesh*, the court said that, Article 23 of the constitution prohibits forced labor and mandate that any contravention of such prohibition shall be an offence punishable in accordance with law. The Court had no doubt that paying a pittance to them is virtually paying nothing. Even if the amount paid to them was little more than a nominal sum the resultant position would remain the same. Government of India set up in 1980 a committee on Jail Reform under the Chairmanship of Mr. Justice A.N. Mulla a retired judge of the Allahabad High Court. The report submitted by the said Committee is known as Mulla Committee Report. It contains a lot of very valuable suggestion among which the following are contextually relevant.

All prisoners under sentence should be required to work subject of their physical and mental fitness as determined medically. Work is not to be conceived as additional punishment but as means of furthering the rehabilitation of the prisoners, their training for work, the forming of better work habits, and of preventing idleness and disorderpunitive, repressive and affective work in any form should not be given to prisoners. Work should not become drudgery and a meaningless prison activity. Work and training programs should be treated as important avenues of imparting useful values inmates for their vocational and social adjustment and also for their ultimate rehabilitation in the free community.... Rates of wages should be fair and equitable and not

merely nominal or partly. These rates should be standardized so as to achieve a broad uniformity in wage system in all the prisons in the States and Union Territories.

The court finally gave the following observation

a. It is lawful to employ the prisoners who are sentenced to rigorous imprisonment to do hard labor whether he consent to do or not.

b. It is open to the jail officials to permit other prisoners also to do any work which they choose to do, provide such prisoners make a request for that purpose.

c. It is imperative that the prisoners should be paid equitable wages for the work done by them. In order to determine the quantum of equitable wages payable to prisoners the State concerned shall constitute a wage fixation body for making recommendations. We direct each State to do so as early as possible.

d. Until the State government takes any decision on such recommendation every prisoner must be paid wages for the work done by him at such rates or revised rate as the Government concerned fixes in the light of the observation made above. For this purpose we direct all the State Governments to fix the rate of such interim wages within six weeks from today and report to this court of compliance of this direction.

e. State concerned should make law for setting apart a portion of the wages earned by the prisoners to be paid compensation to deserving victims of the offence the commission of which entailed the sentence of imprisonment to the prisoner, either directly or through a common fund to be created for this purpose or in any other feasible mode.

Right against Solitary Confinement, Handcuffing and Bar Fetters and Protection from Torture

Solitary Confinement in a general sense means the separate confinement of a prisoner, with only occasional access of any other person, and that too only at the discretion of the jail authorities. In the strict sense it means the complete isolation of a prisoner from all human society.

Torture is regarded by the police investigating agency as normal practice to check information regarding crime, the accomplice extract confession. Police officers who are supposed to be the protection of civil liberties of citizens themselves violate precious right of citizen. But torture of a human being by another human is essentially an instrument to impose the will of the strong over the weak. Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it.

An arrested person or under-trial prisoners should not be subjected to handcuffing in the absence of justifying circumstance. When the accused are found to be educated persons, selflessly devoting their service to public cause, not having tendency to escape and tried and convicted for bailable offence, there is no reason for handcuffing them while taking them from prison to court.

In case of *Prem Shankar Shukla vs. Delhi Administration*, the petitioner was an undertrial prisoner in Tihar jail. He was required to be taken from jail to Magistrate Court and back periodically in connection with certain cases pending against him. The trial court has directed the concerned officer that while escorting him to the court and back handcuffing should not be done unless it was so warranted. But handcuffing was forced on him by the escort. He therefore, sent a telegram to one of the Judges of Supreme Court on the basis of which the present Habeas Corpus petition has been admitted by the court.

To handcuff is to hoop harshly and to punish humiliatingly. The minimum freedom of movement, under which a detainee is entitled to under Article 19, cannot be cut down by the application of handcuffs. Handcuffs must be the last refuge as there are other ways for ensuring security.

Right to free legal aid

The basic philosophy of legal aid envisages that the machinery of administration of justice

should be easily accessible and should not be out of the reach of those who have to resort it for the enforcement of their legal rights. In fact legal aid offers a challenging opportunity to the society to redress grievances of the poor and thereby lay foundation of Rule of Law.

In India, judiciary has played an important role in developing the concept of legal aid and expanding its scope so as to enable the people to have access to court in case of any violation of their human rights. In the case of *M.H. Wadanrao Haskot vs. State of Maharashtra*, the court held that the right to legal aid is one of the ingredients of fair procedure.

If a prisoner is sentenced to imprisonment, and is virtually unable to exercise his constitutional and statutory right of appeal, for want of legal assistance, there is implicit in the court under Article 142 read with Article 21 and 39A of the Constitution power to assign council for such imprisoned individual for doing complete justice. 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 required assign competent council for the prisoner's defense, provided the party doesn't object to that lawyer.

Right to speedy trial

Right to speedy trial is a fundamental right of the prisoners implicit in Article 21 of the Constitution. It ensures just, fair and reasonable procedure. The fact that a speedy trial is also in public interest or that a speedy trial is also in public interest or that it serves the social interest also, does not make it any the less right of accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstance.

In the case of *Hussainara Khaton (1) vs State of Bihar*, a shocking state affair in regard to the administration of justice came forward. An alarmingly large number of men and women, including children were behind prison bars for years awaiting trial in the court of law. The offence with which some of them were charged were tribal, which even if proved would not warrant punishment for more than a few months, perhaps a year or two and yet these unfortunate forgotten specimens of humanity were in jail, deprived of their freedom, for periods ranging from three to ten years without as much as their trial having commenced. The Hon'ble Supreme Court expressed its concern and said that: What faith can these lost souls have in the judicial system which denies them a bare trial for so many years and keeps them behind the bars not because they are guilty, but because they are too poor to afford bail and the Courts have no time to try them.

One reason why our legal and judicial system continually denies justice to the poor by keeping them for long years in pre-trial detention is our highly unsatisfactory bail system. This system of bail operates very harshly against the poor and it is only the non poor who are able to take advantage of it by getting them released on bail. The poor finds it difficult to furnish bail even without surety because very often the amount of bail fixed by the Court is so unrealistically excessive that in a majority of cases the poor are unable to satisfy the police or the Magistrate about their insolvency for the amount of the bail and where the bail is with surety as is usually the case, it becomes an almost impossible task for the poor to find person sufficiently solvent to stand as sureties.

In *Hussainara Khaton vs Home Secretary, State of Bihar*, the Court while dealing with the case of under-trial who had suffered long incarceration held that, a procedure which keeps such large number of people behind bars without trial so long cannot possibly be regarded as reasonable, just or fair so as to be in conformity with the requirement of Article 21.

In *Mathew Areeparmtil and other vs. State of Bihar and other*, a large number of people were languishing in jails without trial for petty offences. Directions were issued to release those persons. Further the Court ordered that the cases which involve tribal accused concerning imprisonment of more than 7 years should be released on execution of a personal bond. In the case where trial has started, accused should be released on bail on execution of a personal bond. In case where no proceeding at all have taken place in regard to the accused within 3 years from the date of the lodging of F.I.R. the accused should be released forthwith under section 169 of the Cr.P.C. If there are cases in which neither charge sheet have been submitted nor investigation has been completed

during the last three years, the accused should be released forthwith subject to investigation to the said cases on the fresh facts and they should not be arrested without the permission of the Magistrate.

Right to meet friends and consult lawyers

The horizon of human rights is expanding. Prisoners' rights have been recognized not only to protect them from physical discomfort or torture in the prison but also to save them from mental torture.

In the case of Joginder Kumar vs. State of U.P. and others, the Court observed that whenever a public servant is arrested, that matter should be initiated to the superior officers if possible before the arrest and in any case, immediately after the arrest. In the case of armed forces, army, navy or air force initiation should be sent to the officer commanding the unit to which the members belong. It should be done immediately after the arrest is affected. Under Rule 229 of the procedure and conduct of business in Lok Sabha when a member is arrested on a criminal charge or is detained under an executive order of the Magistrate the executive authority must inform without delay such fact to the Speaker. As soon as any arrest, detention, conviction or release is affected initiation should invariably be sent to the government concerned concurrently with the initiation sent to the Speaker/ Chairman of the Legislative Assembly or Council or that of the Lok Sabha or Rajya Sabha.

The person who has been arrested has the right to have someone informed. That right of the arrested person, upon request, to have someone informed and to consult privately with a lawyer was recognized by Section 56(1) of the Police and Criminal Evidence Act 1984. That section provides: Where a person has been arrested and is being held in custody in a police station or other premises, he shall be entitled, if he so request to have one friend or relative or other person who is known to him or who is likely to take an interest in his welfare be told, as soon as there is practicable expect to extent that delay as is permitted by this section that he has been arrested and is being detained there.

These rights are inherent in Article 21 and 22(1) of the Constitution and required to be recognizing and scrupulously protecting. For effective enforcement of these fundamental rights, the Court issue the following requirements: a. An arrested person being held in custody is entitled if he so request to have one friend relative or other person who is known to him or likely to take an interest in his welfare told as far as is practical that he has been arrested and where is being detained.

b. The Police Officers shall inform the arrested person when he is brought to police station of this right.

c. An entry shall be required to be made in the Diary as to who was informed of the arrest. These protection from power must be held to follow from Article 21 and 22 (1) and enforced strictly.

The above mentioned rights are the basic human rights of a citizen. Supreme Court has gone a long way fighting for prisoners rights. However, the fact remains that it is the police and prison authorities who need to be trained and oriented so that they take prisoner's rights seriously.

THE AARUSHI TALWAR MURDER CASE : RECENT DEVELOPMENTS

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On the morning of May 16, 2008, Aarushi Talwar (May 24, 1993 - May 15, 2008), the 14-year-old daughter of a successful dentist couple, was found dead with her throat slit in her parents' home at Jalvayu Vihar in Noida, a posh suburb of Delhi. Suspicion immediately fell on the family's live-in man-servant, Yam Prasad Banjade alias Hemraj, a 45-yr-old Nepalese national, who was found missing from the home. Immediately declaring Hemraj as the prime suspect, the Noida police announced a reward for information leading to Hemraj's apprehension and arrest. In addition, a police party was dispatched to his hometown in Nepal, in hopes of apprehending him there.

A post-mortem was conducted on Aarushi's body on May 17, 2008, after which it was cremated. Her parents took her ashes to the holy city of Haridwar for immersion in the waters of the Ganges. A retired Noida police officer, accompanying a relative of the Talwars, happened to visit the Talwars' home to express his condolences, and during his visit, detected blood stains on the stairs leading to the terrace of the flat. Following the trail of blood, Noida police detected the dead body of the missing domestic help, Hemraj, on the terrace. After a disorganized, long-drawn and completely bungled up investigation, the police finally arrested Dr. Rajesh Talwar, the father of the deceased girl, on May 23, 2008, charging him with having committed the double murder. His wife, Dr. Nupur Talwar, stoutly defended her husband, accused the Noida police of framing him, and requested Uttar Pradesh chief minister Mayawati to transfer the case to the Central Bureau of Investigation (CBI).

The CBI took over the investigation into the murders of Aarushi and Hemraj on June 1, 2008, forming a 25-member team in a resolute attempt to crack the case. As soon as CBI moved in to take over the case, Uttar Pradesh chief minister Mayawati promptly gave transfer orders to senior police officers that comprised part of the Special Investigation Team (SIT) that had previously been in charge of the investigation, including the Noida Senior Superintendent of Police, Satish Ganesh, and Meerut Inspector General, Gurdarshan Singh. In addition, the deputation of CBI officer Arun Kumar, formerly a member of the Uttar Pradesh Police, who was in charge of the investigation also ended in July, 2008.

Significance of the Case

The case received significant national attention, and has become representative of what most people believe are recent tendencies towards sensationalism in the Indian media, including tendencies of "overkill" and trial-by-media. The Union Minister for Women and Child Development, Renuka Chowdhury, condemned the police for what she called the "character assassination" of a child victim and called for a commission of legal experts to investigate whether specific legislation existed or needed to pass in order to allow filing of defamation suits against the Noida police, a government agency. In addition, the focus by 24-hour cable news on speculative aspects of the personal lives of the father and his dead daughter, and the media frenzy that compromised the privacy of the families involved in the case has caused comparisons to be made to the Jon Benet Ramsey case in the United States. The case has also attracted a lot of public attention as a bizarre whodunit, with the CBI reporting that the agency had been receiving a large number of telephone calls from members of the general public, giving investigators ideas and advice on how to solve the case. In addition, the story hit blog-o-sphere in a major way with many Indian bloggers avidly and enthusiastically blogging about the murder mystery.

Shoddy Investigation

CBI investigators charged the Noida police with a shoddy investigation, which, it claimed, had

resulted in the destruction of 90% of the evidence on the crime scene. Aside from not capturing the finger prints on the whisky bottles in Hemraj's room, the police allowed the media to freely roam the crime scene rather than preventing access to the flat.

In addition, the police allowed doctors, not specifically trained in forensic pathology, to conduct the autopsies of Hemraj and Aarushi, while it is established procedure to lift fingerprints (of both murderers and victims) from the skin of the victims. The doctors entrusted with the autopsies neglected to call forensic scientists to lift said fingerprints from the cadavers. On August 11, 2008, the CBI reported that it had evidence pointing to the presence of a fifth person in the house at the time of the murders, as finger prints not matching any of the suspects or occupants of the house were found on the whisky bottles. Arushi Talwar was murdered, the Central Bureau of Investigation (CBI), which took over the case a fortnight ago, isn't the only one questioning the investigation of the Noida police.

Experts at the All India Institute of Medical Sciences (AIIMS), who are working closely with the CBI, have raised questions over one entry in Aarushi's post mortem report. The report, dated May 16 and prepared by Sunil Dore for the Noida police, mentions "whitish discharge" from the vagina which AIIMS doctors say wasn't investigated. They have raised this issue with the CBI.

"It is the duty of the doctors and the investigating officer to collect all biological evidence. As per law, it is mandatory to write about it in the post mortem report which is legal evidence. But in this case no further investigation was done on the evidence that they got from natural orifices," Sudhir Gupta, associate professor, forensic medicine, AIIMS, told The Indian Express. Gupta is one of the doctors in the team scrutinizing the post mortem report.

The post mortem report says that various organs including stomach with contents, samples from small intestine, gall bladder, spleen and one kidney were preserved, sealed and sent for examination to rule out poisoning.

"However, the report doesn't mention whether a vaginal swab was sent for further investigation," said Gupta. "The whitish discharge could be attributed to several causes, from a fungal infection, common at this age, to even sexual assault. But in a murder case, this was a serious biological finding which required deliberation. No such type of biological evidence was collected and sealed by the doctor who prepared the autopsy," he added.

Timeline of the Case

May 16, 2008

Aarushi Talwar, daughter of a dentist couple, found dead with her throat slit in the bedroom of her flat in Jalvayu Vihar; domestic help Hemraj (Nepalese national) suspected of murder.

May 17, 2008

- Hemraj's body found on the terrace of Talwar's house.
- Noida Sector-20 police Station Officer (S.O.) Dataram Nauneria shifted for lapses in investigations.
- Autopsy report rules out sexual assault.

May 18, 2008

- Police say murders done with surgical precision; Insider job suspected.
- Superintendent of Police (City) Mahesh Mishra transferred.

May 19, 2008

- Talwar's former Nepalese domestic help Vishnu Sharma named suspect.

May 21, 2008

- Delhi Police join murder probe; police say murder committed by a "doctor or a butcher".

May 22, 2008

- Family under suspicion; honor killing angle probed; police quiz Aarushi's close friend, whom she spoke to 688 times in the 45 days preceding her murder.

May 23, 2008

- Aarushi's father Dr. Rajesh Talwar arrested for the two murders.

June 13, 2008

- The Nepalese compounder of Dr. Rajesh Talwar, Krishna (alias Kishan) arrested by CBI. The arrest followed polygraph test and Narco Analysis test at Forensic Science Laboratory (FSL), Bangalore the day before. He was earlier subjected to polygraph test twice at Central Forensic Science Laboratory (CFSL), Delhi as well as psychological assessment test at AIIMS, New Delhi on June 9, 2008; based on the test results, CBI arrested Krishna.

June 14, 2008

- Krishna the compounder of Dr. Rajesh Talwar was produced before the duty magistrate, district courts, Ghaziabad. CBI requested for 14 days Police custody of Krishna for further investigation. The Magistrate granted 3 days police custody remand. He was to be produced before the Special Magistrate for CBI cases at Ghaziabad on June 17, 2008. Earlier on the, a CBI team conducted search at Jalvayu Vihar, Noida, where Krishna used to live. CBI team had seized some clothing and other materials for forensic examination. Rajkumar, the Nepalese domestic help of the Duranis, was subjected to polygraph test at CFSL, Delhi.

June 19, 2008

- The judicial custody of Dr. Rajesh Talwar was extended up to July 2, 2008. An application was moved for second lie detection test of Dr. Rajesh Talwar, as his first lie detection test remained inconclusive, experts advised for a second lie detection test. Lie detector test on also been conducted on Vijay Mandal the domestic help of a neighbor of the Talwars.

June 17, 2008

- Krishna produced before special magistrate, CBI court, Ghaziabad. CBI applied for further 11 days police custody remand for continuing the investigation. The magistrate granted 6 days police custody. He was to be produced before CBI magistrate, Ghaziabad on June 23, 2008. A team accompanied by forensic expert thoroughly searched the room where Rajkumar used to live in Sector 53, Noida. Earlier, something seized from this room on June 13, 2008 was being forensically examined.

June 20, 2008

- Lie detection test of Dr. Rajesh Talwar conducted at CFSL, Delhi.

June 23, 2008

- Krishna arrested by CBI on June 13, 2008 produced before the special magistrate, CBI courts, Ghaziabad. After completion of 6 days police custody given on June 17, 2008, CBI requested for further custody of Krishna for 4 days for further interrogation and recovery of weapon. The magistrate passed an order extending his further police custody for 4 days. He was to be produced before the Court on June 27, 2008.

June 25, 2008

- Second lie detection test was conducted on Dr. Nupur Talwar. Her first lie detection test was found inconclusive.

June 26, 2008

- The CBI declared the case to be a "blind case". Dr. Rajesh Talwar refused bail by the special magistrate, CBI courts, Ghaziabad.

June 27, 2008

- Krishna taken to Talwars' residence by the CBI and thereafter produced before the special magistrate, where his bail plea was rejected once again. The Talwars' family friends Duranis' Nepalese domestic help Rajkumar arrested on the suspicion of involvement in the murder. Some washed T-shirts with faint human blood stains seized and sent for DNA matching. However, the Duranis (doctors themselves) maintained that the stains could be from the boils that Rajkumar had on his

body. Rajkumar had already been subjected to polygraph test, psychological assessment, brain mapping and narco analysis at FSL, Gandhinagar from June 23 to June 26, 2008.

June 28, 2008

■ Rajkumar produced before special magistrate, CBI court, Ghaziabad and is sent to police custody for 14 days. He looked unperturbed. However, when reporters badgered him with questions about what he ate, he frowned.

June 30, 2008

■ Krishna's lawyer approached a Ghaziabad court for his bail. However, it was refused because the court that was approached did not have sufficient powers in this case. CBI joint director Arun Kumar who was in charge of the investigation received a letter from Uttar Pradesh government for recall to his original cadre in Uttar Pradesh.

June 31, 2008 A leading news channel AAJ TAK, aired a news through their two journalists SHIVENDRA SRIVASTAVA and TANSEEM HAIDER, claiming that VIJAY MANDAL a new face, is also involved in noida double murder. This was the most authentic details which were aired till date. a very long show detailing step by step information about the incident. Finally on July 11 CBI accepted same theory in NOIDA DOUBLE MURDER case.

July 2, 2008

■ Once again, Dr. Rajesh Talwar was produced before special magistrate, CBI court, Ghaziabad. His bail plea was rejected and his judicial custody extended till July 11, 2008. CBI said that he was still among the suspects.

July 3, 2008

■ The supreme court of India rejected a public interest litigation (PIL) case which challenged the administration of narco-analysis test on the accused in the case. A bench headed by Justice Altamas Kabir refused to hear the petition, as the petitioner, a lawyers' body, was an unregistered entity.

July 6, 2008

■ Major English daily revealed that, apparently, on the night the murders were committed, the dentist couple Dr. Rajesh and Dr. Nupur left their flat around midnight and came back around 5 AM. They went to a high society party for which some 12 suites were booked in a posh South Delhi hotel.

July 7, 2008

■ CBI came out with an official statement on their site, stating, "A section of media has reported quoting CBI sources that Dr. Rajesh Talwar and Dr. Nupur Talwar were not present in their house on the night of 15th May, 2008 and more than a dozen rooms were booked in a hotel in Delhi. It is clarified that the news item is speculative and not true. Investigation of the case is progressing diligently." Earlier, Dr. Nupur Talwar went to the CBI headquarters and refuted the allegations regarding their absence on the night of the murders. She also expressed her intentions to take legal action against the media house. However, some other TV channels debated the merits of her and CBI's affirmations in the light of glaring gaps in the Talwars' story.

July 9, 2008

■ Rajkumar, the domestic help of the Durrani who are close associates and family friends of the Talwars, was subjected by CBI to narco-analysis test at FSL Bangalore. Rajkumar's police custody ends on July 11, 2008. It was Rajkumar's second narco-analysis test.

July 10, 2008

■ A news report on some TV channels suggested that CBI had some breakthrough on Rajkumar as the culprit and had confessed during narco-analysis test. He was learned to have committed this along with Krishna, Sambhu and allegedly Hemraj also. The reason told by him was lust and killing Hemraj for fear that Hemraj might have disclosed information.

July 11, 2008

■ Vijay Mandal (alias Sambhu) the servant one of the neighbors of the Talwars was arrested by the CBI. Arun Kumar, Joint Director CBI, held a press conference. In the press conference he stated that the CBI was awaiting DNA matching of washed blood stains on Rajkumar's T-shirts. He confirmed the affirmation that the CBI still considered a blind case. He expressed hope that the case will be fully solved very soon and thereafter another press conference will be called. Dr. Rajesh Talwar and Krishna both appeared before special CBI court, Ghaziabad to seek bail. Their petitioned were heard and Dr. Rajesh Talwar has been decided to be released on bail, as the CBI had no evidence against him as of now. Eminent criminal lawyer R. K. Anand undertook to defend Krishna. CBI now tentatively believes some two or three domestic helps and Krishna to be the prime suspects. However, CBI just has forensic evidence which is not admissible as evidence in the court. Still, there is no recovery of the weapon of murder and the two cellphones respectively of Aarushi and Hemraj.

July 12, 2008

■ Dr. Rajesh Talwar has been freed on bail from the Dasna Jail in Ghaziabad. The news of his release brought back widespread media attention to the case. Channels did all kinds of clever programing to compete for the attention of frenzied channel surfing TV viewers. Vijay Mandal was sent to 3-days' CBI custody by the court of additional chief judicial magistrate Dinesh Kumar in Ghaziabad. Vijay Mandal has been accused under 302, 201, 120(B) of the Indian Penal Code (IPC).

July 15, 2008

■ Vijay Mandal's police custody extended for four more days. The CBI expected to find the murder weapon and the cellphones of Aarushi and Hemraj with Mandal's help.

July 16, 2008

■ An association of Nepalese citizens alleged that Krishna and Rajkumar were being pressurized to come out with confessional statements.

July 18, 2008

■ CBI has not seized any evidence and is yet to receive crucial forensic report on accused Rajkumar, according to media reports. It has weakened of the case against the three in the CBI net — Krishna, Rajkumar and Vijay Mandal. The CBI claimed near closing of the case even when preliminary reports from Hyderabad's Centre for DNA Fingerprinting and Diagnostics, according to media reports, suggested that identifying the blood on the T-shirt "may or may not be possible"; separating DNA from garment after a lapse of two months is not always possible, because of the disintegration of the red blood cells on the cloth.

July 19, 2008

■ Vijay Mandal sent again into police custody for four more days.

July 21

■ Rastriya Jana Morcha (RJM) chairman Chitra Bahadur K.C. alleged that two Nepalese nationals Krishna Thapa and Rajkumar were falsely accused by the CBI in the case, in order to save Dr. Rajesh Talwar. The party has decided to raise the issue in the Nepalese parliament. The party would also approach the Nepalese government and the national human rights commission to save the two.

July 22, 2008

■ A bench comprising of Justice Altmas Kabir and Justice Markandey Katju of the supreme court of India instructed the media to be careful. This came up during a hearing on a public interest lawsuit that has raised questions on the media coverage of the high-profile murder case. In the probe, the character of the victim's parents was hotly debated, especially of Aarushi's father made about the compounder Krishna and the other two domestic helps Rajkumar and Vijay Mandal. In this case, a distinction seems to have appeared according to the accused persons' class and

national identities.

July 25, 2008

■ The Police custody of the accused Krishna, Rajkumar and Vijay Mandal was extended till August 8. The three accused were brought to the Ghaziabad court handcuffed and all linked to a rope. The judge objected to the subhuman treatment of the accused and the police officer tendered his apologies.

July 31, 2008

■ A leading Hindi channel Aaj Tak aired a news report which made allegations of repeatedly drilling desirable information into one of the accused Vijay Mandal, prior to the narco-analysis tests. Further, there were allegations that Mandal's confessions during narco-analysis tests too had many gaps. Why did the Indian police use narco-analysis tests when the questions that they apparently asked were extremely general in nature, like something aired on a popular quiz show, Kaun Banega Crorepati? These and many other issues, raises more questions than it answers.

August 8, 2008

■ The Police custody of the accused Krishna, Rajkumar and Vijay Mandal was extended for 14 more days, as they were now considered the prime accused.

August 9, 2008

■ CBI director Ashwani Kumar said that the case is still unsolved, as many important corroborative pieces of evidence yet to be found. However, he fully accepted that it was very important that the father Dr. Rajesh Talwar was exonerated otherwise the very sanctity of our family structure would have been challenged.

September 4, 2009

■ The Central Forensic Laboratory in Hyderabad released information that Aarushi's vaginal samples were substituted with those of an unknown woman. The correct samples could have helped to establish who killed the teenager, and whether she was sexually assaulted before being stabbed. The clothes that Aarushi was found in were soaked in blood. But the forensic lab received clean clothes.

September 14, 2009

Delhi police recovered Aarushi's mobile phone in Bulandshahr. (ref) India tv news 16/7/09

Jan 5, 2010.

CBI Moves Court to conduct Narco test on Talwar Couple

Court agrees for conducting the tests.

New ground in Aarushi Talwar's murder case

CBI collects DNA samples

CBI is collecting DNA samples of all persons associated with the post-mortem of teenager Aarushi Talwar, whose murder had hogged national focus, to find the identity of the woman whose vaginal swab was sent to CBI for forensic tests.

The CBI team probing Aarushi-Hemraj double murder case, which has been working overtime in re-working the missing links of the case, decided to collect the DNA samples of doctors and technical staff of the hospital where the post-mortem was done, sources said.

The decision to do this was taken after it came to light that the vaginal swabs drawn from the victim were substituted with those of an unidentified woman. This was found during the tests conducted by the Centre for DNA Fingerprinting and Diagnostics in Hyderabad. Aarushi's parents Rajesh Talwar and Nupur Talwar, who are to be subjected to narco analysis test following a court direction, may also be questioned in connection with the bungling in sending the vaginal swabs of Aarushi, the sources said, adding the samples collected would be matched with the vaginal swab.

There was no semen (as alleged initially) in the slides sent to the Centre and corroborative testing found that the material was not drawn from Aarushi. Dr Sunil Dohere, an Okhla-based doctor, had

drawn vaginal swabs following Aarushi's murder on May 15, 2008, at her residence in Noida. The doctor had reported that the swabs contained a white discharge, suggestive of seminal fluid. But Dr Dohere's senior, Dr S C Singhal, later said the slides prepared from the swabs had tested negative for semen.

The murder case had made headlines when Aarushi's father Rajesh Talwar, a dentist, was arrested in connection with the murder of the girl. CBI arrested three servants of the locality and had given a clean chit to Dr Talwar but could not file any chargesheet within the stipulated time frame, after which they were released on bail. After nearly two years of probe, Rajesh Talwar and his wife Nupur will undergo a narco-analysis test in connection with the double murder case.

The new CBI team had requested for a narco-analysis of parents of the victim. Special Judicial Magistrate Preeti Singh granted the permission but asked CBI to seek medical clearance for Dr Rajesh Talwar, an asthma patient, before the test. Rajesh was arrested on May 23, 2008, by Noida Police in connection with the murder of Aarushi, a class IX student of Delhi Public School, Noida, and her domestic help Hemraj. The case was transferred to CBI in July. (ANI)

February 11, 2010

Aarushi's parents to undergo narco tests. No new facts or any fruitful result came out from the test.

February 23, 2010

CBI conducts another narco test on Vijay Mandal, Rajkumar and Krishna. However once again the test proved to be futile as the three accused hardly accepting the fact that they were involved in the murder.

Conclusion

If the CBI is accusing the Noida police of shoddy investigation, then even the role of the CBI in the manner which they are approaching the case is sure to raise many eyebrows. At first, Aarushi's father was arrested and applied third degree torture in CBI custody. The bereft father, who lost his daughter, was picked up by the CBI just on the ground of doubt. In all women oriented cases, men are considered as the prime accused in the family, even if the woman is a victim of rape and murder. Based on this pre determined concept, Aarushi's father was arrested and tortured. There should be a widespread protest against such anti men legislation of laws. Nowhere in the six long hours of the video tape of the recent narco test conducted on Vijay Mandal, Rajkumar and Krishna shows any instance of them being even minutely accepting that they were the culprits who actually murdered Aarushi. Well, if so is the case then why not CBI is giving these three accused a clean chit? What is the use of conducting so many narco tests on the same persons again and again? Is there any other party which is involved in the murder? How much more time will the CBI take to solve this murder mystery? Will Aarushi get justice? These are the questions which are yet to be answered and only time will tell when.....

WRIT

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'Writ' is an order issued by a court in the sovereign name directed some act or forbearance. Originally, a writ is an instrument under seal bearing some command of the sovereign. There are five types of writs as mentioned:

1. Habeas Corpus

2. Mandamus
3. Prohibition
4. Certiorari
5. Quo-warranto

1. Habeas Corpus

Habeas Corpus is a Latin term which literally means 'to bring the body'. The writ of habeas corpus is issued as an order by a court calling upon a person by whom another person is detained to produce the detainee before the court to examine the legality of his detention. If the detainee produced before court discloses that detained person illegally detained the court will order to release the detain person. The main object of the writ is to provide quick and immediate release to a person who may be illegally detained. The application for the writ of habeas corpus may be made by person himself or by any other person on his behalf if he is not in a position to make the application. The application may be made even by a stranger. But the person making the application on others behalf has to give the reason why the detained person could not make the application himself.

In A.D.M Jabalpur vs Shivkant Shukla (Popularly known as Habeas Corpus case) The Supreme Court has held that in case of the order of the President under Article 359(1) no petition under Article 226 is maintainable to enforce any of the Fundamental Rights specified in that order. In such condition no person has locus standi to move any writ petition under Article 226 before a H.C. for habeas corpus or any other writ. But after the 44th amendment Act 1978 where a proclamation of emergency is in operation the decision as to the suspension of Article 21 has lost its importance because Article 21 can not be suspended under Article 359(1).

In State of Punjab V/s Sukhpal Singh, the court held that in case of detention of person under law providing for preventive detention the court can see whether the provision of Article 22(5) has been complied with by the detaining authority i.e. whether the authority has communicate to the person the grounds of his detention and has given him a reasonable opportunity to make a representation.

A writ of habeas corpus is maintainable if the petitioner has been illegally detained by the State as defined under Article 12; the petition for the writ of habeas corpus is maintainable against any detainee whether it may be State or private person. But it is not maintainable under Article 32 against a private person who has illegally been detained by the petitioner.

The writ of habeas corpus will be issued if the detention is prima-facie illegal. The detention becomes unlawful if the person who is arrested is not produced before the Magistrate within 24 hours of his arrest. If the legislature made a law which they are not competent to make then the detention under such law will be illegal detention. The illegal detention must continue at the time to issue writ of habeas corpus. An appeal lies against the order of the H.C. for granting or rejecting the writ of habeas corpus under Article 132, 133, 134 or 136.

In Kanu Sanyal vs D.M. Darjeeling, S.C. held that while dealing with the application of writ of habeas corpus production of body of person alleged to be unlawfully detained is not essential.

2. Mandamus

The word 'mandamus' means an order. The writ of mandamus is in form of a command issued by Superior court commanding a person or public authority including the government to do or refrain from doing something which is in the nature of public duty. The main object of this writ is to compel the performance of public duties prescribed by the statute and to keep the subordinate tribunals and officers exercising public functions within the limit of their jurisdiction.

There are various conditions for which the writ of mandamus may be issued: a. The person or authority against whom the writ of mandamus is sought to be issued must have public duties and there must be some failure on the part of the authority in exercising his duty.

b. The authority or person against whom the writ is sought to be issued must have mandatory duties.

c. The petitioner should have legal right to compel the authority or the person against whom he seeks the issue of the writ of mandamus to perform his public duty.

d. The petitioner must be called the authority to perform his duty and the authority must refuse it.

When the duty is merely discretionary in nature the writ of mandamus will not lie.

In *State of M.P V/s Mandawara* (AIR 1954 S.C 493), M.P. Government has made a rule making it discretionary to grant dearness allowance to its employees at a particular rate. The S.C held that writ of mandamus could not be issued to compel government to exercise its power.

The writ of mandamus cannot be issued for the enforcement of private duties. Mandamus also cannot be issued against private body or private individuals if it is not entrusted with any public duty. If the petition of mandamus is found to be fruitless then it may be issued. Writ of mandamus may be refused on ground of unexplained delay and also an misstatement.

Mandamus cannot be issued against President of India or Governor of State for the exercise and performance of the powers and duties of his office. When the H.C. or judges thereof acts in judicial capacity as distinguished from an administrative capacity the writ of mandamus can not be granted. Any person who is affected by the violation of statutory duty or abuse of statutory power may apply for writ of mandamus.

3. Certiorari

A writ of certiorari is issued by a Supreme Court to an inferior court or body exercising judicial or quasi judicial function to remove a suit from such inferior court or body and adjudicate upon the validity of proceeding. It may be used before the trial to prevent an excess or abuse of jurisdiction. It has been used also after the trial to quash an order which has been used without jurisdiction. The object of writ of certiorari is to keep the inferior court or Tribunals or bodies exercising judicial or quasi judicial function within the limit of jurisdiction assigned to them by law and to prevent them from acting in excess of their jurisdiction.

In *Surya Dev Rai vs Ram Chandra Rai* (AIR 2003 SC 3043), the S.C held that certiorari under Article 226 can be used for correcting the errors of the jurisdiction that means when a subordinate or inferior court has acted without or in excess of jurisdiction.

The person whose legal right has been invaded may apply for certiorari. The person who is aggrieved by an impugned order may apply for certiorari. However if the matter is one which affect the people generally then an individual citizen may ordinarily invoke the remedy of certiorari. The grounds for which the writ of certiorari may be issued are:

1. The writ is used for correcting errors of judicial and quasi judicial authority when they act in excess of their jurisdiction.
2. This writ is also issued for correcting an error of law apparent on the face of records.
3. Writ of certiorari also lies against a court or tribunal when it acts in violation of principal of natural justice. The two main principles of natural justice are:
 - a. The court must be free from bias.
 - b. Audi Alteram Partem, i.e. parties must be heard before decision is given.

The writ of certiorari cannot be issued to quash an order on the ground that it is unconstitutional. When there is already available adequate statutory remedy the court may refuse to issue the writ of certiorari when the application is made before the superior court without first resorting to the remedy.

4. Prohibition

A writ of prohibition is issued to prevent an inferior court or tribunal from exceeding its jurisdiction

or acting contrary to the rule of natural justice. This writ issued in both cases where there excess of jurisdiction and when there is absence of jurisdiction. The object of the prohibition is to restrain the inferior court or tribunal or bodies exercising judicial or quasi judicial function from exceeding their jurisdiction and to keep them within their limitation. The person whose legal right has been derived may apply for prohibition. The person aggrieved by proceeding in inferior court or tribunal or in violation of principle of natural justice may apply for this writ.

Prohibition will not be against the exercise of legislative or executive function. Prohibition lies so long as the proceedings are pending before inferior court. The application for prohibition may be refused without a hearing on merit if the applicant has suppressed the material fact with a view to mislead the court.

5. Quo-warranto

The literal meaning of 'quo-warranto' means 'by what authority'. By this writ the holder or any person who holds the office is called upon to show to the court by what authority he holds the office. The object of writ of quo-warranto is to prevent a person from holding that office which he is not legally entitled to hold. The person who unauthorizedly occupies an office may be ousted by the judicial order and the person entitled to the office may be allowed to occupy it. For the issue of writ of quo-warranto the following conditions are required to be fulfilled-

a. The office in question must be a public office of substantive character. For the issue of the writ the office held by the usurper must be public office of a substantive character. In *University of Mysore vs Govind Rao*, the S.C held that for the issue of writ of quo-warranto substantive office should be taken to mean an office independent in title. It can not be issued against an office of a private character.

b. It must be held by a person without legal authority. A person who is individually aggrieved may apply for this writ under Article 226. The petition for quo-warranto does not necessarily seek to enforce the petitioner right but challenges the right of the opponent whether he has authority to hold the office. A stranger may also apply for the writ petition if at the instance he has acted in a bonafide way.

As writing skill of a person is an art which a very rare person possesses likewise drafting an excellent writ petition is also an art which may be learnt by experience. Before drafting the writ petition the lawyer should have clear knowledge about the jurisdiction of H.C and S.C and the condition for the issue of the writ. The petition must be drafted after taking a firm decision as to which writ is to be prayed. The following parts of writ petition is notable-

a. Name of the court: The name of the court in which the petition is to be filed should be properly indicated, e.g., The Gauhati High Court.

b. Number and Year of the Petition: After the name of the court in which the petition is to be filed the year and number of petition must be mentioned e.g. Writ Petition No.....of 2000.

c. Name of the Parties: The petition must contain the name of the parties along with the full described and permanent address.

d. Reference of relevant article: Some words must be written to indicate the Article of the constitution under which the writ petition is to be filled.

e. Body of Petition: In the body of the writ petition the facts of the case should be stated very clearly. It may be begun with the words like, "the petitioner named above begs to state as under." In case of delay there must be reasonable explanation for it in the petition.

f. Prayer: In the petition the prayer for the issue of specific writ should be clearly stated.

g. Signature: The petition should contain the signature of the petitioner and of his advocate along with the date and place when and where it has been signed by them.

h. Affidavit and Verification: The affidavit contains the same heading and title as the petition. In the affidavit the deponent, states on oath that he is fully conversant with the facts of the

petition and the information is true to his personal knowledge.

The affidavit is required to be verified by the deponent. In the verification part it should be stated clearly that all the facts of the affidavit are true and nothing has been unsealed. The deponent signed the verification in the presence of the advocate. The writ petition should be attached with all the necessary documents relating to the facts of the suit so that it can be used as an evidence to prove the facts of the deponent, i.e. plaintiff.

THE RESERVATION POLICY : WHEN WILL IT ALL ENDS ?

Rafiul Ahmed

B.A.I.L.B 8th Semester

Reservation is intended to increase the social diversity in campuses and work places by lowering the entry criteria for certain identifiable groups that are grossly underrepresented in proportion to their numbers in the general population. Caste is the most used certain to identify underrepresented groups.

It is necessary, to know about the history of the reservation policy and its effect now a days. In the time of British rule there was no such division amongst the different communities. They first applied their 'divide and rule' policy by making wedge between Hindu and Muslims, sowing seeds of mistrust between those two communities. That was the reason for the certain of two countries, India and Pakistan, due to which the father of the nation Mahatma Gandhi was heart broken.

After independence one would have thought that the various communities would work together to reach the common goal of India's prosperity. But it has not happened rather the situation has now become a hotbed of violence, with various communities taking arms against one another, and for that the successive governments are responsible with their 'holier than thou' expression they are doing everything possible to divide the country in communal lines.

Reservation in education, Jobs and promotion for long sixty years have given a jolt to our social fabric. During the British rule of course there was no policy of reservation but they were least interested in the development of the country or its people. When India became independent, our first Prime Minister Pandit Jawaharlal Nehru in his famous speech regarding our trust with destiny promised various schemes for the prosperity of the country. He was the architect of modern India and his idea was to bring India up to the level of other developed countries.

After India achieved Independence Dr. Ambedkar was appointed chairman of the drafting committee for Indian Constitution. The Indian constitution has accepted the ideals of equality and justice both in the social and political field. Accordingly it abolishes any discrimination to any class of persons on the ground of religion, race or place of birth.

The Indian National Congress took over the reins of the country and then realized that many sections of the people were backward in all aspects like education, jobs and promotion, so development of those backward people was a matter of prime importance and as a follow up, reservation of backward classes comprising scheduled caste, tribes, hill tribes etc were introduced for fifteen years, people also thought fifteen years were longer enough for the people of backward classes to be at par with general classes. But now it appears that by the introduction of reservation policy the government had opened a Pandora's Box.

During these fifteen years the backward classes have multiplied tenfold and more and more

communities are claiming for inclusion in the backward category. One would have thought that after independence, with all the facilities available there would be no backward classes at all after the fifteen years of reservation policy. But after independence people are getting more and more backward.

For the quality and justice, the constitution of India visited some erstwhile groups as scheduled caste (SC) and schedule Tribes (ST). The framers of the constitution believed that, due to the caste system, SCs and the STs were historically oppressed and denied respect and equal opportunity in Indian society and were thus underrepresented in nation building activities. The Constitution laid 15 percent and 7.5 percent of vacancies to government aided educational institutions and for jobs in the government / public section as reserved quota for the SC and ST candidates respectively for a period of time five years, after which the situation was to be reviewed. This period was routinely extended by the following governments and Indian parliament, and no revisions were undertaken for the fear of losing votes.

Later, reservation was introduced for other section as well, the Supreme Court ruling, the reservation cannot exceed 50 percent. However, there are state laws that exceed this 50 percent and these are under litigation in the supreme court.

The other backward classes (OBC) in India are groups of citizens other than the scheduled castes and the scheduled tribes as may be specified by the central government in their lists.

The list presented by the commission is dynamic and will change from time to time depending on social, educational and factors the constitution of India recognizes the need to extend positive discrimination to this section units 1985, the affairs of backward classes were looked after by the backward cell.

Likewise there are various constitutional provisions for the backward cases. Under article 340 of the Indian constitution, it is obligatory for the government to promote the welfare of the OBCs.

The natural tendency of the people is that they do not want to be termed as backward will any mother tolerate if her son is called a backward child? It is the characteristics of people that they like to be called progressive and enlightened. The strange thing we see day is that various communities are eager to be recognized as backward only for the benefits.

Some time back the country witnessed unprecedented agitation by the students over the reservation issue. The students from all the elite Medical College, Engineering Colleges, and management institutes all over the country came out to the streets against the unfair reservation of seats for the backward classes. Merit should be the only critical for admission and not the caste. But the government was adamant in their decision and was in no mood to withdraw its unjust decision.

When will the reservation policy end ?

For how long the party leaders would dangle the carrot of reservation to woo the votes? For clinging to the chair, there is nothing that they would not do. For their reckless self promotion policy the unity of India is in shreds. We were proud of saying that India is a unity is diversity but we can say that now, with all this mayhem around us? And the government and various parties have seen to be doing everything possible to divide the people on the basis of caste, community and religion. From 1981 the demand for reservation of government jobs was made with an agitation in the princely states of Travaniare against the recruitment of non natives into public service over looking qualified native people. From 1981 till today the government was adamant in their decision and was in no mood to withdraw its unjust decision finally the situation was eased by the Supreme Court by its stay order.

The Government is enamored of the reservation policy and don't dare to repeal it. On August 31, 07 the Govt. has come up with its welfare schemes for the Muslim Community in the government jobs. The centre has also adopted some measure to look into the problems of educated backwardness of the Muslim community.

There are many Christian in the backward village in the hills and plains. Then why are they deprived of the facilities? If the Muslim are backward, then these Christians are also backward and they should also get equal facilities. Then many people belonging to the general classes also are backward they should also get the facility.

But what we see in Indian is that in the name of secularism, only one community gets pampered while other are ignored. Because of the excessive policy of reservation in the educational institutions, the students belonging to the general classes are deprived of seats which they richly deserve. The same thing is happening in the matter of jobs and promotion in service. The constitution of India also contains.

Articles 14 guarantees to every person the right not to be denied equality before the law or the equal protection of laws and articles 15 also prohibits discrimination by state on the grounds only of religion, race caste etc, with regard to access to public places. Nothing in this articles shall prevent from making any special provision for the advancement of socially and educationally backward classes of citizens or for the scheduled classes and the scheduled tribes.

If the constitution of India guarantees equality before law and equal protection of law then there is no question of reservation policy. If there is any prevision for reservation then it violates the articles 14 of the constitution then there is no equality before law and equal protection of law.

The term backward class is not defined by the constitution of India. But it is for the control and the state government to specify such classes of persons for the purpose of the constitution. I think it is the discretionary power given to the control and state government. The policy of reservation was first introduced for fifteen years but now it is extended day by day only because of clinging to the chair and they include various community as backward classes only because of their own into rest. It is the time to class the issue of reservation policy unless it becomes a day when the reservation policy turn into a very dangerous position.

TERRORISM AND PREVENTIVE DETENTION

Rajdeep Neog

BALLB 8th Semester

Terrorism is a scourge of human civilization. It is posing a grave threat to the established political and social system besides causing destruction of life and property and acute sense of insecurity of the people all over the world affecting the basic rights of humanism. The terrorist idea behind killing innocent men, women and children is to create a sense of collective vulnerability among the citizens. Outrageous mindless use of violence is intended to install a sense of fear that the next time around it could be the turn of this or that individual to fall prey to yet another terrorist bullet. The epidemic of terrorism has enveloped the entire globe. No nation or society can consider itself safe against its strike or effects.

Terrorism has hampered the growth, progress, peace and prosperity of our nation. It is affecting the unity and dignity of the nation and we have been threatened by outside divisive and terrorist forces wanting to destabilize and disintegrate our great country. The future of our country is integrally linked with sweeping and strong measures to be taken to curb the terrorism.

The Preamble of our Indian Constitution inter alia provides to secure to the people of India. The concept of fraternity cannot be extended that it endangers the unity and integrity of the nation. Keeping in the mind this goal of the Constitution, the individual right of life and personal liberty enshrined in Article 21 of the Constitution of India has been interpreted by the Supreme

Court of India to mean that the words "procedure established by law" in Article 21 does not mean "due process of law".

The Supreme Court while interpreting Article 21 in *A. K. Gopalan vs. Union of India*, AIR 1950, declared that though it protects any person from the arbitrary executive discretion but this right can be restricted by the legislature. This means that a law of preventive detention, if passed by the Parliament or a State Legislature, will be valid. However, subsequently the Supreme Court put a rider on the above interpretation by holding in the case of *Maneka Gandhi* that procedure prescribed under Article 21 should not be arbitrary, unfair and unreasonable.

The above ruling reminds the classic dissent of Lord Atkin in the case of *Liversidge vs Anderson* in 1942 wherein he observed that "amid the clashes of the laws in England are not silent".

Article 22 provides those procedural requirements which must be adopted and included in any procedure enacted by the legislature. Thus Article 22 prescribes the minimum procedural requirements that must be included in any law enacted by the Legislature in accordance with which a person may be deprived of his life and personal liberty. Article 22 deals with two separate matters: (1) persons arrested under the ordinary law of crimes; (2) persons under the law of 'Preventive Detention'.

Clauses (4) to (7) of the Article 22 provide the procedure which is to be followed if a person is arrested under the law of 'Preventive Detention'. The word "Preventive" is used in contradistinction to the word 'punitive'. It is not a punitive but a preventive measure. While the object of the punitive detention is to punish a person for what he has already done, the object of preventive detention is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved nor is any charge formulated. The sole justification of such detention is suspicion or reasonable probability of the deteneu committing some act likely to cause harm to the society or endanger the security of the government, and not criminal conviction which can only be warranted by legal evidence.

In *A. K. Gopalan Vs. State of Madras*, AIR 1950 SC'27, Patanjali Shastri, J., in explaining the necessity of such a provision, said : "This sinister-looking feature, so strangely out of place in a democratic Constitution, which invests personal liberty with the sacro sanctity of a fundamental right, and so incompatible with the promises of its preamble, is doubtless designed to prevent the abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant republic".

The structure of the Constitution of India shows that integrity and unity of the Nation is superior to the concept of individual freedom. All the fundamental rights under Part III of the Constitution of the India are subject to the integrity and unity of the Nation. Even the federal structure of the Constitution is 'quasi-federal'. In other words, it is a centralized federation where the national or federal government is more powerful so as to protect the unity and integrity of India. The federal structure of the Constitution does not allow any State government to belittle the unity and integrity of India. This philosophy pervades the whole of the Constitution.

In the past, in the interest of unity and integrity of India, laws of preventive detention were passed by the Indian Parliament and they were upheld by the Supreme Court as constitutionally valid. Therefore, there is no legal or constitutional doubt about the enactment and validity of such a law in future. However, the necessity of such a law at any particular time is a political question. It is not possible to provide legal answers to such political questions.

Article 22 of the Indian Constitution clearly provides protections to persons who are kept under preventive detention. The Supreme Court while interpreting this Article has evolved an admirable jurisprudence in the form of case law where arbitrary misuse of preventive detention law can be very effectively controlled. In totally it can be said that Indian Constitution provides sufficient safeguards against misuse of any preventive detention law in India.

LAW & MORALITY

Saya Rani Devi

BALIB 2nd Semester

Law in its most general and comprehensive sense means any rule of action and includes any standard or pattern to which actions are or ought to be conformed. In its Judicial Sense, 'Law' means a body of rules of conduct, action or behavior of persons made and enforced by the state. It expresses a rule of human action. As Holland puts it, "the term 'law' is employed in jurisprudence not in the sense of the abstract idea or order but in that of the abstract idea of rules of conduct." For him, law is the general rule of external human action enforced by a sovereign political authority.

As to the question why do people generally obey laws, the convincing reply may be that they do so because rules of law generate standards which people consider it necessary to obey as their moral duty. As pointed out by H.L.A. Hart, law exerts a certain "pull" on human beings towards compliance with law.

The function of law is that of social engineering and this perception has been accepted by all the civilized countries of the world including India. The concern of law as instrument of enhancing economic and social justice has widened to such an extent that there has been growth of a variety of laws touching various facets of human life. A significant development in this process has been that besides the legislative enactments the laws made by the executive in exercise of its delegated power to legislate have grown much more, both in quality and quantity.

Though law functions to regulate the conduct of men in society, its extent of operation has to be restricted to some extent for ensuring certainty and stability in the legal system. Having regard to history of development of law, it would be seen that different approaches through doctrinal theories propagated by jurists from time to time has been to project law as an instrument for balancing the rights and duties of the subjects to exert social control. Some of these theories are as follows:

Imperative theory of Law

The main exponent of imperative theory of law was John Austin. Therefore, this theory is also called the Austinian theory of law. Austin seeks to distinguish Law by its formal criteria and not by contents. According to him, "every positive law or every law simply or strictly so called is set by a sovereign individual as a sovereign body of individuals to a person or persons in a state of subjection to its author." Thus, law is the command of the sovereign. This in other words means that there can be no laws without a sovereign and therefore, existence of law re-assures existence of a sovereign.

I. Law as a command

Austin holds that law is made up of general commands issued to the subjects. This command is an expression of a wish by one person that another should do or forebear from specified act. The idea of command must necessarily indicate the existence of sanction behind it.

A command to be a law, must be general and not particular. Thus, as rightly pointed out by Blackstone where a command obliges persons individually, it is not a law, Austin, therefore, holds a view that law is an expression of a wish by the sovereign that the subjects shall do or forebear from doing acts of a class as distinguished from a simple isolated act.

In short, Austin's theory considers that law has a sovereign authority and there cannot be a law without a sovereign authority. Secondly, law as a command of sovereign must be accompanied by a sanction. Thirdly, command should be general in nature and not a particular one.

II. Laws are principles enforced by courts (Neo- Austinian view)

Salmond regarded law as the practice of the court and propounded the theory of legal realism. Like contemporary positivists, he agreed that law is an expression of the will of the state but as a realist he felt that it is not the parliament but the court which expounds law.

Salmond defined law as "the body of principles recognized and applied by the state in the administration of justice." This definition closely resembles the definition of law given by Prof. Gray who said, "Law of the state or of any organized body of men is composed of the rules which the court—that is, the judicial organ of that body, lay down for the determination of legal rights and duties.

As stated earlier, the greatest merit of Salmond's definition is that it treats law as an instrument of justice and as such it has an ethical value.

III. Law as a Norm of Action (Kelson's pure theory of Law.)

Keelson tried to modify Austin's theory of law by propounding his 'pure theory of law.' He regards law as a norm of action and jurisprudence as a normative science as distinguished from a natural science. According to Kelson, "State is a synonym for the legal order which in nothing but a 'pyramid of norms.' He derives pure science of law from 'ought propositions' of juristic science. He builds up his pure theory of law on the hypothesis of the grundnorm or basic norm. This grundnorm is not capable of being derived from principles of pure science of law. It is an initial hypothesis and is incapable of logical proof. Illustrating his hypothesis, Keelson observed that for England, the grundnorm is what the crown in parliament lays down as law." There is no norm above this. He contended that from the basic norm which he calls grundnorm, norm making power devolves upon a lower level, from which it flows to a still lower level and so on. Thus there is a hierarchy of norms, the grundnorm being at the apex of it. The entire hierarchy of norm-making organs and the process of concretization of norms is called by Keelson the legal order of a particular state.

IV. Marxist theory of Law.

The Marxist theory of law was propounded by Carl Marx and Engel and is also called the communist Theory of Law. It has undergone several changes ever since the Russian Revolution of 1917 and particularly in the later half of twentieth century.

Karl Marx in his 'Communist Manifesto' pointed out that the history of all hitherto existing society is nothing but the history of class struggle. The social and economic development of society is essentially an outcome of class struggle between the dominant and the suppressed classes of the society. In earlier stages, it existed in the form of privileged classes and the slaves which subsequently changed into the class struggle between the feudal lords and the serfs. With the evolution and development of trade, commerce and industries this class struggle transformed into a clash of interest between the capitalists and the working class i.e. haves and 'have nots'.

Purpose and functions of Law

Jurists have expressed different views about the purpose and function of Law. It is well known that the Law is a dynamic concept which keeps on changing with time and place. It must change with changes in the society. Law, in the modern sense, is considered not as an end in itself, but it is a means to an end. The end is securing of social justice. Almost all theories agree that law is an instrument of securing justice.

Of all these views, Salmond's opinion regarding function of law appears to be more sound and logical. The objective of law is to ensure justice. The justice may either distributive or corrective. Distributive justice seeks to ensure fair distribution of social benefits and burden among the members of the community. Corrective justice on the other hand, seeks to remedy the wrong. Thus if a person wrongfully takes possession of another's property, the court shall direct the former to restore it to the latter. This is corrective justice. Rule of law is *sine qua non* for ever handed dispersion of justice. It implies that every one is equal before law and law extends equal protection to everyone. Judges should impart justice without fear or favour and like cases should be treated alike.

It must, however, be stated that justice alone is not the only goal of law. The notion of law represents a basic conflict between two different needs, namely, the need for uniformity and the need for flexibility.

The main advantages of law as the fixed principles of rules for administration of justice are as follows:

1. It provides uniformity and certainty to the justice system. It is applicable to all alike.
2. Law as fixed principles of justice avoids the danger of arbitrary and biased decision. It reasonably limits the discretion of the judge and thus eliminates the changes of bias or improper motives affecting the parties adversely.
3. It provides adequate safeguards against error of judgment. Commenting on this aspect of law, the Greek Philosopher Aristotle observed, "to seek to be wiser than the law is the very thing which is by good laws forbidden". This in other words means that "Law in other words means that 'Law is not always necessarily wise, but on the whole and in the long run, it is wiser than those who administer it.'"
4. Yet another advantage of law is its reliability. It is certainly more reliable than the individual judgments of the courts.

Moral rights are those rights which are based on human consciousness. These are the products of moral faculty of each human being. They are backed by moral force of human mind. They are based on human sense of morality and justice. These are not backed by the force of law. Sense of moral goodness and public opinion are the sanctions behind moral rights. If any individual violates a moral right, no legal action can be instituted against him. The state can not enforce these rights. The courts do not recognize these rights. Moral rights include right of good conduct, courtesy and moral behavior. Moral rights are of the nature of moral claims. For example, it is children's moral right that their parents should give proper attention to their up-bringing and education. However, in case the parents fail to do so, no legal action can be initiated against them. Similarly, it is the moral right of parents that children should look after them in old age but if children do not fulfill their duty towards the parents, they cannot be legally forced to do so. The teachers and elders in a family can all ask for a good behavior from the younger ones but only on the basis of moral right to command obedience and never as a legal right. When a moral right or claim is adopted and enforced by the law of the state, it becomes a legal right.

Moral principles and values are not absolute. They emerge in a particular society in certain can never be the same as those are conditioned not by objective standards but by subjective standards which vary from society to society and country to country. However, there are certain moral principles which are universally recognized and upheld. Truth is accepted all over the world as morally sound and anything contrary to it is positively immoral. Marriage as an institution is necessary for the regulation of sexual morality and concubine is immoral.

Both ethics and political science are social sciences dealing with man. One is the science of morals and the other is the science of state and government. In the affairs of state and governments, moral principles are absolutely essential. Political science can never be indifferent to moral values.

In a democratic state like India, the legislature has the power to make laws according to the provisions of the constitution. However, if the legislature makes laws without taking into consideration ethical principles, the consequences would be disastrous. The people will not obey a law which is morally unsound, absurd or cruel. They will refuse to pay taxes which are without adequate moral justification. Political science is not the hand maid of ethics but it as to respect moral principles. A judge has to keep in mind moral principles when interpreting laws and giving judgments. Even in a dictatorship, the dictator cannot afford to ignore ethical values at all times and for an indefinite period.

In ancient times, there was no distinction between law and morals. The Hindu jurists in ancient India did not make any distinction between law and morals. However, later on, a distinction was

made in actual practice. The same was the case in Europe. In the name of the doctrine of natural rights, the Greeks formulated natural rights; the Greeks formulated a theoretical moral foundation of law. There is a new trend in approach to law indirectly studies morals also although a distinction is made between law and morals and law alone is considered as the proper subject matter of study.

Law and morality differ from each other in content, sanction and definiteness. Law is chiefly concerned with the outward acts of man and not touch his heart or his inner springs of conscience. Law can prescribe external acts but not morality. It is only when thoughts and motive translate themselves into action that they come within the purview of law. False hood cunning, ingratitude, envy etc. are morally wrong but not legally wrong. One may be habitual liar in his personal life, but if he does not cheat anybody or break his contract, law does not come into operation.

The sanction behind law is force. The sanctions behind morality in one's own conscience, social indignation and the fear of God's wrath. The state uses the fear of legal punishment and hope of reward to do its work. Morality rests on a person's intuitive ideas of what is good and what is bad and the motive of social approbation and disapprobation. Public censure is behind morality and political punishment is behind law.

Law and morality differ in their scope and definiteness. Law is universal and is more exact, consistent and definite than morality into which enter elements of uncertainty and ranginess. In the last analysis, an individual is the best judge of what is right or what is wrong.

Moral duty and legal obligation do not always coincide with each other. What is morally unjustified is not necessarily legally wrong. What is prohibited by the state is not necessarily morally wrong. In India, the traffic is to the left, but in the United States and France, traffic keeps to the right of the road.

Another difference is that while law is objective, morality is subjective. The former deals with what is permitted and the later with what is not permitted by the law of the land. Morality is rooted in universal values as conceived and interpreted by the individual. The state cannot dictate morality because state directed morality is a matter of inner conviction and conscience and as such it does not easily land itself to outer regulation.

Law is concerned with the external actions of individuals while morality is primarily concerned with internal actions. Law cannot regulate or control the conscience of individuals. Ethics is concerned with all the actions of individuals. It touches the rectitude of each man's life, the truth of his dealings with his own conscience, the whole substance of character and conduct, righteousness both of act and of mental habit. Law, on the other hand, is concerned with controlling the outward acts of man.

There is considerable common ground between law and morality. If the people are good, the state is good and vise-versa. Plato wrote, "The best state is that which is nearest in virtue to the individual. If any part of the body politic suffers, the whole body sufferers. Man can develop fully his personality only within the state. It is the supreme condition of his moral life.

The state can positively promote the conditions of morality and negatively remove conditions inimical to morality. Gilchrist writes, "As a positive moral agent, the state make good laws, i.e., laws which are in accord the best moral interest of the people. Negatively, the state must remove bad laws."

Law forbids morality. It forbids what morality forbids. That is why many acts are made penal if they are condemned by morality. "Laws cannot outrun public morality nor can public morality allow laws to be uninfluenced by it. In case of conflict between the two, however, it is morality which demands our allegiance."

R.M. MacIver observes "we regard the state as the condition of morality. The state and law continually affect both public opinion and actions; in its turn law reflects public opinion and thus acts as the index of moral progress."

A study of the various legal systems shows that law and morals have had a long union with occasional desertion and judicial separation but have never been completely divorced. There are indeed many different types of relations between law and morals and there is nothing that can profitably be singled out for study as the ideal relation between them. The view of Stammler is that jurisprudence depends much upon moral ideas as just law has need of ethical doctrine and just law of correspond to positive morality and rationally grounded ethics. There is no difference and if any, it is only the difference of manner in which the desire for justice presents itself. C.K. Allen observes thus on the relationship between law and morality. "Our judges have always kept their fingers delicately but firmly upon the pulse of the accepted morality of the day". Morals have often been considered as the end of law and many eminent jurists have defined law in terms of justice. It is contended that the aim of law is to secure justice which is very much based upon morals. In most of the languages of the world, the words used for law convey the idea of justice and morals also. In Sanskrit the word for law is Dharma which also implies morals.

It is contended by some writers that even if law and morals are distinguishable, morality is in some way an integral part of law or of legal development. Morality is "secreted in the interstices" of the legal system and to that extent is inseparable from it.

Law and morals act and react upon and mould each other. In the name of justice, equity, good faith and consciences morals have infiltrated into the fabric of law. Morals considerations play an important part while making law, interpreting law and exercising judicial discretion, morals act as a restraint upon the power of the legislature. No legislature will dare to make a law which is opposed to the morals of society. All human conduct and social relations can not be regulated and governed by law alone and their many relations are left to be governed by morals and law does not interfere with them. Morals perfect the law. Parton writes, "In marriage, so long as love persists, there is little need of law to rule the relations of the husband and wife but the solicitor comes in through the doors as love flies out of the window."

The sociological approach is very much concerned with the ends to be pursued by law. The result is that morals have become a very important subject of study for good law making. Morals also exercise a great influence on international law. The brutalities made during the world wars have forced the people to turn back to morals and efforts are being made to establish standards and values which must be followed by nations. If law is to remain closer to the life of the people, it cannot ignore morals.

DOWRY : A CURSE ON THE INDIAN SOCIAL SYSTEM

Shabnaz Khan

BALLB 2nd Semester

Dowry is an evil practice which takes away peace in every family. Dowry is the payment in cash or kind by the bride's family to the bridegroom's family along with the giving away of bride in marriage. Dowry is a social practice which first came from upper class families as the wedding gift from the bride's family to her to help her family or to the husband for his needs. Dowry started in the ancient times as Varadakrishna still goes on today. The problem of dowry is that it has escalated to a very deadly practice. Dowry deaths have become common news of every day.

There are no solutions to this inhuman practice, the only solution presented was the legislation of the Dowry Act in 1961 and since then it has gotten worse. This Dowry law in 1961 worsened the marital harmony although the dowry offenders are sometimes brought to justice. Dowry, according to section 2 of the Dowry Prohibition Act, 1961 means any property or valuable security

given or agreed to be given either directly or indirectly –

- a. By one party to the other party in the marriage or
- b. By parents of either party in a marriage or by other person to either party in the marriage or to any other person.

At or before any time after the marriage in connection with the marriage of the said parties, but does not include dowry or Mehr in the case of persons to whom the Muslim personal law Shariat applies. As the section 4 of the Dowry Prohibition Act, 1961, if any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees. As per section 3 of the Act, if any person gives or takes dowry, he shall be punishable with imprisonment for a term which shall not be less than five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry whichever is more.

Dowry is a deplorable practice. It is not a practice for which there is religious sanction, but it continues to be practiced in India today. Ridding the society of this cheapens the sacredness of marriage is a challenge to today's youth. Dowry is that kind of a social practice which no educated Indian will own up with pride. Ever among the educated sections of the society, dowry continues to form an essential part in an arranged marriage. Dowry is still very much a status symbol. Although the practice of dowry exists in many countries, it has assured to the forces of modernity and change only in India.

There are a number of case laws regarding dowry deaths. These include (Pawan Kumar Appellant vs State of Haryana Respondent), (Harijinder Kaur Petitioner vs State of Jharkhand and another respondents), (Vikash Appellant vs State of Rajasthan Respondent), (Hira Lal and others Appellants vs State (Govt. of NCI) Delhi Respondent), (Dhain Singh and another appellant vs state of Punjab Respondent). There is no end to case laws regarding dowry deaths because this cruel practice is increasing day by day, and this system is so deeply rooted in Indian culture that sometimes one feels that there's no way out to get rid of this inhuman practice.

Although many Acts have been passed regarding dowry system, but these have not been able to change the conservative thoughts of our society. Therefore, government should introduce some awareness features that would shake the typical mentality of our society and shapes this multi – faceted issue in a new form. Thus, dowry can be a security blanket for married women by giving them a fund of their own rather being a vulnerable violence towards women. In 2003, Supreme Court of India used the term legal terrorism, as the section 498A of Dowry and Cruelty oriented law was very much misused by many women, and as a result, most of the innocent families were behind bars for false FIRs. As a result, dowry laws creating another problem as legal terrorism, for certain loopholes in the laws.

PRESENT INDIAN JUDICIARY: A RAIN SOAKED BLANKET

Sahidulla Ahmed
BALLB 8th Semester

Judiciary, not only in India but all around the globe, is the most respected & trusted organ of the government because it carries forward the word justice. It protects the rights of the people. It is involved in maintaining the peace and order in the society by punishing the guilt and giving remedy to the injured.

Modern Indian judiciary was set up by the British in the 18th century when they established Mayor's court in the three Presidency towns of Bombay, Calcutta and Madras. The main object of British in establishing the courts was to carry out their domination and to punish those Indians whoever raised voice against their exploitive governance. Due to this, the British Indian judiciary was not offered the due respect by the Indian people and they had little faith in it. But after Independence, Indian judiciary was taken up by our native people, and Indian judiciary forsook its humiliating approach towards the Indian people. As a result, Indian people started believing that the courts will do justice to them and offering due respect to the organ of the government which aims at justice, peace and order.

However, today as a result of the growing drawbacks in the judicial system the honor of the Indian judiciary is declining rapidly. Faith of the people is being tested by the growing angularities in the judicial system. Problems faced by the Indian judiciary at present time weakening the root of the system. In this small article, some of the present day problems of the Indian judiciary have been highlighted.

Judges and lawyers are the two wheels of the chariot of justice. Judges are regarded as the statute of justice. They are the symbol of fairness, impartiality, and honesty. But now a days, the honor and dignity of the holly profession is declining day by day. It is primarily due to their deviation from the professional ethics.

Though bitter, yet has been admitted by many vastly knowledgeable judges and jurists that corruption among judges of lower as well as higher judiciary is growing in size like forest fire. The Chief Justice of India, S. P. Bharucha, speaking in Kerala has reflected the possibility of 20% of judicial officer being corrupted. Though intuitive a 20% corruption figure is enough to cause alarm. One in every five judges may be corrupt, but not all the time and not in all the cases. In an address, Chief Justice of India, R. C. Lahoti while teaming the Indian judiciary as one of the best in the world conceded that rampant corruption in the society has not left the judiciary untouched. The C.J.I stated "The judges are not Sadhus and Sanyasis and in spite of ethics expected of them, and rightly so, the fact can not be denied that judges being human beings are the products of this society. Spread of any epidemic would not and can not leave the judges, they being human, untouched." Justice Bhagawati in a T. V. interview blamed the judges for the fallen standard and suggested revamping of the judicial system.

In a recent study under taken by Delhi based centre for media studies, a research firm, report that in 2008, 59% of respondents paid bribes to lawyers, 5% to judges and 30% to court officials. There are many instances of metropolitan magistrates ensuing boilable arrest wans ants against individuals of whose identities he has no idea in for an inducement. Sometimes back, a metropolitan magistrate in Ahmedabad issued billable warrant against the president of India in return for an inducement of a sum of money. In some cases, judges offer a favor in exchange of personal gain. In Rajasthan, sometime back, there were reports of a judge who offered judicial favor in exchange for sexual favor from a litigant. Recently it was found that Haryana additional advocate general delivered a bagful of cash worth Rs. 1.5 million at the evidence of a judge of the Punjab and Haryana high court in August 2008. In police investigation it revealed that the cash was meant for another lady judge of the same high court. Very recently, in September 2008, an additional district government council accused two judges of Lucknow session court of corruption and misconducts before media person. There are thousands of such examples of judicial scandal.

Now, the question arises why the rate of corruption is increasing among judicial officers. The fact is that the system is rife with delays and inefficiency creating an ideal condition for middleman to step in. It is well known that the lack of sufficient staff and complicated judicial process make cases drag on for years. People often have to pay bribes to speed up the process. Recent media reports have shown that it is possible to secure a favorable judgement in lower court by bribing the judiciary, although the situation radically improves when it comes to the higher courts. A judge has a lot of discretion in issuing bail; the guidelines governing this are fairly basic. It is possible to secure bail by influencing the judge in some cases. A lot of non-case related works also fall under

the purview of the judiciary. This includes the issue of affidavits, registration. People often pay bribes to get these works done by a middleman.

It is true that independence of judge is very much required for impartial judgment, but the excessive liberty has provided fuel to run the machine of corruption. The Supreme Court of India has ruled that no First Information Report (FIR) can be registered against a judge, nor a criminal investigation be initiated without prior approval of the Chief Justice of the S.C. once appointed, a judge of the H.C. or S.C. cannot be sacked except by a complicated impeachment process, done by the members of the Lok Sabha and Rajya Sabha, the two houses of Indian parliament susceptible to political influence. In 1990's, when the Congress was in power, a motion seeking to impeach justice V. Ramaswami could not be passed by parliament as congress members of parliament abstained from voting. Since then there has been no other attempt at impeachment in India. Last year, the chief justice of India wrote to the prime minister aiming to get rid of a judge of Calcutta High court who had misappropriated Rs.85 million of the High Court's funds. But no impeachment has taken place. It shows that there is no effective mechanism to punish a guilty judge. Moreover, under the existing rule, any person making any allegation of corruption or other things against a sitting judge can be charged and punished for contempt of court. It is a deterrent even against coming into light instances of corruption on the part of the judges.

It is true and well accepted that rampant corruption in all the offices of the govt. has been affecting the progress of the country. On 26th August, 2009, the honorable prime minister of our country Dr. Manmohan Singh in a biennial conference of CBI and anti-corruption bureau state, "Pervasive corruption in our country is distorting the rule of law and weakening institution. It hinders our economic growth in a variety of ways, apart from hindering our effort to build a just, fair and equitable society." But it is still considered less calamitous to have to pay a bribe for an occupational license than to be denied justice in the court or to get it by paying for it. A judicial scandal is considered especially deplorable. The slightest hint of irregularity or impartiality in the court is a cause for great anxiety and alarm. Increasing corruption among judicial officials not only jeopardizes the prestige of the judiciary, but also destroys the faith of common people in the judiciary. To reduce the corruption among judges, apart from giving effect to measures advised by different commissions, surveys, and jurists, steps like that were taken by the C.J.I. Bal Krishnan is very much needed. The C.J.I. did not just allow a probe by police and CBI in to various instances of judicial misconducts and corruption, but also formed high level judicial panel for independent scrutiny of the truth behind the allegations. But, to check this erosion completely, it is the judges who were to understand the professional ethics and realize their duty properly. The judges are to realize that people keep their eye on the judges for justice when their rights are encroached. The judges are to comprehend fully that it is not the tragedy of just a few hundred individuals that their ability and intentions are being brought in to question; When they happen to be guardians of our liberty and property, the interpreters and watchdogs of our constitutions, it becomes a national catastrophe. It affects and stultifies each one of us. Advocacy is a noble and honorable profession. Such recognition has been conferred on the legal profession by the society for so many centuries. It is considered as one of those careers which are meant for the service of the community. In fact, there is no other career which touches the various aspects of human life. In modern age, advocates are regarded as the custodians and vindicators of order, justice and liberty.

But, now days, there is a growing feeling in almost every circle about the declining standards of the advocates. Today, people feel lawyers an undesirable necessity evil. The honesty, integrity, fairness, fearlessness and reasonable fees are becoming things of past. All the seven lamps of advocacy are found among only a few advocates of today. Professional ethics teaches that advocacy is a legal profession the role object of which is public service and to discharge social obligation. But now days, advocacy has become a business the object of which is to make money. The need for lawyers to charge fees is necessary for comfortable living and to enable them to be efficient and discharge their duty honestly and fearlessly. But it should not be biased to amass wealth and exploit the client when he is in trouble.

Advocates are very important part of the judicial mechanism. While dealing with his case advocate plays his role not merely in establishing the case of his client but also in guiding the court to impart justice. He is expected not to misguide the court. An advocate should not hide any fact relating to the case. But today advocate has almost together their professional ethics. There is a general feeling that advocates are above law and once the case is handed over to them, they can conduct the case in any manner lawyers are also said to be responsible for delay multiplicity of proceeding and corruption the judges.

However, some of the criticisms are unfair. The litigants are also to be blamed as they want their cases to be a *ulna* and defendant or accused to get free anyhow. A lawyer for fees is not expected to be by client.

A lot of improvement is necessary to do away with the criticism regarding falling of the standard. Standard can be maintained by following the great tradition of bar and by maintaining high standard value, learning and following professional ethics and not by cultivating relation with judges. It is duty of lawyers to see that the professional is not looked down upon by the public.

The virtual collapse of judicial system in India can be seen in extra-ordinary time taken for settlement of any case and the large number of cases pending before all courts at all levels. In India the judicial process is unnecessarily complicated, cumbersome, inefficient and slow making cases drag on for a long time. At last count, some about 26 million cases were pending in Indian courts.

The dockets, or calendars of civil causes, are always over crowded and it may take years to get a trial on merits. The procedure is too elaborate and technicalities impede the litigant at every stage. Even after initial judgment a number of appeals may be a further cause of delay. Where the final judgment is secured, execution is more than likely to be returned unsatisfied, under such circumstance the honest litigant is impeded in the assertion of his legal rights, while paradoxically enough the dishonest litigant is encouraged to assert unfounded or exaggerated claims.

Delay and technicalities are operative not in civil action alone. The condition is not better in the administration of criminal justice. In the pre-democratic era, the arbitrary character of criminal justice led to accusations of excessive harshness, while at present the *otter* is against an excessive tenderness towards malefactors. Many criminals are never even apprehended for those who have more than even chances to escape by taking advantages of the loopholes of the law. The inherent drama of a criminal trial in the very nature of things always favors the defense. On the other hand, corruption, favoritism and perjury are especially operative in criminal trials. Every period has its own causes of *célèbre*. It is hear say that wealthily and powerful malefactors escape while the poor and friendless go to jail. In a T.V. interview on the channeled DY365, a senior advocate of the Gauhati High Court said that in his legal career he met such a case where the accused remained in jail as under trial prisoner for nine months for a petty offence for which the highest punishment was imprisonment for six months. Apart from the technicalities and long procedures, another reason for delayed justice in India is lack of required judicial staff. There are more than 30% posts in judicial offices vacant. The state governments always seemed to be unconscious about such vacancies. Although the law commission, keeping eye on such an adverse situation, recommended in its fourteenth report for the establishment of all Indian judicial service which was also supported by the First National pay Commission, but no step has yet been taken. Indian legislature has provided by different status for establishment of the Family Courts, consumer forums and Lok Adalats for speedy disposal of family matters, consumer matters and cognizable offences. But, there have been lack of proper implementation of this. It requires no further justification after we know that there are only two Family Courts in Assam till today.

P.V. Narasimha Rao, former Prime Minister of India (1991-96), who was in his eighties and was facing a large number of legal cases on various charges is said to have remarked in exasperation that death alone will settle his cases. Former chief justice of India P.N. Bhagwati said, "I am pained to observe that the judicial system in the country is almost on the verge of collapse. Our judicial system is creasing under the weight of arrears. It is a trite saying that justice delayed is

justice denied. We often utter this platitudinous phrase to express our indignation at the delay in disposal of cases but this indignation is only at an intellectual and years to get justice. They have to pass through in our pawn courts, have to wait potentially for years and years to get justice. They have to pass through the labyrinth of one court to another until their patience gets exhausted and they give up hop in utter despair."

Along with inordinate delays in deciding cases, highly expensive litigation has become characteristic of our legal system. Any litigation is a costly affair: court fees, expenses for preparing a case, expenses in the courts, additional miscellaneous expenses, lawyers' fees all these have to be incurred by the litigants.

Criminal courts are supported out of public funds, as there is no provision in law for making the accused or guilty person pay the expenses. However, the accused or defendant in a criminal cases has to meet the high fees of the lawyers to defend them. In the civil court, a litigant has to pay for three main items:

- a. Court fees, which is a substantial source of income to the states and which is guide height;
- b. Expenses of collecting evidence and bringing witnesses to the court for proving his case or defiance;
- c. The fees of Advocates and preparing of briefs and also miscellaneous expenses.

The costs to the litigants are high in our system and some of the reasons are:

a. The nature of our procedure, which requires most cases to be proved by oral evidence involving an elaborate process of examination, cross-examination and re-examination of witnesses in open court subject to technical rules of evidence.

b. Litigants are to meet the high fees of advocates. Today, as stated earlier, advocacy has become a business rather than a pious profession. It is almost impossible for many poor litigants to meet the high fees of advocates for proving their rights or defending their rights. Moreover, the division in the legal profession between senior and junior advocates has resulted in a case involving two sets of fees.

c. The absence of fixed days for hearings involves a great deal of wasted time and money by reason of parties, their witness and their lawyers having to wait around sometimes for days before their case is called on, apart from the difficulty of making firm arrangements in regard to other matters, when it is not known within how many days or even weeks a case is likely to be reached and even then adjourned.

- d. There is also under the present system multiplicity and high cost of appeals.

Moreover, our system has adopted the principle that in the H.C. and S.C the cost of judges should fall upon the public funds and all other expenses of the administration of civil justice upon the litigants. The every state defers and in a recent judgment of the S.C, it was held that a state can increase court fees to any extent.

As a result, it is now utterly impossible to count the costs of litigation beforehand. Since everything depends on the manner the other side, advocates and the court conduct the case, one does not know whether a litigant who succeeds will be a winner in terms of money, even if he succeeds in the case if agony, time and cost are taken into consideration. Small claims and small litigants are at a special disadvantage. The expenses of the litigation very nearly consume the claim, and sometime the costs may exceed the amount in dispute, if not, may still eat away so much of the claim as to make litigant futile. On the other hand, relatively considerable financial resources that can be utilized for litigation gets obvious advantages in pursuing or defending a claim. In the first place they can afford to litigate. They can pay high fees and retain the best advocates. They are, in addition, able to withstand the delays of litigating. Each of these capabilities in the hands of one (litigant) party can be powerful weapon.

If equal justice to all is high constitutional priority, then the effectuation and realization of the

same would depend directly in proportion to the availability of expeditious and inexpensive legal system and remedies. The administration of justice will not be effective and real, if access to justice is so expensive as it has become today.

Some relief has been provided by way of legal aid, as step lowered affording relief to the poor, but it is a drop in an ocean of high costs.

Subordinate judiciary is the backbone of our judicial system. But, the actual fact, today, is the condition of subordinate judiciary of the judicial structure in India is pitiable. There are large number of cases pending in the subordinate courts of District judge, civil judge, and massifs. There is not enough members of judges in the subordinate judiciary in many of states, nor there is enough number of courts. There is no arrangement in India to give the subordinate judges pre-appointment training or continuing in service training. India proceeds on the assumption that as soon as persons are appointed as subordinate judges, some divine wisdom descends upon them and they acquire skill and capacity to deliver justice. When finances are needed for the purpose of improving the judicial system at the lower levels, there is reluctance to make such finances available.

If we the Indians want to maintain a strong judicial system then we are to realize that it is subordinate courts which form the basis of the pyramided of justice, and unless the base is strengthened, the pyramid is bound to crumble. We should not forget that the conduct of the common man with justice system occurs only at the level of the subordinate courts; he has rarely occasion to go to the High Court and therefore, if we want to inspire confidence in common man that he can get justice, it is imperative to strengthen the subordinate judiciary. If there is a strong subordinate judiciary, the number of appeals to the High Courts will go down and the burden on the High Courts will be considerably reduced.

The alienation of the common man in India with judicial system leads to his feeling that the court room is an alien- land almost like a war fielded where the common notion of morality and ethics have no place. It is not unusual to see in Indian courts persons who are other-wise respectable and God fearing submit false affidavits and make statements that have no relation to facts. It is often said that 'All is fair in love and war.' In India, this gets extended to the court room where technicalities rather than truth and morality rules. This has led the Indian courts becoming graveyards of justice instead of being temples of justice.

The absence of any relationship between the judiciary and the academic community, as in many European countries, has weakened both institutions in Indian. For most students getting admission to a course in law is the last option after they have lost all hopes of entering any other profession.

The poor judicial system in Indian has attracted worldwide attention. International investors and corporations take this as one of the big hurdles of doing business in India. Businessmen in India restore to all means other than courts for settlement of disputes. Courts are considered only as a last or as an attentive to be used for harassment of the opposite party.

All this lead the common Indian citizens to feel that Indian judiciary, today, has become a rain soaked blanket on the back of a common litigant. British set up a poor copy of their judicial system as Indian judicial and today, Indian judiciary has become a decaying institution that has no internal mechanism, or will or strength to adopt to the changing time. The situation is indeed alarming and calls for immediate steps on war footing. The only institution who can stem this not is the judiciary itself, but the judiciary does not even seen to be very much conscious about these problems.

Justice V.D. Tuzapurkar of the supreme court once said, "If an independent judiciary regarded as the heart of a republic, then the Indian republic is at present suffering from serious heart ailment." The late Mr. M.C. Setalved, the first Attorney general of India, in his address to the Bar Association of India said, "No doubt, the British system of administration was very good and led to excellent results, but it had its defects which have been accentuated in two ways. We are now a democratic country and we are a much more poplars country. In these days, therefore, what is required is a radical change in method of administration of justice. We want court to which people

can go with ease and with as little cost as possible. It is not merely the quickness of justice but it is the easy approach and quick disposal both which are needed and that only can be achieved if the system is completely overloaded."

In writing this Article, my intention is not to hurt the esteem of the Indian judiciary. Being a student only, I am also well equipped with knowledge to criticize the judiciary. However, I have tried to make the present as well as the future judges and lawyers and also and also serious Indian citizens aware of the problems faced by the Indian legal system, because I believe diseases cannot be cured, and problems cannot be solved unless we know them clearly.

ROLE OF MEDIA IN PRESENT SOCIETY

Sakuntala Bhuyan
BALLB 8th Semester

No civilized society can live without the press. Taking into account its utility in modern life and with the unprecedented improvement in the field of science and technology, media i.e. print and electronic media have become almost as necessary as food and clothing of human life. Let us consider, its influences on man. A good press educates and helps in forming sound and healthy public opinion, moves the barriers regarding religion, language, caste and sex. It is considered as the direct communication with man and influences them for destructive and constructive work. Thus, it can be said that "All media revolutions are sensational revolutions of the individual and a corresponding revised form of socialization."

As pointed out earlier that there are two parts of media i.e. print media (press) and electronic media. Information media have become an indispensable part of modern democracies. Media plays an important role in protecting human rights, democratic rights and civil liberties. Though newspaper, the press keeps providing information about our day to day political, social and commercial activities yet people are also posted with news and informative articles on literature, sports and Science. The additional comments after serve as guidelines to government for constructive work. People express their feelings through the letters to the editors.

Information media are also important socializing agents. The press, radio and television are most important agencies and played a crucial role in encouraging individual to conform to the existing norms and values or oppose and change them. They are an instrument of social power as they can attract and direct attention to problems and provide possible solution to these problems.

The press served the general task of bringing about social reforms. Many social evils like constructibility, dowry system, smuggling activities etc are ruthlessly attacked and criticized by the press. Government servants as well as public servants or higher posted authorities are more careful because of the fear of being exposed by the press. There are very few people who are not afraid of its power.

The term "Media" derived from the word: "Medium" necessary for communication between the sender and receiver, plays an important role in our lives. Upholding the truth of its definition, media brings information at the same time helps public voice reach the appropriate authority. Thus, media serves a two fold purpose. Being an intermediary between the people and government it not only carries information to public but also carries back public response to the government. It enhanced the quality of democratic process by providing a platform for public participation on issues of national or social concern in a manner that is able to influence the government into action. Press is considered as the "fourth estate of democracy" and it was Walter Lipmann who

called it as "The Bible of Democracy". By publishing domestic and international news and views regarding political, social and economic issues make the people aware of their rights and duties. It can harass any stable government by poisoning public opinion. It can also give information about proceedings of the parliament and assembly and all important political events in the country without these people would be in the dark about the political and social trends in the country.

Media played an important role during the period of election mainly in India i.e. representation of government there is a question arises inform of the every citizen that to whom they cast their vote. In that case, media can help the masses in an indirect manner by highlighting the achievement and failures of a government and bringing into highlight the atrocities that might have been committed during its tenure. Media can help people to identify the selfish leader by removing their marks by throwing light on their improvement in corruption, bribery and able to select the efficient, talented best candidate to represent them and make democracy successful through the welfare work. So we can say that media can expel out the perverted one so that we can not be entered to the truth common people.

The electronic media, television, radio and cinema can play a very important role in our society which is able to attract the mind of the people immediately. Cinemas like "Nayak", "Rang De Basanti", "Slumdog Millionaire", "Gangajal" a part from entertaining the people have succeeded in providing some inspiring message to the masses.

Media have also been providing employment opportunities to a large number of educated youth of our society. India is one of the world's largest markets today with some 40 satellites news channels, who are supremely innovative practitioners of infotainment. It is also provide employment news through the advertisement or news paper.

"Media Trail" the most commonly used phrase in the late 20th century and early 21st century to describe the impact of the fourth estate, in the form of print and virtual media or a person's reputation by creating an extensive perception of culpability despite the consequences of any verdict in a court of law. Especially visual media tends to make people instantly judgment. So how far is it fair on part of media to skulk with their words? It has now days become a menacing media practice to citizen any accused of an offence even before the judiciary passes any verdict. To stop this, the courts would be right in issuing a gag order for cases that are Sub-Jud ice. It is said that "For the rule of law and orderly society, a free press and independent judiciary are both inseparable. When a judicial decision is arbitrary and whimsical, must be subjected to scrutiny. Exposure to criticism can no way waken its dirty rather true criticism done in good faith should be allowed for it will make judiciary more responsible and will increase its accountability. But now a days trail by media has become a serious menace as it busy in passing judgement and divert from its main function. Under Act 39 of constitution of India it self provides "amicus curie" through which every accused has the right of representing himself by a lawyer of his own choice before the court of law. But quit contrary the trail conducted by the media even before the actual trail commences in the court of law, creates pressure on the lawyers to a great extent and make them come to a double mind as to whether they should take results into the accused being tried without a defense layer and this is indeed a threat to natural justice and we are also unable to expect a fair judgment from a judge who is under such tremendous pressure from all sections of society. Even where a criminal court finds somebody not guilty the media can still appear to sit in judgment over the sentence. Therefore former chief justice of India K.K. Sabharwal expressing his views in this regard that "If this continues, there can't be any conviction judges are confused because the media has already given a verdict". For example, in the case of "Aarushi murder case" Bench acted that, "It is our credibility that is on stake, therefore it is necessary to decided the case on its merits and not on news reporter" while hearing the "Neeraj Grover" murder case the co wet also made it clear to the state that only if the case is prove an order of conviction will be proved. They also said that it was a rather unfortunate situation that the media reports are effecting the investigations and also the trials. Accordingly in the "Bharat Shah case" media has jumped to the instant conclusion, on the persuasion of the police and political establishment that Shah is guilty of playing foot sie with the mob. In the process, they have ignored the actual evidence before the court. Till the

courts, pass a verdict, we have no idea whether Shah is no guilty or not; therefore in the best traditional of justice and fair play. We must presume his innocence. But it is always not always true that media only play negative role in this regard; in the case of "Jessica Lal murder" case is played an unexpected active role which was dominated from 29-30th April 1999 through money power but recently in 2009 media bring to light this case and finally gave justice by S.C. and convicted person awarded life imprisonment.

Infect, the press is a two way weapon. If use carefully it can help in building up the nation framing the right public opinion. If misused, it can lose the very foundation of other side of the picture. Media is not still able to attain 100% success in protecting democratic values and norms. In the name of publishing hot news such as publication of case of Shankar Sarmah, accused of thrashing Yashwant Sinha's dream budget, or the case of Fardeen Khan where he was caught with a gram of co cocaine for his own use, or for example, Salman Khan who has been accused of diverting his local rearming into foreign exchange the case of Shiny Ahuja who are the number of people that media has put this torment to make headlines, that can sell newspapers and tempt the viewers for their news shoos and creates unnecessary atmosphere. As the number of channels in growing the ability and domination of political information have also reasonable increased. Sender of political message new has channels for sending customized political message to diverse audience. It is also true that with the multiplicity of channels the needs of specific groups are better addressed today. Besides them some of the news agencies are creation of political parties which lower not only the status of a newspaper but also democracy and democracy become "a government off the people, to buy the people and for from the people."

Apart from these disadvantages on failures, the role and significance of media can not be ignored. But there is a question arises regarding the people who the news or who makes another people politically conscious, i.e. the agent of media or the reporters, journalist to what extent their lives are protected and to what extent Article 19(a) of "Freedom of speech and expression and Article 21 of "Right to life and personal liberty" is protected through our constitution. Recently on the 4th March, 2009 the killing of Anil Muzumder, editor of the Assamese daily news paper 'Aji' is socking and needs to be condemned by one and all occurring four month after the murder of Jagajit Saikia, another journalist in Kokrajhar, the development by bare the escalating threat the life faced by working journalist in the state. This has been a phenomenon witnessed not just in Assam but in many parts of the North East. Targeting of journalist by militant and anti social is nothing uncommon in the region with Assam alone accounting death of as many has twenty journalistic the past decades. In this context we can recall one most formerly Assamese reporter named Late Parag Kr. Das. He was most concern person to people to people who wanted give people full freedom and peace by look out the falls and corruption happening by different authorities in different ways. But suddenly he was killed by terrorist in 1992. The most disturbing aspect of this glory episode is that a single killer could be arrested till date. This reflected the sheer inefficient of the government and law enforcing agencies in dealing with the mounting attack on media person so that the constitution itself considered as the "Beautiful flavor without regencies. In the situation only the government in the way who can take precious measure to prevent the growing attack on media person otherwise being the fourth pillar of democracy, an impartial and courage's media is critical to the survival of the democratic etches.

Thus it can be concluding in the words of F.D Roosevelt's that, we took forwarded to a world funded upon freedom and fear..... which any where in this world. It is real fact that media give the society..... The line of finding civilized which may consider as a election of peace and happiness. We need a world but does not mean full of enemy, full of crises. So further on this may be considered as a pillar of society. This is a real fact that media helps the people of think the world as a small one and by which self energy we can protect our own fundamental rights. Therefore, the role played media upon society can not be ignored for which media considered to be "Fourth Estate" of the government.

CRIME : AN EVIL DEED

Shraddha Mahapatra
BALLB 6th Semester

Man by nature is a fighting animal hence to think of a crimeless society is a myth. There is no society without the problem of crime and criminals. The concept of crime is essentially concerned with the social order. It is well known that main interests are best protected as a member of the community. The concept of crime seems to have always been changing with the variations in social conditions during the evolutionary stages of human society. In the early English society during the 12th and 13th centuries only those acts were included as crimes which were committed against the state or the religion. Treason, rape and blasphemy were treated as crime whereas 'murder' was not a crime. In the primitive society there was no distinction between the law of crime and torts but only knew law of wrongs.

In the eighteenth century the criminological thinking was little bit changing. The concept of crime was relating with the social policy. With the change in ideology, the concept of crime also was changing. New crimes spring up whereas some existing crimes become obsolete and they were deleted through adequate changes in the criminal law. Recently the stringent anti-dowry laws were enacted to prevent the incidence of dowry deaths and bride-burning and deterrent legislation against the practice of sati providing for death sentence and find to those who abet this evil practice in any form clearly indicate that the society is no longer going to tolerate atrocities against women and desires to assure them a dignified place in the community.

There have been considerable inverses in crime rate in recent decades. The crime statistics all over the globe have recorded a similar trend. In fact, the incidence of crime in western countries is for greater than that of India. Twenty-first century's hi-tech world and use of computer network has given rise to cyber crimes and other computer related unlawful activities. Cyber crimes are harmful acts committed for or against a computer or against information on computer network.

The existence of crime in a society is a challenge to its members due to its members due to its deleterious effect on the ordered social growth. In fact, it leads to a colossal waste of human energy and an enormous economic loss. There are variety of crimes such as violent personal crimes, occasional property crimes, occupational crimes, political crimes, public order crimes, sexual crimes, crimes against property, person, decency, public order etc. these may be categorized into three main heads namely (i) offences falling under code of criminal procedure (ii) offences under Indian penal code and (iii) offences under local or special laws or enactments.

Some writers have preferred to classify crimes into legal, political, economic, social and miscellaneous crimes.

1. Legal crimes can be termed as traditional crimes such as theft, robbery, docility, rape, hurt and rioting etc.
2. Political offences are those which are motivated politically or committed in violation of the election laws or norms set out for the politicians in course of their political activities.
3. Economic crimes include which collar offences such as tax evasion, smuggling, prostitution, gambling, foreign exchange violations etc.

It must be stated that recent developments in the field of psychology sociology and other behavioral sciences have brought in their wake a corresponding change in the criminological trends and opened new vistas in comprehension of human behavior. It has been generally accepted that crime is a product of various factors which cannot always be explained on the basis of hedonistic calculus of pain and pleasure as propounded by Bentham. There is need to control criminogenic influence by improvised correctional techniques as to bring out re socialization and reformation of

the offenders. Crime has been a baffling problem ever since the dawn of human civilization and man's efforts to grapple with this problem have only partially succeeded.

Lombrosian Anthropologists through their biological and anthropological researches succeeded in establishing a correlation between heredity of the criminal and his criminogenic tendencies. The psychiatrists on the other hand located crime in mental depravity of the criminals. The psychologists explained crime in terms of personality deviations. Modern researches have however shown that hereditary influences have little effect on criminality. As a result of persistent studies carried on in respect of identical twins in western countries, it is now well established that when twins are separated early in life and placed in different environments, they behave differently in their tastes and way of life. The tribal areas in India deserve a special mention here. They are mostly due to superstitions belief in witchcraft, petty quarrels, sexual indulgence and intoxication due to excessive consumption of liquor, especially in festive seasons.

According to the sociological theory 'crime' asserts that there are persons who do not conform to the established norms and traditions prescribed by law. These persons do not adjust themselves within the framework of normal standards of society and are more or less indifferent to societal norms. The sociological theory pre-supposes that criminals are a product of society. The impact of sociological factors is so great on persons that they either shun criminality or embrace it, depending on their environment and immediate social conditions. It is also true that personal situations of the criminal do play a vital role in the causation of crime yet these 'situations' alone can hardly be sufficient to motivate a person to commit crime if his previous life experience are otherwise different.

Crime and economic conditions

The proposition that economic life is fundamental and has the determining influence upon the social and cultural values is as old as the human civilization itself. This connotes that economics factors influence the nature and form of all social patterns and control all other aspects of human life. Thus, criminologists have tried to explain crime in terms of economic conditions through what they called as economic determinism. Leg philosophers of all ages have accepted that economic conditions have a direct bearing on crime. Aristotle, the Greek Philosopher commented that poverty endangers revolution and crimes originate from poverty he asserted that crimes are committed merely for the sake of meeting the necessities of life but also for acquiring superfluous things. He believed that crimes are mostly committed because of the acquisitive tendency of man and his greed for acquiring surplus wealth. The critics of this view argue that poverty factors for crime causation but it is not true that necessity always motivates a person to commit crime. In fact it is the materialistic tendency of man that generates criminality within him. Thus, the desire to possess articles of luxury prompts him to commit criminal acts if he cannot procure them by legitimate means. Poverty gives rise to hunger, misfortune, disease and anger, which destroys the personality of an individual and makes him irresponsible to do undesirable acts. Under those circumstances, he is forced to lend himself into criminality. Therefore, according to these philosophers' economic factors has a close bearing on criminality and crime rate rises when poverty increases in times of economic depression.

Organized crimes

Criminality is a global phenomenon. With the advancement of time and development of knowledge and technology the complexities of life have multiplied with the result many anti-social elements think it profitable to embrace criminality as a profession to earn their livelihood. This has provided opportunities to criminals to organize themselves into criminal gangs. In the modern age of science and technology, new techniques of crime are used by the gangsters to accomplish criminal designs.

Organized crime is an act which is committed by two or more criminals as a joint venture in an organized manner. It is an illegal act which the members of an unlawful association commit with their mutual co-operation and adventure. Organized crimes have been in existence for centuries in almost every society. Criminals organize themselves into formal or informal groups to carry on their illegal activities violating the law ruthlessly. Like any other business organization, the professional

criminals organize themselves into criminal gangs to carry on their anti-social activities vacating the law ruthlessly with skill and efficiency for profit making. The gang of criminals practicing one particular criminal activity doesn't generally interfere with criminal organizations practicing other crimes. On account of interconnection between the criminal activities carried on by two or more organized groups of criminals, one group may at times be seen to carry on its activities in close liaison with that of another. Thus organized gambling, liquor trade and prostitution may go on hand in hand because of the peculiar nature of these crimes. The professional criminals who organize themselves into criminal gangs are often the habitual and hardened offenders who have embraced criminality as a regular profession in their life. There are different types of criminal organizations that may operate in the criminal world can be categorized into the following heads:

1. Organized predatory crime
2. Crime syndicate
3. Criminal racket
4. Political graft.

Crime statistics are the indications of intensity of crimes recorded annually in a particular country, region or place. It reflects upon the ascending or descending trends in crime and also gives information as to how new forms of crime are emerging and new dimensions. Thus crime statistics are indicative of the general moral tune of a given society and throw light on the general efficacy of police, prosecuting agencies and law courts. Therefore, the role of crime statistics in analyzing the causation of crime and devising measures to combat criminality need not be over emphasized. The statistics of crime help the law enforcement agencies to spot out the preponderance of crime at a place and region at a particular time.

Criminologists differ as to their views about the scope of criminal statistics. Some of them assert that the data should mainly concern with offences and offenders, administrative actions and decisions of the courts, while others maintain that it should only be limited to offenders and convicted persons. But the generally accepted view is that crime statistics should not only be confined to data on offences and offenders but also include numerical figures pertaining to the criminal law administration agencies such as police, prosecution, courts, parole and probation services, juvenile delinquency, prisons, drug law violations etc.

The crime records bureau operating under the ministry of home affairs. Government of India is engaged in collecting and disseminating information relating to crime, criminal and property in respect of various offences on the basis of monthly statement/ returns received from State Police. The data available in the crime record division is used for the purpose of co-ordination of recovered or seized properties such as motor vehicles, firearms etc with data of cost or stolen motor vehicles and firearms and vice-verso. The outcome of co-ordination is communicated to the concerned district police superintendent through wireless message for follow-up action. The data pertaining to 'TALASH' is used to co-ordinate the persons arrested, wanted, missing, kidnapped, escaped, deserter, unidentified dead-bodies with each other and the concerned authorities are informed accordingly.

The crime record division also prepares a data relating to foreigners involved in crimes and their activities for use of immigration authorities.

The major purpose underlying crime statistics is to explain and predict the phenomenon of criminality and focus attention on causes of different crimes in different locations. The reliability of such statistics, however, depends on the validity of data collected for the purpose. Analysis of data involves the ordering or breaking down of relevant figures into constituent parts in order to find out the cause for increase or decrease in the rate of various crimes. Thus statistical methodology derives as a useful technique for formulating strategies to combat crimes and criminality.

Crime prevention and protection against crime may be defined as any thing which reduces the incidence of crime and /or perceive fear of crime. The main focus is on making the environment safe from crime and reducing the potential for crime in high-risk situations. An objective evaluation

of crime prevention program further suggests that there is a growing need for enhancing the existing powers of the police relating to arrest, interrogation and search of suspected persons. Police officials should be empowered to arrest a suspected offender even without a warrant. Experience has shown that much time is lost in observing the procedural formalities of law which afford sufficient opportunity for the offender to escape detection. It must be recognized that the devastating effect of corruption is perhaps the major obstacle in effective implementation of the crime prevention programs. In order to promote integrity, honesty and responsibility among public officials with a view to preventing corruption, adequate measures need to be taken to evolve transparent systems of procurement and developing code of conduct for judicial and prosecution services.

POSITION OF WOMEN IN INDIA IN LEGAL PERSPECTIVE

Tridib Talukdar
BALLB 8th Semester

You can tell the condition of a nation by looking at the status of its women.

- Jawaharlal Nehru.

In this 21st Century, when the whole world is awakening to the call of enlightened feminism, India still wallows in the swime of primordial misogyny. In many parts of our country, women are still considered to be a burdensome appendage. She is an economic drain. She must be exploited or dispensed with as a non-person because she crushes her family with marriage and dowry expenses. Her birth in many parts of the country is greeted with silence, even sorrow; in contrast, a boy arrives to the sound of joyous conch shells. Discrimination begins at birth or even before it and continues till she is dead. Comprehensive studies concluded by UNICEF as well as Indian Social Scientists reveal an organized pattern of discrimination against women. Their revelations are starting.

Women can be burnt for not bringing enough dowries, tortured and harassed for not providing money to their alcoholic husbands, raped to satisfy the lust of males, or just to teach them a lesson for being bold and outspoken. This is the reality in the spite of the Constitutional assurance of its belief in the "equity and dignity of all human beings" and its guarantee that "the State shall not discriminate against any citizen on grounds of religion, race, caste, sex, place of birth or any of them or subject them to any disability, liability or restrict on that count. It assures everyone of equality before the law and equal protection of law. And direct people to renounce practices derogatory to the dignity of women because its aim is to set up a social order in which 'justice, social, political and economic shall be prevailing'.

Without a constitutional guarantee of women's equality, even favorable rulings and good laws on women's rights can be ignored, revoked or overruled. The Constitution of India guarantees to all Indian women equality (Article 14), no discrimination by the State (Article 15(1)), equality of opportunity (Article 16), and equal pay for equal work (Article 39(d)). In addition, it allows special provisions to be made by the State in favor of women and children (Article 15(3)), renounces practices derogatory to the dignity of women (Article 51(A) (e)), and also allows for provisions to be made by the State for securing just and human conditions of work and for maternity relief (Article 42). The Constitution has authorized the Legislatures to pass special protective laws in favor of women to undo the injustices done to them for ages. Injustice were committed in the past, they are being committed in the present also. There seems to be no let up in man's brutality towards woman in spite of protective laws to depend women. Our protective laws fall like proverbial pack of cards in face of social realities.

Protective laws have existed in our statute books since long and more laws have been added from time to time but there was a sudden spurt in the number of these laws in the last two decades as a result of the publication of the report of the committee on the status of women in India.

One of the heinous crimes against women is rape. Sections 375 and 376 of Indian Penal Code, 1973 deal with rape and other sexual offences. In spite of the law, those crimes were on the increase.

Things came to a breaking point in the later part of seventies when even the custodians of law started indulging in sexual offences with impunity. Mathura was raped at a police station and Maya Tyagi was paraded naked on the streets of Baghpat and later raped. The existing laws proved insufficient to punish the guilty.

The Parliament passed a comprehensive Criminal Law Amendment Act in 1983 to strengthen the hands of the Executive and the Judiciary to apprehend to punish the rapists with a firm hand: seven year imprisonment was prescribed as the minimum sentence for rape. A legal presumption was also created against the accused in case of custodial rape if the women alleged that the act was without her consent.

Justifying (the rape of Kailash Devi in Government Hospital by Doctors) reinstated of the doctors the Executive said 'rapists and criminals are part of the society, everybody cannot be a saint'. Even MLA's, temple priests and other religious leaders have been apprehended indulging in his crime. Such examples are innumerable. This is the reality in spite of the amended rape laws and the rigorous punishment. Legislation exists only on paper and the culprits manage to escape because of their political clout and the defective enforcement of legal provisions.

Section 354 of IPC deals with acts that outrage the modesty of women and punishes perpetration of this crime with fine and imprisonment, but even small girls of tender age are victims of this crime.

If Section 509 of IPC was implemented whole heartedly and with determination there would not have been so many incidents of eve teasing and harassment of females in buses and other public places. This section along with Section 294 of IPC punishes not only obscene acts but obscene words, signs and gestures also.

Sections 493-497 of the IPC deal with offences relating to marriage, deceitful marriage, bigamy, adultery and the objective of these sections is to maintain the sanctity of marriage and punish acts which are blot on the holy institution of marriage, are committed with impunity.

Women, who are suffering part, don't get anything through legal action. Legal action makes deep dent in her economy and at the end of the case she finds herself exactly where was. She does not gain anything. Even simple cases like getting a meager maintenance under Section 125 of Code of Criminal Procedure may take years.

The 1983 amendments in Criminal Law introduced Section 498A of IPC and added 113A to the Evidence Act to arrest the increasing number cases of bride burning and harassment of wives for insufficient dowry. The Dowry Prohibition Act, 1961 was also amended. As a result of these changes the concept of dowry has become wider and cruelty by husband or relatives of the husband has become a crime, both physical and mental cruelty invites penal action.

In cases of death of a wife under suspicious circumstances, within seven years of marriage, the husband and his relatives will have to prove that they had no hand in killing the bride, if there is a history of torture and harassment of the wife. According to the Rules framed under the Dowry Prohibition Act in all cases of such cases death the body of the deceased has to be sent for post mortem and preserved till a certificate for cremation is given by the Police. The concept of dowry has been also widened and punishment for demanding dowry was been made more stringent yet perhaps more wives were burnt in the last few decades.

Immoral traffic among women and girls is prohibited by Section 366 of the Indian Penal Code.

In 1986, the Suppression of Immoral Traffic in Women Act was passed to banish this evil.

The constraints that come in the way of effective implementation of protective legislation and suggestive measures based on critical appreciations of the restrictions and the problems faced by various enforcement agencies in their respective fields. The social scientists, jurists, social workers, judges and the Police Force, all of them will have to co-operate and work in unison to frame strategies for implementing the laws. The social workers will have to be infused with missionary zeal to be able to comprehend the problems of the victims and to give them required physical, emotional and legal support. The Police Force has to be sensitized to the appalling trauma that a victim undergoes so that they can investigate the crimes with a sense of purpose and determination. The problem of arrears in the Court has to be simplified to achieve this aim. The pledge of fair and speedy justice for women has to be redeemed. Moreover, in the last few decades, have no doubt seen women coming out in the open and joining the mainstream of development of the country. Women in India now participate in all activities such as education, politics, media, art and culture, service sectors and science and technology.

AN OVERVIEW OF LEGAL EDUCATION IN INDIA

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Legal education is essentially a multi-disciplined, multi-purpose education which can develop the human resources and idealism needed to strengthen the legal system. A lawyer is a product of such education which would be able to contribute to national development and social change in a much more construction manner.

Legal profession is a profession of service, service to the community. The aim of this profession is to give justice to the community at a large. The lawyers are also playing most significant part in establishing the rule of Law. Now-a-days, the lawyers are that of policy planner, business adviser, negotiator among interest group, expert in articulation and law reformer etc. these roles demand specialized knowledge and skills. To deal with the problems of diverse magnitude a student of law and lawyer has to be trained in professional skills, and law curriculum must provide integrated knowledge of a whole range of physical and natural sciences on which legal policies are now formulated.

In India, Legal education did not receive any serious attention of the universities which provides courses of Law. Formal legal education was established in the year of 1855 and in the year of 1857 it was introduced in three universities in the presidency of Calcutta, Madras and Bombay.

Legal education in India lags behind in adapting to the developments and experiments worldwide. The Legitimate aim of legal education should be to promote the major values of democratic society and to reduce the number of immoral things.

In India, our legal education gives more emphasis on doctrinal study of Law, with little scope for innovation in the design of courses, development of appropriate modules, formulation of research agenda including undertaking of research projects and also the promotion of advocacy in lawyering.

The need of hour is for the development of clinical legal education. The Bar Council of India after a detailed study and in order to reform legal education developed a five year integrated LL.B. program with a view to give a professional orientation, a multi-disciplinary approach and a clinical thrust to legal education. The objective of Bar Council was to confine professional legal education to the new five year integrated LL.B. course.

The Council did not want universities to discontinue the 3 years LL.B. program which was much in demand by employed persons and those who are seeking legal education to improve employment opportunities. However, within two years of introduction of the new legal education rules, council allowed 3 years and 5 years LL.B. Integrated courses to continue as professional courses.

The newly introduced curriculum for LL.B integrated Law courses gives more importance to practical training aspect of legal education and it also involves a scheme of practical training.

Despite reformation in the legal education, following are some of the challenges facing legal education in India:

1) The foremost problem in legal education is that of irrelevant syllabus. Introduction of too many papers has diluted the concept of teaching skills of finding law and interpreting them. University makes the syllabus as per the scheme given by Bar Council of India, but there is no unanimity on the outcome that the revised syllabus will serve a better purpose to produced more informed and competent lawyer.

2) In India it is very easy to start educational institute on law. Mostly various industrialists and other businessman have entered into legal education with a profit motive. Now-a-days, it is very easy to get permission from State Government to establish legal educational institutions. Though University and BCI's approval is also necessary, but generally before giving approval they send their teams for inspection. The focus of such inspections on building, books and on faculty members rather than the cause of legal education.

3) The quality and style of legal education was also unsatisfactory. Facilities including the library are poor and non properly maintained. The Indian Law teacher had to cope with a law salary and a heavy teaching load, fifteen to twenty hours a week are normal for full-time lecturers. Indeed, with the heavy teaching load, and inadequate library facilities, such a tradition could hardly be supported.

4) The present system does not sufficiently recognize the key problem with regard to legal education such as lack of faculty members who are good teachers as well as sound researchers. There is no doubt that poor financial incentives discourage many young and brilliant lawyers from considering a career in academic. Besides, UGC has prescribed passing of NET examination after LLM as an essential qualification for recruitment as a lecturer but it has proved to be not a criterion of competence.

5) A high percentage of students taking admission in LLB program have no serious interest in career in law. Most of the students are studying Law either because they are unacceptable and unsuccessful in other department, get admitted into law with the hope that the degree would be helpful in their work for government and, in a lesser degree for a business.

6) Legal education does not imply only teaching of legal doctrine to its students but to developing and acquiring certain skills of thought, goal thinking and scientific thinking. The law institute must provide a realistic and comprehensive picture of the structure and function of society and will oriented towards the implementing consistent and explicit set of democratic value.

Therefore, to meet the challenges of the legal education effective reform is required. But there is not doubt that the establishment of the National Law School of India University (NLSIU) in Bangalore successfully met the challenges of legal education and has been able to promote excellence in legal education and research and particularly by attracting brightest students to consider law as a preferred career option. The outstanding success of NLS invited the attention of policy planner and subsequently, NALSAR at Hyderabad (1996), NLIU at Bhopal (1997), WBNUJS at Kolkata (1999), NLU at Jodhpur (2000), HNLU at Raipur (2003), GNLU at Gandhinagar (2004) have been established.

The BCI has also laid down standard in terms of system, classroom teaching, practical training and skills, court visit, moot court, legal aid work and other practical training program for law

students. This has been a special impact to Indian Legal Education.

The role of law schools in imparting legal education and developing lawyers who are rational thinkers and social engineer is central to the future of legal education and the development of knowledge economy in India. Therefore, quality legal education is to be imparted to the students of law taking into accounts of the needs of the society. Legal education is basic, which only would create such a responsible and responsive social lawyering.



Bar Council of India (BCI) visit to NERIM



Director Dr. Zoiinath Sarmah & the Dean Dr. Sangeeta Tripathi at the refreshment hour with the BCI member in the afternoon



BCI members welcome by the students of NERIM
Win-rare



Interaction between BCI members & the students